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GARNISHMENT IN VIRGINIA

Traditionally, the process of garnishment has been available to a creditor at two stages of a legal proceeding to accomplish two distinct purposes. Before judgment, the defendant's property in the hands of a third person could be placed within the custody of the law to await a final determination of the suit, providing security for debts or costs. The process also could be used in aid of execution of a judgment in favor of the creditor, to reach property held by a third person to satisfy the lien created by the judgment. Under the Virginia statutory scheme,¹ the term "garnishment"² is used exclusively to denote the postjudgment proceedings in aid of execution; the general term "attachment" describes garnishment

1. VA. CODE §§ 8.01-511 to 525 (Repl. Vol. 1977 & Cum. Supp. 1979).

2. In its broadest sense, garnishment is a term used to describe any of several statutory procedures whereby a plaintiff may reach assets of a defendant in the hands of a third party. The word "garnishment" is derived from the Norman French word "garnir," meaning to warn. *Lynch v. Johnson*, 196 Va. 516, 84 S.E.2d 419 (1954). Hence, the summons of garnishment is a warning to the garnishee not to deliver or dispose of the assets of the judgment debtor in his hands, upon threat of personal liability should he do so.

The origin of the garnishment concept has been traced to a commercial action established in the trading centers of medieval London known as "foreign attachment," a legal device with similarities to both modern garnishment and attachment procedures. See C. DRAKE, *TREATISE ON THE LAW OF SUITS BY ATTACHMENT* §§ 1-4 (2d ed. 1858); Musman & Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1 (1942); Comment, *Wage Garnishment—The Contemporary Shylock's Pound of Flesh*, 40 MISS. L.J. 151 (1968). Foreign attachment was a process designed to provide the plaintiff with security for an unpaid debt from a nonresident debtor by attaching the property of such debtor in the hands of a third person. Musman & Riesenfeld, *supra*, at 8 n.21.

The remedy of foreign attachment flourished in England prior to its introduction to colonial America. The earliest statute on this subject in Virginia was passed in 1744 and may be found at 5 W. HENING, *STATUTES AT LARGE* 220 (Richmond 1819). *Kelso v. Blackburn*, 30 Va. (3 Leigh) 323, 330 (1831). The early Virginia statutes contemplated a suit in foreign attachment in chancery; this remedy was granted to a creditor against a debtor who was absent from the state when the debtor had an estate or debts due to him in the county where the suit was brought. 1 J. MATTHEWS, *DIGEST OF THE LAWS OF VIRGINIA* 113 (Richmond 1856). See generally *Pulliam v. Aler*, 56 Va. (15 Gratt.) 54 (1859); *Erskine v. Staley*, 39 Va. (12 Leigh) 417 (1841); *Templeman v. Fauntleroy*, 24 Va. (3 Rand.) 434 (1825).

The early statutes dealing with foreign attachment, however, were not the precursors of the modern garnishment process in Virginia. Rather, the substantive legislative changes giving rise to this process occurred some one hundred years later. For further delineation of these statutory developments, see notes 6-15 *infra* & accompanying text.

before judgment. Garnishment in Virginia is the process whereby a judgment creditor enforces the lien of a writ of *fiery facias*³ against any debt or property due the judgment debtor and in the possession of a third party, the garnishee.⁴ It is substantially an action at law in which the judgment creditor is subrogated to the rights of the judgment debtor against his debtor, the garnishee.⁵

The primary objective of this Note is to survey the practical and procedural aspects of the garnishment process in Virginia. The discussion will be limited to the general topic of garnishment and will not include allied remedies such as the basic executionary process or attachment. To this end, federal legislation in the area also will be considered, because of its tremendous impact on the Virginia garnishment statutes.

HISTORICAL DEVELOPMENT

At common law, the writ of *fiery facias* commanded a sheriff to take the amount of money mentioned in the writ out of the tangible personal property of the person against whom the judgment had been rendered.⁶ The laws of Virginia before July 1, 1850, reflected this common law tradition. Thus intangible personal property, termed generally "choses in action,"⁷ could not be subjected to levy and public sale under a writ of *fiery facias*, nor was the writ a lien on such personalty; it therefore could not be reached to satisfy the creditor's judgment.⁸

3. See note 5 *infra* & accompanying text.

4. *In re Cruft*, 280 F. Supp. 846, 848 (W.D. Va. 1968); *Lynch v. Johnson*, 196 Va. 516, 520, 84 S.E.2d 419, 421 (1954).

5. See *Ayres v. Harleysville Mut. Cas. Co.*, 172 Va. 383, 394, 2 S.E.2d 303, 307 (1939); *Levine's Loan Office v. Starke*, 140 Va. 712, 714, 125 S.E. 683, 684 (1924).

6. A. FREEMAN, *TREATISE ON THE LAW OF EXECUTIONS IN CIVIL CASES* § 7 (1885); 3 W. BLACKSTONE, *COMMENTARIES* *417; see Riesenfeld, *Enforcement of Money Judgments in Early American History*, 71 MICH. L. REV. 691, 709-12 (1973); Riesenfeld, *Collection of Money Judgments in American Law - A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155, 177-78 (1957).

7. A chose in action is defined generally as a personal right not reduced to possession, but recoverable by a suit at law. BLACK'S LAW DICTIONARY 305 (4th ed. 1968). Hence, all the personal estate of the debtor of which he is not currently in possession, including debts of all kind due to him, is included in the term "choses in action."

8. *The Lien of The Writ of Fiery Facias in Virginia*, 2 VA. L. REG. 704, 705 (1897). See 1 REV. CODE OF VA., ch. 134, § 1 (1819). The writ of *fiery facias* became a lien only on the goods and chattels of the debtor that were capable of being levied on at the time the writ

In 1849 a substantial revision of the Code of Virginia was undertaken. It was enacted that, effective July 1, 1850, the writ of *fiery facias* would be a lien on all the debtor's intangible personal property.⁹ This new and extensive lien became effective against the intangible personalty from the time the writ was delivered to the sheriff for execution;¹⁰ because the lien was not inchoate or conditional,¹¹ nothing more was required than delivery to the sheriff to make it valid and binding. Furthermore, the new lien did not terminate with the passing of the return date, but continued in force until the right of the judgment creditor to levy a new execution ceased.¹²

The garnishment process was devised as the means by which the debtor's intangible personal property, now subject to the comprehensive lien of the writ of *fiery facias*, could be made available to the creditor in satisfaction of his judgment.¹³ Garnishment merely afforded the judgment creditor a direct remedy against a third party, who in some way was indebted to the judgment debtor, to insure that the lien of execution was enforced effectively.

The early case of *Charron & Co. v. Boswell*¹⁴ confirmed the sup-

was delivered to the sheriff.

9. See CODE OF VA. § 3601 (1887). The 1887 version of the statute differs in no essential part from the text originally enacted 1850. See CODE OF VA., ch. 188, § 3 (1860).

10. *Frayser's Adm'r v. Richmond & A. R.R.*, 81 Va. 388, 392 (1886); *Charron & Co. v. Boswell*, 59 Va. (18 Gratt.) 216, 221-22 (1868); *Purveyar v. Taylor*, 53 Va. (12 Gratt.) 401, 408 (1855).

11. *In re Acorn Elec. Supply, Inc.*, 348 F. Supp. 277, 280 (E.D. Va. 1972). In contrast, the effectiveness of a lien against tangible property depended on a levy being made before the return date of the writ. 2 VA. L. REG., *supra* note 8, at 706.

12. *Trevillian's Ex'rs v. Guerrant's Ex'rs*, 72 Va. (31 Gratt.) 525, 529-30 (1879); *Purveyar v. Taylor*, 53 Va. (12 Gratt.) 401, 408 (1855). In *Trevillian*, the court held that the lien of a writ of *fiery facias* upon a debtor's choses in action, although not asserted in the lifetime of the debtor or the creditor, is not defeated or impaired by the death of either or both, and may be enforced by the appropriate statutory remedies. 72 Va. at 531.

13. With the creation of the garnishment process the Code revisors intended to provide as effective a remedy as was previously available through use of the writ of *capias ad satisfaciendum*, which was abolished in 1850. *Purveyar v. Taylor*, 53 Va. (12 Gratt.) 401, 407 (1855). Prior to 1850, the writ of *capias ad satisfaciendum* was the only procedure by which a creditor could reach the unleviable property of the debtor. Under that writ, the execution was made against the body of the debtor, who was imprisoned until his discharge under the insolvency laws, at which time title to all his unleviable property became vested by operation of law in the creditor. *Id.* See also Note, *Body Attachment and Body Execution: Forgotten but Not Gone*, 17 WM. & MARY L. REV. 543 (1976).

14. 59 Va. (18 Gratt.) 216 (1868).

plementary nature of the garnishment process as a proceeding in aid of execution. In *Boswell*, certain creditors were able to have their garnishment summons served on the garnishee first even though their judgment had been rendered at a date later than that of certain other creditors. They contended that by the garnishment process they acquired a special lien on the funds in controversy that entitled them to preference over the other creditors. In rejecting this contention, the court stated, "Now this view is wholly inconsistent with the purpose and effect of the [garnishment] proceedings [they] do not give any lien at all, *general* or *specific*. They are merely a *means* provided by law for the enforcement of a legal lien which already exists."¹⁵

The court in endowing the writ of *fiery facias* with power to bind mere choses in action, made the garnishment remedy a more humane alternative to debtor's prison, and completed the framework of Virginia's modern execution of judgment statutes. The garnishment process in Virginia has remained substantially unchanged since its inception in 1850.

NATURE AND EFFECT OF GARNISHMENT

At the outset, an understanding of the nature and effect of the process of garnishment is essential. As has been noted, in Virginia, the term "garnishment" refers exclusively to the exercise of that remedy in aid of execution; therefore, the existence of a prior, valid judgment is presupposed.¹⁶ Garnishment is the process by which a judgment creditor enforces the lien created by the writ of *fiery facias* issuing out of that judgment against any debt or other chose in action due his judgment debtor in the hands of a third person, the garnishee.¹⁷

Garnishment is a proceeding that exists only by virtue of statu-

15. *Id.* at 223-24.

16. Though a judgment regular on its face is presumed to be valid, a judgment debtor may challenge the validity of the judgment against him by entering a motion to quash the garnishment proceedings. VA. CODE § 8.01-477 (Repl. Vol. 1977). For further discussion of the grounds for the effect of filing a motion to quash, see notes 280-94 *infra* & accompanying text.

17. *Lynch v. Johnson*, 196 Va. 516, 520, 84 S.E.2d 419, 421 (1954); *Ayres v. Harleysville Mut. Cas. Co.*, 172 Va. 383, 394, 2 S.E.2d 303, 307 (1939); *Levine's Loan Office v. Starke*, 140 Va. 712, 714, 125 S.E. 683, 684 (1924).

tory enactment,¹⁸ and cannot be enforced beyond the scope of the statute in order to fit the exigencies of a particular case.¹⁹ The proceeding is regarded generally as in derogation of common law and therefore the judgment creditor must follow strictly the procedure outlined in the statute.²⁰ The garnishee likewise cannot safely waive compliance with any of the statute's substantive provisions, or honor a judgment in an unauthorized garnishment proceeding and thereby absolve himself of liability. Any volunteered acts on the garnishee's part will be regarded as void to the extent they interfere with the rights of third parties.²¹

Though supplementary to and in aid of a judgment, a garnishment proceeding in Virginia is an independent civil action,²² rather than a summary execution process. In the 1853 case of *Tunstall v. Worthington*,²³ the court remarked,

The proceeding must be regarded as a civil suit, and not as a process of execution to enforce a judgment already rendered.

In this proceeding the parties have a day in court; an issue of fact may be tried by a jury, evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment.²⁴

18. *Lynch v. Johnson*, 196 Va. 516, 520, 84 S.E.2d 419, 421 (1954).

19. *Bickle v. Chrisman's Adm'x*, 76 Va. 678, 691 (1882).

20. J. ROOD, *TREATISE ON THE LAW OF GARNISHMENT* § 6 (1896). In the administration of statutory law, the standards of construction are far more limited in number and range than if a general principle of law was involved. A statute is a positive enactment made by a power competent in itself to make law and that power is presumed to know the full meaning of the terms it employs. 1 VA. L.J. 705, 706 (1877). *But see* J. Rood, *supra*, §§ 8-11.

21. *Bickle v. Chrisman's Adm'x*, 76 Va. 678, 691 (1882).

22. *Levine's Loan Office v. Starke*, 140 Va. 712, 714, 125 S.E. 683, 684 (1924); *Rollo v. Andes Ins. Co.*, 64 Va. (23 Gratt.) 509, 513 (1873). The sole authority cited in Virginia cases for the proposition that the proceeding in garnishment in aid of execution is a civil suit in the legal conception of that terminology is C. DRAKE, *supra* note 2, § 452. Drake, in turn, relies principally on two older Alabama cases: *Moore v. Stanton*, 22 Ala. 331 (1853); *Travis v. Tartt*, 8 Ala. 574 (1846). *See also* J. Rood, *supra* note 20, § 3.

Although the Virginia cases relying on Drake have embraced his authority without question, the concept of the garnishment process as an independent suit is proper in light of the wide latitude accorded the Virginia courts in determining the existence and the extent of the liability involved. *See* notes 86-88 *infra* & accompanying text. In many other jurisdictions, garnishment proceedings are regarded as summary in nature and a court may not resolve disputes as to liability. *See, e.g.*, *Cornelius v. Albertson*, 244 N.C. 265, 93 S.E.2d 147 (1956).

23. 24 F. Cas. 324 (C.C.D. Ark. 1853) (No. 14,239).

24. *Id.* at 325.

Thus, a proceeding in garnishment is substantially an action at law by the judgment debtor in the name of the judgment creditor against the garnishee.²⁵

In such proceedings, the judgment creditor alleges that a debt of, or property in the hands of, the garnishee is due to the judgment debtor. Therefore, the principal objective is to ascertain whether there is, or was, such indebtedness, and, if so, its amount.²⁶ If the garnishee denies any indebtedness to the judgment debtor or the judgment creditor alleges that the garnishee has not fully disclosed his liability, the court, without any formal pleading, must inquire into the liability of the garnishee;²⁷ the issue then becomes the existence and the extent of such liability, and the judgment creditor carries the affirmative burden of proof. On demand by either party, the court is authorized to impanel a jury to determine this issue.²⁸ In addition, when an adverse claim to the alleged indebtedness exists, the adverse claimant may be joined by order of court at any stage of the proceeding and the validity of his claim may be adjudicated.²⁹

A fundamental doctrine of the law of garnishment is that the judgment creditor acquires no rights against the garnishee greater than the judgment debtor himself possesses.³⁰ Consequently, a present, fixed liability of the garnishee is necessary to render him liable in the garnishment proceeding.³¹ A garnishee is not chargeable unless the judgment debtor can recover from him what the creditor seeks to secure by garnishment. In order to hold the garnishee liable, the creditor must show that the legal obligation for the debt is absolute and not subject to some future contingency or dependent

25. *Lynch v. Johnson*, 196 Va. 516, 521, 84 S.E.2d 419, 422 (1954); *Ayres v. Harleysville Mut. Cas. Co.*, 172 Va. 383, 394, 2 S.E.2d 303, 307 (1939); *Rollo v. Andes Ins. Co.*, 64 Va. (23 Gratt.) 509, 512-13 (1873); C. DRAKE, *supra* note 2, § 452; J. ROOD, *supra* note 20.

26. *Fentress v. Rutledge*, 140 Va. 685, 687, 125 S.E. 668, 669 (1924).

27. *Id.* at 687-88, 125 S.E. at 669.

28. VA. CODE §§ 8.01-519, -565 (Repl. Vol. 1977).

29. *Jetco, Inc. v. Bank of Va.*, 209 Va. 482, 486-87, 165 S.E.2d 276, 279 (1969); *see notes* 62-64 *infra* & accompanying text.

30. C. DRAKE, *supra* note 2, § 458; *see* A. FREEMAN, *supra* note 6, §§ 159-60. This doctrine results from the conception of the garnishment process as an action by the judgment debtor in the name of the judgment creditor against the garnishee. *See notes* 24-25 *supra* & accompanying text.

31. *See note* 34 *infra*. *See also* C. DRAKE, *supra* note 2, § 460.

upon an unperformed condition precedent.³² Courts have held, however, that when a debt has a present existence, although payable at some future date, it is subject to the lien of a writ of *fiery facias* and may be reached by garnishment.³³

The issue of whether a present, fixed liability exists that may be reached by a creditor in satisfaction of his judgment has been the subject of much litigation in Virginia.³⁴ *Boisseau v. Bass Administrator*³⁵ is the Virginia case offering the most thorough discussion of this issue. In *Boisseau*, the judgment creditor sought to hold an insurance company liable as garnishee for the proceeds of a life insurance policy on the life of one R.T. Bass, contending that her writ of *fiery facias* constituted a subsisting and continuing lien on all the personal estate of the debtor, including the insurance policy.³⁶ In rejecting the creditor's claim for the proceeds, the court noted that payment of the premiums was a condition precedent to any right of the insured to claim under the policy and that such payments were entirely voluntary.³⁷ The court concluded that the insurance contract did not constitute a present fixed liability upon the company to pay anything, nor did it create any present indebtedness that the insured could demand.³⁸ Until the insured's death, the policy was liable to forfeiture for nonpayment of the premi-

32. *Fentress v. Rutledge*, 140 Va. 685, 688, 125 S.E. 668, 669 (1924); *Frietas v. Griffith & Boyd*, 112 Va. 343, 345, 71 S.E. 531, 532 (1911); *Boisseau v. Bass' Adm'r*, 100 Va. 207, 210, 40 S.E. 647, 649 (1902).

33. C. DRAKE, *supra* note 2, § 551; A. FREEMAN, *supra* note 6, § 165. See *Boisseau v. Bass' Adm'r*, 100 Va. 207, 210-11, 40 S.E. 647, 649 (1902); *Baltimore & O. R.R. v. Gallahue's Adm'rs*, 53 Va. (12 Gratt.) 655, 665-66 (1855).

34. See, e.g., *Jetco, Inc. v. Bank of Va.*, 209 Va. 482, 165 S.E.2d 276 (1969); *Lynch v. Johnson*, 196 Va. 516, 84 S.E.2d 419 (1954); *Ayres v. Harleysville Mut. Cas. Co.*, 172 Va. 383, 2 S.E.2d 303 (1939); *Combs v. Hunt*, 140 Va. 627, 125 S.E. 661 (1924); *Fentress v. Rutledge*, 140 Va. 685, 125 S.E. 668 (1924); *Boisseau v. Bass' Adm'r*, 100 Va. 207, 40 S.E. 647 (1902); *Bickle v. Chrisman's Adm'x*, 76 Va. 678 (1882); *Baltimore & O. R.R. v. Gallahue's Adm'rs*, 53 Va. (12 Gratt.) 655 (1855); *Baltimore & O. R.R. v. McCullough*, 53 Va. (12 Gratt.) 595 (1855); *Brockenbrough v. Ward's Adm'r*, 25 Va. (4 Rand.) 352 (1826).

35. 100 Va. 207, 40 S.E. 647 (1902).

36. *Id.* at 208, 40 S.E. at 648. Under the terms of the policy, payment of a fixed premium was required for a period of twenty years. Bass died before the expiration of the twenty-year period, yet well after the return date of the writ of garnishment. *Id.* at 209-10, 40 S.E. at 648-49.

37. *Id.* at 210, 40 S.E. at 649.

38. *Id.* The court had relied previously on A. FREEMAN, *supra* note 6, §§ 164-65, as authority for its conclusion that no present fixed liability existed.

ums; therefore, whether an obligation to pay ever would rest upon the company by reason of such policy was questionable.³⁹

Similarly, in *Lynch v. Johnson*,⁴⁰ a case involving a dispute over the proceeds of a fire insurance policy, the court held that if the judgment debtor had no right to demand payment in whole or in part from the insurance company for his own benefit, his creditor likewise is not entitled to garnish the proceeds. The evidence demonstrated that the destroyed property had been conveyed to the judgment debtor, with the grantor reserving a life estate for herself. The policy insured the entire value of the property for the benefit of all persons having an interest in it. The court held that under these facts, the debtor had no individual claim to the proceeds of the policy; hence, his creditor could not reach them.⁴¹

In conclusion, a judgment creditor seeking to garnish any indebtedness due to the judgment debtor from any source must comply with the appropriate statutory procedures. He must allege, and be prepared to prove, the existence of a present fixed liability on the garnishee's part to the debtor as a prerequisite to obtaining the issuance of a writ of garnishment.

PARTIES TO THE GARNISHMENT PROCEEDINGS

No judgment against the garnishee is possible unless the creditor has secured a valid judgment against his debtor.⁴² Once a valid

39. 100 Va. at 210, 40 S.E. at 649.

40. 196 Va. 516, 84 S.E.2d 419 (1954).

41. *Id.* at 524, 84 S.E.2d at 424. The court noted that when a person insures his own interest in property in his own right and at his own expense, he is entitled to the insurance proceeds, and the owner of any other interest in that property has no claim to the proceeds. *Id.* at 523, 84 S.E.2d at 423. See *Morotock Ins. Co. v. Cheek*, 93 Va. 8, 24 S.E. 464 (1896). Here, however, the property was insured for the benefit of all persons having an interest therein. Further, an agreement made contemporaneously with execution of the deed stated that any insurance proceeds received from the property would be used exclusively for its restoration.

The court went on to state that, even if the judgment debtor was individually entitled to some portion of the proceeds, the evidence did not establish what amount of money was due to him. Because no definite portion was alleged, the creditor had no right to garnish any of the proceeds. 196 Va. at 524, 84 S.E.2d at 424.

42. *C. DRAKE*, *supra* note 2, § 460; see *In re Acorn Elec. Supply, Inc.*, 348 F. Supp. 277, 281 (E.D. Va. 1972); *Shackelford v. Apperson*, 47 Va. (6 Gratt.) 451 (1849); *Henley's Case*, 3 Va. 145 (1805). VA. CODE § 8.01-504 (Repl. Vol. 1977) provides that if notice of a lien of a writ of *fieri facias* is served on a defendant (presumably, including a garnishee) when no

judgment has been rendered in the creditor's favor, the lien acquired on the debtor's intangible personalty in the possession of a third person remains in force for one year from the date of the final determination of the amount owed.⁴³ During this period, the number of garnishment writs the judgment creditor may sue out to obtain satisfaction is unlimited⁴⁴; that the creditor may avail himself of the benefit of other statutory remedies will not impair his lien.⁴⁵ The proceeding by interrogatory is one additional remedy available to the judgment creditor to compel any person to answer such questions as may be advanced by the creditor or judge to ascertain whether any personal estate of the debtor is in that person's possession.⁴⁶ The statute provides, however, that when a judgment creditor seeks to have an employer withhold payment of a debtor's wages or salary, he must do it through a garnishment proceeding,⁴⁷ presumably to give the debtor the maximum benefit of the safeguards and exemptions which accompany the proceeding.

Having been found liable to the creditor, the judgment debtor's entire personal estate, including all debts from whatever source, is available for the creditor's satisfaction, subject to any statutory exemptions afforded for his protection.⁴⁸ The creditor's lien existing on the debtor's intangible personalty, however, may be defeated by an assignee who pays valuable consideration and takes without no-

judgment exists against the defendant, both the plaintiff causing such service and the officer actually serving the notice shall pay the defendant \$100 plus whatever other damages are proved. As to the availability of an action for wrongful garnishment, see notes 280-91 *infra* & accompanying text.

43. VA. CODE § 8.01-505 (Repl. Vol. 1977).

44. *Id.* § 8.01-475; see *Richardson v. Wymer*, 104 Va. 236, 51 S.E. 219 (1905); *Puryear v. Taylor*, 53 Va. (12 Gratt.) 401 (1855). The right to issue numerous executions cannot be used to unnecessarily oppress or injure the debtor. *Sutton v. Marye*, 81 Va. 329 (1886). The right to issue multiple garnishment summons is limited further when the judgment creditor seeks to garnish a judgment debtor's wages or salary. See notes 70, 207 *infra* & accompanying text.

45. VA. CODE § 8.01-425 (Repl. Vol. 1977).

46. *Id.* §§ 8.01-506 to 510 (Repl. Vol. 1977 & Cum. Supp. 1979). The statute has been amended recently to provide that a party may file an affidavit requesting the production of books of accounts or other writings in possession of the debtor or a person not a party to the proceedings. *Id.* § 8.01-506.1.

47. *Id.* § 8.01-503.

48. *Id.* § 8.01-501.

tice of the lien,⁴⁹ even when the debtor intended to commit a fraud in making the assignment.⁵⁰

The garnishee's position in the garnishment process has been described as that of a "mere stakeholder" or "custodian" of the debtor's effects in his hands.⁵¹ This characterization is not totally accurate, however, when the garnishment process is viewed as a separate civil proceeding.⁵² Once served with a notice of garnishment, the garnishee is actually the defendant in the separate proceeding. If he fails to respond and pay the correct amount to the court, he may be compelled to appear or face contempt proceedings as well as a direct suit by the creditor for costs the creditor may have incurred because of the garnishee's resistance.⁵³ The garnishee can escape all personal liability by surrendering into the custody of the court the money or other effects due to the debtor.⁵⁴

Any person who owes money to the judgment debtor or has any of the debtor's property in his possession or control may be subjected to liability as a garnishee and directed to make a compul-

49. *Id.*, see *Virginia Mach. & Well Co. v. Hungerford Coal Co.*, 182 Va. 550, 29 S.E.2d 359 (1944); *Charron & Co. v. Boswell*, 59 Va. (18 Gratt.) 216 (1868); *Evans v. Greenhow*, 56 Va. (15 Gratt.) 153 (1859). *Evans v. Greenhow* was the first case interpreting the language pertaining to assignment, which was included in the original draft of the statute in 1849. The court in *Evans* found that the proper scope of this new and extensive lien was limited so that it should do no injury to the rights of others. 56 Va. (15 Gratt.) at 159-60.

50. *Shields v. Mahoney*, 94 Va. 487, 27 S.E. 23 (1897). In *Shields*, the court held that an insolvent debtor could, notwithstanding his insolvency, make a valid assignment of a chose in action owned by him, and the bona fide assignee for value of such chose in action takes title superior to the lien of *fiery facias* against the debtor. If the assignee has no notice of any intent by the debtor to commit fraud, such intent is immaterial. *Id.* at 490-91, 27 S.E. at 24.

51. *Bickle v. Chrisman's Adm'x*, 76 Va. 678, 691 (1882); see *Lynch v. Johnson*, 196 Va. 516, 520, 84 S.E.2d 419, 422 (1954). The garnishee also has been described as an agent of the court, entitled to hold the property until the question of his liability is determined, and not at liberty to exercise any acts of ownership over it. *Erskine v. Staley*, 39 Va. (12 Leigh) 406 (1841); C. DRAKE, *supra* note 2, § 453.

52. See notes 22-25 *supra* & accompanying text.

53. VA. CODE §§ 8.01-519, -564 (Repl. Vol. 1977). In *Bickle v. Chrisman's Adm'x*, 76 Va. 678, 691 (1882), the garnishment process was described as:

differing in no essential particular from attachment by levy, except as is said that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value.

Id. See C. DRAKE, *supra* note 2, §§ 450, 456.

54. *Bickle v. Chrisman's Adm'x*, 76 Va. 678, 692 (1882).

sory assignment for the creditor's benefit. The term "person" is construed broadly to include corporations,⁵⁵ partnerships,⁵⁶ unincorporated associations,⁵⁷ and any other entity having legal recognition or existence. Furthermore, Virginia is in a minority of jurisdictions that permit a municipality to be sued as a garnishee in certain actions other than those expressly provided by statute.⁵⁸ The 1899 Virginia case of *Portsmouth Gas Co. v. Sanford*⁵⁹ interpreted the then-recent abolition of sovereign immunity with respect to garnishment of the wages and salaries of municipal and state employees⁶⁰ as indicating a shift in public policy allowing for the garnishment of debts owed by municipal corporations. Recently, *Portsmouth* has been interpreted narrowly, and its holding has been restricted to "an ordinary debt to a third person" when "little inconvenience and no prejudice can result to the city"⁶¹

55. VA. CODE § 8.01-468 (Repl. Vol. 1977); see *Baltimore & O. R.R. v. Gallahue's Adm'rs*, 55 Va. (14 Gratt.) 563 (1858).

56. When two or more persons are jointly indebted to the judgment debtor, the general rule is that they must be joined as garnishees. See, e.g., *Lyon v. Ballentine*, 63 Mich. 97, 29 N.W. 837 (1886). The Virginia Code, however, provides: "When a judgment is against several persons jointly, executions thereon may be joint against all of them." VA. CODE § 8.01-469 (Repl. Vol. 1977) (emphasis supplied). Therefore, when one seeks to garnish a debt owing from a partnership to the debtor, under Virginia law, a summons properly can be served on only one of the partners.

57. VA. CODE § 8.01-15 (Repl. Vol. 1977). See generally *Yonce v. Miner's Mem. Hosp. Ass'n*, 161 F. Supp. 178 (W.D. Va. 1958).

58. The weight of authority favors the view that municipal corporations and their officers who hold property to which others are entitled are not liable to the creditors of such persons through a garnishment proceeding. 17 E. McQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 49.86 (3d ed. 1968); Note, *A Changing Public Policy: Garnishment of Municipal Corporations in Illinois—Henderson v. Foster*, 25 DEPAUL L. REV. 745 (1976). For an examination of the reasoning used by courts in applying public policy considerations to exempt municipal corporations from garnishment, see *City of Roosevelt Park v. Norton Township*, 330 Mich. 270, 47 N.W.2d 605 (1951); *Welsh Lumber Co. v. Carter Bros. & Bird*, 78 W. Va. 11, 88 S.E. 1034 (1916).

59. 97 Va. 124, 33 S.E. 516 (1899). See also *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S.E. 596 (1897).

60. By an act approved in 1898, the wages and salaries of officials, clerks and employees of a municipal corporation may be subjected to garnishment when a judgment has been rendered against such persons. In a separate act, this right was extended to the wages and salaries of all state employees. *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 127, 33 S.E. 516, 517 (1899). See also *Knight v. Peoples Nat'l Bank*, 182 Va. 380, 29 S.E.2d 364 (1944). For a discussion of current statutes relating to garnishment of the wages and salaries of municipal and state employees, see notes 181-92 *infra* & accompanying text.

61. *Slaughter v. Winston*, 347 F. Supp. 1221, 1222 (E.D. Va. 1972), *aff'd per curiam*, 476 F.2d 972 (4th Cir. 1973). In *Slaughter*, a person who had been awarded a judgment against

Finally, it is well settled that a court may not adjudicate the rights of a nonparty.⁶² Consequently, in a garnishment proceeding, the rights of a third party claimant to the funds sought to be garnished cannot be adjudicated unless he is a party to that proceeding.⁶³ The Virginia Code is liberal in its provision for adding new parties at any stage of the proceeding as justice may require.⁶⁴

THE VIRGINIA STATUTORY SCHEME

Initiation of Garnishment Proceedings

To obtain issuance of a garnishment summons, the judgment creditor must suggest to the court, either orally or in writing, that, because of the lien of his writ of *fiery facias*,⁶⁵ some person other than the judgment debtor is liable or that some person has, in his capacity as personal representative of some decedent,⁶⁶ a sum of

the city sergeant in his official capacity, for having been subjected to cruel and unusual punishment, sought to garnish the operating funds appropriated by City Council for the city sergeant's office. The court, however, found that the city was not a "mere stakeholder" of such funds; rather, the funds sought to be garnished were the means of paying expenses incurred in performance of a municipal function, and the city's statutory obligation to contribute such funds would remain even if garnishment was permitted. Therefore, garnishment of these funds would have been contrary to public policy and was precluded by the doctrine of sovereign immunity. *Id.* at 1222-23.

62. *Jetco, Inc. v. Bank of Va.*, 209 Va. 482, 486, 165 S.E.2d 276, 279 (1969).

63. *Id.* The court in *Jetco* suggested that, alternatively, the garnishment proceeding could have been suspended until a suit had been instituted to determine the validity of the third party's claim. *Id.* at 487, 165 S.E.2d at 280. In the interest of preventing duplication of actions, determination of the claim in the course of the garnishment proceeding seems the preferable solution.

64. VA. CODE § 8.01-5 (Repl. Vol. 1977). See generally *McDaniel v. North Carolina Pulp Co.*, 198 Va. 612, 95 S.E.2d 201 (1956); *Hogan v. Miller*, 156 Va. 166, 157 S.E. 540 (1931).

65. In Virginia, the lien created on the debtor's intangible personal property by the writ of *fiery facias* continues for one year from the return day of the execution or from the determination of the amount owed by a third person to the debtor, whichever is longer. VA. CODE § 8.01-505 (Repl. Vol. 1977). The lien ceases when the right to enforce the judgment ceases, see *id.* § 8.01-251, or is suspended by a forthcoming bond being given and forfeited, by supersedeas, or by other legal process. *Id.* § 8.01-505. See M. BURKS, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 372 (4th ed. 1952).

66. Before 1932 Virginia did not permit garnishment of an executor or administrator to recover a legacy or distributive share because the proper remedy was in a court of equity. See, e.g., *Bickle v. Chrisman's Adm'x*, 76 Va. 678 (1882); 2 T. HARRISON, WILLS AND ADMINISTRATION §§ 538-42 (2d ed. 1961). That year, however, the statute was amended to allow the process of garnishment to lie against the personal representatives of a debtor of the judgment debtor.

money to which the judgment debtor is or may be entitled as creditor or distributee of such decedent.⁶⁷ The judgment creditor also must specify in his suggestion the amount of interest due on the judgment and any credits made toward satisfaction of the judgment.⁶⁸ In addition, when the judgment creditor seeks to garnish the wages or salary of the judgment debtor, no summons will issue at his suggestion of liability unless he makes one of six allegations enumerated in the statute.⁶⁹ Frequently, the net effect of this provision is to prohibit for eighteen months the issuance of a second garnishment summons on a different judgment secured by the judgment creditor against the same judgment debtor.⁷⁰

Following the judgment creditor's suggestion of liability, a summons⁷¹ may be sued out of the clerk's office of the court in which the judgment was rendered or to which an execution thereon has been returned against such person.⁷² In Virginia, service of the summons on both the garnishee and the judgment debtor is mandatory and the proceedings cannot continue until such notification is given.⁷³ The statute, however, provides that when service cannot be made on the judgment debtor in the customary fashion,⁷⁴ the clerk may send a copy of the summons by first class mail

67. VA. CODE § 8.01-511 (Cum. Supp. 1979).

68. *Id.*

69. *Id.* See note 207 *infra* & accompanying text.

70. A. PHELPS, HANDBOOK OF VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW 271 (3d ed. 1974); See M. BURKS, *supra* note 65, § 374 (Supp. 1961).

71. The summons is to be substantially in the form prescribed in VA. CODE § 8.01-512 (Cum. Supp. 1979). The substantive restrictions and definitions of the federal wage garnishment law are contained on the face of this model summons. After July 1, 1980, the summons issued must be identical in form to the statutory model. *Id.* § 8.01-512.1.

72. *Id.* § 8.01-511 (Cum. Supp. 1979). See *id.* § 16.1-99 (Cum. Supp. 1979) (providing for return of the writ of *fiery facias* within ninety days to the general district court from which it issued).

73. *Id.* § 8.01-511 (Cum. Supp. 1979). The statute reads in pertinent part: "The summons shall be served on the garnishee, and shall be served on the judgment debtor." This language reflects the principle, lying at the foundation of Virginia's judicial system, that an individual has the right to notice and an opportunity to be heard. *Dorr's Adm'r v. Rohr*, 82 Va. 359, 362 (1886). See also *Fultz v. Brightwell*, 77 Va. 742 (1883); *Underwood v. McVeigh*, 64 Va. (23 Gratt.) 409 (1873). The Virginia Supreme Court, however, has held that when the summons has been duly served on the garnishee, he is properly before the court, and no additional notification of the time of the hearing is necessary. *Jetco, Inc. v. Bank of Va.*, 209 Va. 482, 488-89, 165 S.E.2d 276, 280-81 (1969).

74. Service ordinarily is made in the manner prescribed in VA. CODE § 8.01-296(1), (2) (Repl. Vol. 1977).

to the debtor's last known address.⁷⁵

When the garnishee is a corporation, the garnishment statute provides that the exclusive mode of service of the summons is on an officer or managing employee of the corporation.⁷⁶ The summons can be served on the registered agent or the clerk of the State Corporation Commission only if the judgment creditor files a certificate stating that he has used due diligence and that no such officer or managing employee could be found within the state.⁷⁷

When the garnishee is the United States government, the summons is to be served on the managing employee of the agency alleged to be liable, or, if the judgment debtor is a member of the armed forces, service is made on the chief fiscal officer of the military post to which the debtor is assigned.⁷⁸ Service of the summons may be made on a United States Attorney or other agent when it cannot be made on the persons designated in the statute.⁷⁹ Finally, of significance is that the wages and salaries of federal employees, including servicemen, are subject to garnishment *only* for the limited purpose of collection of legal obligations to provide child support and alimony.⁸⁰

Examination of the Garnishee, Judgment, and Costs

The garnishee, after receipt of the summons, either must appear in person and be examined under oath, or must file a statement, verified by affidavit, setting forth the amount of his indebtedness to the judgment debtor or what property he holds to which the debtor is entitled;⁸¹ a corporation must appear through its author-

75. *Id.* § 8.01-511 (Cum. Supp. 1979). The statute states that the judgment creditor shall file a certificate setting forth the last known address of the debtor and furnish the clerk with an envelope with first-class postage attached. In addition, the creditor is to furnish the debtor's social security number, if known, which shall appear on the summons. *Id.*

76. *Id.* § 8.01-513 (Repl. Vol. 1977).

77. *Id.* The mode of service prescribed here is in contrast to the general provisions dealing with service of process on corporations set out at *id.* §§ 8.01-299, -301.

78. *Id.* § 8.01-523.

79. *Id.* Service on the United States Attorney or other agent is to be made in the manner set forth in FED. R. Civ. P. 4(d)(4). See note 314 *infra* & accompanying text.

80. 42 U.S.C.A. § 659 (West Supp. 1979). For a discussion of the garnishment of federal employees for alimony and child support obligations, see notes 295-324 *infra* & accompanying text.

81. VA. CODE § 8.01-515 (Cum. Supp. 1979). The Virginia statute provides the garnishee with the *option* to deliver or pay what he is liable for to the officer serving the summons or

ized agent or have that agent file a statement, verified by his affidavit.⁸² If either the judgment debtor or judgment creditor disputes the accuracy of the statement, the garnishee can be compelled to make an appearance and be required to produce such books and papers as are necessary.⁸³

When the garnishee is before the court as the personal representative of a decedent, he must file a written answer stating whether any sum of money is in his hands in his fiduciary capacity owing to the judgment debtor and, if so, the amount.⁸⁴ If the amount has not been determined definitely, the court must continue the case and direct the garnishee to report to the court when this amount is ascertained and payable to the debtor.⁸⁵

When the suggestion is made to the court that the garnishee has not fully disclosed his liability in his answer, the court, without any formal pleading, will inquire into the indebtedness⁸⁶ or, if the proceeding is in a circuit court, will impanel a jury to make the inquiry if a demand is made by either party.⁸⁷ The evidence adduced by the judgment creditor clearly must establish the existence of the indebtedness or property in the garnishee's hands. The garnishee may be examined as an adverse witness, but this alone will not discredit his testimony nor justify a verdict against him if unsupported by the evidence.⁸⁸

When the verified statement or examination of the garnishee discloses his liability to the judgment debtor, the court may render

to the clerk issuing it, before the return day of the summons, and thereby avoid making an appearance or filing a verified statement. *Id.* § 8.01-520 (Repl. Vol. 1977).

Furthermore, notwithstanding the provisions of §§ 8.01-515, -516, an employer may pay his employee wages or salary when due, not exceeding the amount exempted by the federal garnishment restrictions as codified in Va. CODE § 34-29 (Cum. Supp. 1979). He then must file a written statement to this effect, stating the amount so paid, and pay the excess of the wages or salary over the exemption into court and be discharged of any liability to the employee for the wages or salary so withheld. *Id.* § 8.01-517 (Repl. Vol. 1977).

82. *Id.* § 8.01-515 (Cum. Supp. 1979).

83. *Id.*

84. *Id.* § 8.01-518 (Repl. Vol. 1977).

85. *Id.*

86. *Id.* §§ 8.01-519, -565.

87. *Id.* § 8.01-519 states that when the summons is before a general district court, the court shall proceed without a jury.

88. *Huff v. Huff*, 143 Va. 46, 49-50, 129 S.E. 219, 220 (1925); see *Levine's Loan Office v. Starke*, 140 Va. 712, 715-16, 125 S.E. 683, 684 (1924). See also *Eastern Shore Produce Exch. v. Belote*, 138 Va. 707, 123 S.E. 372 (1924).

judgment against him for the amount due and order its delivery to the judgment creditor, a designated officer, or have the amount paid into court.⁸⁹ Judgment as to costs will be made against such party as the court deems just,⁹⁰ but no such judgment may be made against the garnishee unless he fails to make appearance or fails to fully disclose his liability⁹¹

When the garnishee fails to make an appearance or file a statement, the court may either compel him to appear or, in his absence, hear proof of any liability on his part and make appropriate orders as if the proof had appeared by his examination.⁹²

STATUTORY EXEMPTIONS

The Federal Wage Garnishment Law: Title III

On July 1, 1970, Title III of the Consumer Credit Protection Act (CCPA)⁹³ went into force, bringing the subject of garnishment of

89. VA. CODE § 8.01-516 (Repl. Vol. 1977).

90. *Id.* § 8.01-521.

91. *Id.* Where the garnishee delivers or pays what he is liable for before the return day of the summons, there shall be no judgment against him for costs.

92. *Id.* §§ 8.01-519, -564.

93. 15 U.S.C. §§ 1671-1676 (1970), *as amended*, (West (U.S.C.A.) Supp. 1979). The restrictions on garnishment contained in Title III are predicated on the powers granted the Congress in article I, section 8 of the United States Constitution to regulate commerce and to establish uniform bankruptcy laws. *Id.* § 1671(b).

Within the scope of the commerce clause, U.S. CONST. art. I, § 8, cl. 3, Congress' power to regulate commerce is plenary in nature. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). As disclosed in § 1671 of the CCPA, Congress found that unrestricted or inadequately restricted wage garnishments affect interstate commerce in two ways: first, such garnishments encourage undesirable credit extension thereby diverting money into excessive credit payments, away from the payment of goods and services, hindering production and the flow of goods in interstate commerce; second, wage garnishments are related to employee discharges, which affect both production and consumption of goods. Congress also based its authority for the enactment of Title III on the bankruptcy clause, U.S. CONST. art. I, § 8, cl. 4. *See Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935).

These findings make clear that Congress had a rational basis for determining that the CCPA was needed to exercise its constitutional power to regulate commerce and establish uniform bankruptcy laws. *Hodgson v. Hamilton Mun. Court*, 349 F. Supp. 1125, 1131 (S.D. Ohio 1972); *Hodgson v. Cleveland Mun. Court*, 326 F. Supp. 419, 429 (N.D. Ohio 1971). The courts therefore are obligated to accept these findings without further judicial review. *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964). *See also United States v. Gainey*, 380 U.S. 63, 66-68 (1965); *Tot v. United States*, 319 U.S. 463, 466 (1943). Title III therefore appears to be a valid exercise of the constitutional power vested in Congress. For cases holding other

an employee's wages under federal control. Before this time, the garnishment process had been the exclusive concern of state and local tribunals. Congress clearly indicated by the language of the legislation that it did not intend to preempt the entire field of garnishment law.⁹⁴ Rather, it limited its exercise of federal supremacy to two areas: first, the maximum amount that may be garnished from the earnings of an individual for any week or other pay period that has been subjected to garnishment;⁹⁵ second, a prohibition against discharge of an employee because his earnings have been subjected to garnishment for any one indebtedness.⁹⁶

Congress intended that the federal law would preempt any provision of a state law authorizing garnishment of a greater percentage of an employee's wages than is permitted under Title III.⁹⁷ Stated differently, as between the CCPA and state law, whichever is more restrictive and results in a smaller garnishment will control in any given situation.⁹⁸ Thus, the effect of the Title III provisions is to create a statutory minimum exemption on wage garnishments, while leaving the several states free to enact more stringent exemptions.

Background

An overview of the purposes that Congress sought to accomplish

titles of the CCPA constitutional, see *United States v. Perez*, 426 F.2d 1073 (2d Cir. 1970); *United States v. Biancofiore*, 422 F.2d 584 (7th Cir.), *cert. denied*, 398 U.S. 942 (1970). For an in-depth discussion of the constitutionality of Title III, see Note, *Federal Restrictions of Wage Garnishment: Title III of the Consumer Credit Protection Act*, 44 IND. L.J. 267 (1969).

94. 15 U.S.C. § 1677 (1970); *Hodgson v. Hamilton Mun. Court*, 349 F Supp. 1125, 1132 (S.D. Ohio 1972). Section 1677 provides as follows:

This subchapter does not annul, alter, or affect, or exempt any person from complying with, the laws of any State

(1) prohibiting garnishments or providing for more limited garnishment than are allowed under this subchapter, or

(2) prohibiting the discharge of any employee by reason of the fact that his earnings have been subjected to garnishment for more than one indebtedness.

Id.

95. 15 U.S.C.A. § 1673 (West 1974 & Supp. 1979).

96. 15 U.S.C. § 1674 (1970).

97. *Hodgson v. Hamilton Mun. Court*, 349 F. Supp. 1125, 1133 (S.D. Ohio 1972); *Gerry Elson Agency v. Muck*, 509 S.W.2d 750, 751-52 (Mo. App. 1974).

98. *First Nat'l Bank v. Columbia Credit Corp.*, 179 Colo. 242, 245-46, 499 P.2d 1163, 1164 (1972); *Willhite v. Willhite*, 546 P.2d 612, 616 (Okla. 1976).

by the enactment of Title III of the CCPA is critical to an understanding of the legislation. Creditors frequently have resorted to the process of garnishment of a debtor's wages to secure payment for outstanding debts.⁹⁹ Although justified on the ground that its abolition would lead to a tightening in the credit market,¹⁰⁰ garnishment has been criticized severely as a collection device, both because of its potentially drastic effects on the individual debtor¹⁰¹ and those close to him, and because of the attendant social cost involved when the state is used as a collection agency.¹⁰² Title III represents a congressional effort to strike a balance between these conflicting considerations.¹⁰³

Discharge of a garnished debtor from employment is one common consequence of wage garnishment.¹⁰⁴ The garnishment process

99. Socioeconomic changes in American society have generated different patterns of debt and a changed social attitude toward indebtedness. See D. CAPLOVITZ, *CONSUMERS IN TROUBLE* 5 (1974); Comment, *Wage Garnishment*, *supra* note 2, at 154-57. The trend today is increasingly toward the use of consumer credit. The volume of consumer credit has grown from \$5.665 billion in 1945 to \$56.028 billion in 1960 and to \$121.346 billion in 1970. 50 SURVEY OF CURRENT BUSINESS 5-17, 5-18 (July 1970). The level of debt as of July 1979 was \$295.05 billion, having risen 16.2 percent in one year. N.Y. Times, Sept. 13, 1979, at D1, col. 5.

The liberal use of wage garnishments to collect these obligations has produced serious adverse consequences for the individuals affected and for society as a whole. Those creditors who engage in high-risk credit operations usually are extending credit to individuals whose only asset is their periodic earnings; thus, the availability of wage garnishment as a collection device is a major reason for their willingness to extend credit to these individuals. See D. CAPLOVITZ, *supra*, at 27-46, 233-36; Note, *Wage Garnishment Under the Consumer Credit Protection Act: An Examination of the Effects on Existing State Law*, 12 WM. & MARY L. REV. 357, 358 (1970).

100. James & Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Articles V and VI*, 57 GEO. L.J. 923, 938 (1969).

101. See Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1234-38 (1965); Note, *Wage Garnishment in Kentucky*, 57 Ky. L.J. 92, 113 (1968); Note, *Garnishment Under the Consumer Credit Protection Act and the Uniform Consumer Credit Code*, 38 U. CIN. L. REV. 338, 350 (1969).

102. Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 30 (1969). Note, *Wage Garnishment Under the Consumer Protection Act*, *supra* note 99, at 359.

103. As originally introduced, the bill would have provided for a blanket prohibition against the garnishment of wages. Testimony received, however, indicated that a total prohibition would unduly restrict honest and ethical creditors, while permitting those fully capable of paying their debts to escape such responsibilities. H.R. REP. NO. 1040, 90th Cong., 2d Sess. (1967), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1962, 1978.

104. The likelihood of discharge is greater when an unskilled or semiskilled worker is involved, because the replacement costs are significantly less; unfortunately, these workers

has become essentially a tripartite procedure that compels the debtor's employer to incur significant bookkeeping expense and inconvenience in processing the required papers. Therefore, after one or more garnishment summons are served on an employer, he often will dismiss the employee.¹⁰⁵ The loss of employment not only eliminates the discharged employee's ability to provide adequate financial support for himself and his dependents, but also imposes a substantial burden on society. A prospective employer will be reluctant to hire an individual who has been discharged previously because of garnishment difficulties. Unable to find new employment, the debtor will be forced to resort to welfare compensation, the cost of which is passed on to the public.¹⁰⁶

The increase in wage garnishments in this country in the last several years has been paralleled by a dramatic rise in the number of personal, nonbusiness bankruptcy petitions filed.¹⁰⁷ To an employee beset by financial difficulties, the prospect of filing for per-

are most likely to have their wages garnished. Note, *Wage Garnishment Under the Consumer Credit Protection Act*, *supra* note 99, at 359. Also conceivable, however, is that the employer will lose the services of a more highly trained worker if that worker is unable to perform effectively while burdened by his financial problems. Note, *Wage Garnishment in Kentucky*, *supra* note 101, at 117.

105. Note, *Wage Garnishment in Kentucky*, *supra* note 101, at 117. Whereas at one time a garnishee was only an incidental party to the garnishment remedy as a mere custodian of the debtor's goods, he now has become a principal participant in the proceeding. This increase in importance in turn has given rise to increased legal responsibility; the garnishee now may face personal liability for his failure to comply with the procedural requirements. Comment, *Wage Garnishment*, *supra* note 2, at 160; see Comment, *Wage Garnishment in New York State: Practical Problems of the Employer*, 34 ALB. L. REV. 395, 418-22 (1970).

106. See Comment, *Wage Garnishment*, *supra* note 2, at 161; Note, *Wage Garnishment Under the Consumer Credit Protection Act*, *supra* note 99, at 359.

107. D. CAPLOVITZ, *supra* note 99, at 2; Comment, *Wage Garnishment*, *supra* note 2, at 159. As the House report for the CCPA discloses, personal bankruptcy declarations rose from 18,000 per year in 1950 to 208,000 per year in 1967. H.R. REP. NO. 1040, *supra* note 103. The number of personal bankruptcies dropped to 182,210 for the year ending June 30, 1977. R. KIRKS, ANNUAL REPORT: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 131 (1977). The recent decline in the number of bankruptcy petitions filed on a nationwide basis may be misleading. The bankruptcy court that handles cases from Southeastern Virginia received 223 petitions in July 1979, which amounted to a fifty percent increase over the number filed in July 1978, and twice the total for July 1977. Norfolk Ledger-Star, Aug. 30, 1979, at 1, col. 5. For an excellent article discussing the relationship between the use of wage garnishments and the number of nonbusiness bankruptcies, see Brunn, *supra* note 101, at 1234-38. See also Countryman, *The Bankruptcy Boon*, 77 HARV. L. REV. 1452 (1964); Shuchman & Jantscher, *Effects of the Federal Minimum Exemption from Wage Garnishment on Nonbusiness Bankruptcy Rates*, 77 COM. L.J. 360 (1972).

sonal bankruptcy offers an attractive alternative. Bankruptcy discharges the debtor from any unsecured obligations that cannot be repaid from his liquidated estate and eliminates the possibility of a deficiency judgment after repossession by secured creditors.¹⁰⁸ In practice, however, a declaration of bankruptcy frequently results in further aggravation of the debtor's financial distress, principally because of the difficulty and expense of securing credit in the future.¹⁰⁹

Although wage garnishments are not the sole cause of bankruptcy, the legislative history of Title III clearly shows that Congress concluded that a close connection existed between unrestricted state garnishment laws and declarations of personal bankruptcy.¹¹⁰ In conjunction with the more overt evidence concerning employee discharge following garnishment actions, Congress felt that legislation curbing the disruptive effects of wage garnishment was mandated. Against this background, the provisions of Title III were enacted.

Substantive Provisions

Title III attempts to alleviate some of the adverse consequences of wage garnishment by exempting a portion of an employee's earnings from garnishment and by curtailing the employer's ability to discharge an employee whose wages have been garnished.¹¹¹ The basic intent of the wage exemption is to ensure that a wage earner is able to maintain a decent standard of living in order to remain a

108. 11 U.S.C.A. § 524 (West Supp. 1979).

109. D. CAPLOVITZ, *supra* note 99, at 274-75; Note, *Garnishment Under the Consumer Credit Protection Act*, *supra* note 101, at 350-51. The cost of bankruptcy, like other costs generated by the garnishment process, is not borne by the debtor alone, but is partially passed on to society. Nonbusiness bankruptcies now cost creditors well over one billion dollars annually, a cost that the public absorbs through higher prices. Note, *Wage Garnishment Under the Consumer Credit Protection Act*, *supra* note 99, at 360. Moreover, to the extent that the administration of bankruptcy proceedings is funded by the public treasury, it creates an additional financial burden on the public.

110. H.R. REP. NO. 1040, *supra* note 103. In two states that prohibit garnishment of wages, Texas and North Carolina, the bankruptcy rate was 5 to 9 persons per 100,000 population per year, whereas in states with relatively harsh garnishment laws, such as California and Ohio, the rate of personal bankruptcy ranged 200 to 300 persons per 100,000 population. *Id.* See also Annot., 14 A.L.R. FED. 447 (1973).

111. See notes 95-96 *supra* & accompanying text.

productive member of society.¹¹²

That Congress intended a broad application of Title III is demonstrated by the definitions provided in section 1672.¹¹³ Congress, in its definition of "garnishment," did not differentiate between the kinds of debts owed, nor did it restrict the term to a specific withholding; on the contrary, garnishment includes "any legal or equitable procedure."¹¹⁴ These words, given a broad construction, indicate that garnishment is not restricted, and includes proceedings in aid of execution as well as prejudgment attachment proceedings.¹¹⁵

Similarly, the term "earnings"¹¹⁶ is used, rather than "wages" or "salary," because it is broader and encompasses such payments as commissions earned and money received from a business in which

112. Brunn, *supra* note 101, at 1228; see *In re Kokoszka*, 479 F.2d 990, 997 (2d Cir. 1973), *aff'd sub nom.* *Kokoszka v. Belford*, 417 U.S. 642 (1974).

113. *Hodgson v. Christopher*, 365 F. Supp. 583, 586 (D.N.D. 1973).

114. 15 U.S.C. § 1672(c) (1970) provides, "(c) The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."

115. *Hodgson v. Hamilton Mun. Court*, 349 F. Supp. 1125, 1139 (S.D. Ohio 1972). A court order for the support of any person is a "garnishment" within the meaning of Title III if, pursuant to that order, the earnings of an individual are required to be withheld to meet the requirements of the order. *Marshall v. District Court for Forty-First-b Jud. Dist.*, 444 F. Supp. 1110, 1116 (E.D. Mich. 1978).

Garnishment, as used in this section, does not include wage assignments that are brought about by negotiation between a debtor and a creditor and subsequently implemented without judicial intervention; a garnishment denotes a court proceeding whereby a creditor seeks to reach an individual's earnings to satisfy a claim. *Western v. Hodgson*, 494 F.2d 379, 382-83 (6th Cir. 1974). An assignment of wages, therefore, is not within the scope and protection of Title III. This judicial interpretation of Title III is consistent with an opinion expressed by the Wage Hour Administrator for the Department of Labor. See Wage-Hour Opinion Letter No. 1154, 1 LAB. L. REP., Wages Hours (CCH) ¶ 22,501.6511 (Dec. 23, 1970). See also *Sears, Roebuck & Co. v. A.T. & G. Co.*, 66 Mich. App. 359, 239 N.W.2d 614 (1976) (holding that a garnishee is entitled to deduct from the disposable income of an employee any sum previously agreed upon by the employee-debtor, with no limitation, as payments for a debt owed by the employee to the employer; a garnishor-creditor of the employee can only claim the difference, if any, between 25 percent of the employee's disposable earnings and the garnishee's deductions). But see *Moran, Relief for the Wage Earner: Regulation of Garnishment under Title III of the Consumer Credit Protection Act*, 12 B.C. INDUS. & COM. L. REV. 101 (1971) (suggesting that wage assignments may be used to circumvent the purposes of Title III if "garnishment" is not construed broadly so as to encompass such agreements).

116. 15 U.S.C. § 1672(a) (1970) provides, "(a) The term 'earnings' means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program."

the debtor is a participant.¹¹⁷ Both the language of the statute and the legislative intent make clear, however, that "earnings" means only periodic payments of compensation and does not include every asset that is traceable in some way to such compensation.¹¹⁸ Therefore, for the purpose of applying the percentage limitations of Title III, courts have held that compensation loses its character as "earnings" after it has been deposited in the employee's bank account.¹¹⁹ Furthermore, a tax refund representing compensation previously withheld does not become "earnings" when received by the employee.¹²⁰

117. S. MORGANSTERN, *LEGAL PROTECTION IN GARNISHMENT AND ATTACHMENT* 15 (1971). In determining whether money due a person constitutes "earnings" under § 1672(a), the courts are not concerned with labels such as wages, salaries or commissions. The sole criterion for exemption is that the funds subject to garnishment represent compensation for personal services in a strict sense. *Gerry Elson Agency, Inc. v. Muck*, 509 S.W.2d 750, 753 (Mo. App. 1974). The Missouri court in *Muck* held that a lessor of transportation equipment who, as an independent contractor, received a fixed percentage of revenue derived from shipments, did not receive any compensation for personal services and thus had no "earnings" within the terms of Title III's protection. *Id.* at 755.

The Secretary of Labor is vested with authority to enforce the provisions of Title III, 15 U.S.C. § 1676 (1970), and accordingly, wage and hour opinion letters drafted pursuant to that authority will be given substantial weight by the courts. *Brennan v. Kroger Co.*, 513 F.2d 961, 964 (7th Cir. 1975). *In re Cedor*, 337 F. Supp. 1103, 1108 (N.D. Cal.), *aff'd per curiam*, 470 F.2d 996 (9th Cir. 1972), *cert. denied*, 411 U.S. 973 (1973). *See generally* Public Util. Comm'n v. United States, 355 U.S. 534 (1958); *United States v. Howard*, 352 U.S. 212 (1957). The following are illustrative of administrative opinions on what constitutes "earnings": (1) tips that pass through the hands of the employer-garnishee, Wage-Hour Opinion Letter No. 1142, 1 LAB. L. REP., Wages Hours (CCH) ¶ 22,501.158 (Dec. 9, 1970); (2) lump sum payments to artists and writers, after a determination of the number of workweeks spent on the product, Wage-Hour Opinion Letter No. 1127, *id.* ¶ 22,501.159 (Sep. 23, 1970); (3) meals and lodgings provided under an employment contract, Wage-Hour Opinion Letter No. 1142, *id.* ¶ 22,501.16 (Dec. 9, 1970); (4) sick pay, Wage-Hour Opinion Letter No. 1249, *id.* ¶ 22,501.161 (Feb. 1, 1973).

118. *Kokoszka v. Belford*, 417 U.S. 642, 651 (1974), *citing and aff'g In re Kokoszka*, 479 F.2d 990, 997 (2d Cir. 1973).

119. *Dunlop v. First Nat'l Bank*, 339 F. Supp. 855 (D. Ariz. 1975). *Accord*, *Usery v. First Nat'l Bank*, 586 F.2d 107 (9th Cir. 1978). The district court in *Dunlop* interpreted Title III as governing the relationship between employer and employee. 339 F. Supp. at 856. The court stated that to assume that Congress intended to impose the significant burdens required to make exemption determinations on banks and other financial institutions was unrealistic, especially because such institutions are not mentioned in the statute or the legislative history. *Id.* at 856-57, 858 n.12. *See Phillips v. Bartolome*, 46 Cal. App. 3d 346, 121 Cal. Rptr. 56 (1975).

120. *Kokoszka v. Belford*, 417 U.S. 642 (1974). The Court held that a bankruptcy trustee has the right to treat an entire tax refund to a bankrupt wage earner as property of the bankrupt's estate regardless of the garnishment restrictions because a tax refund is not the

"Disposable earnings," as defined in section 1672(b), is that portion of earnings remaining after the deduction of amounts required by law to be withheld.¹²¹ The disposable earnings provision constitutes a substantial change from prior state statutes in that most wage exemptions before the federal legislation were computed on gross earnings.¹²² Permissible deductions include withholding taxes imposed by federal, state, or local governments and social security payments; in addition, amounts withheld for unemployment compensation and workmen's compensation insurance pursuant to state law are also deductible.¹²³ Union dues, credit union loan deductions, or an employee's share of health and welfare benefit payments are not deductions required to be withheld by either federal or state law and therefore are part of disposable earnings.¹²⁴ Furthermore, the phrase "required by law to be withheld"¹²⁵ does not include any amount withheld pursuant to any court order for support of any person.¹²⁶ At least one commentator¹²⁷ has suggested

equivalent of "earnings" The Court concluded that Congress' purpose in enacting the statute was "to regulate garnishment in its usual sense as a levy on periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis." *Id.* at 651. A lump sum tax return, like a bank account, has neither an element of periodicity nor the critical relationship to a person's subsistence that a paycheck does. *Id.* at 648; *accord, In re Kingswood*, 343 F. Supp. 498 (C.D. Cal.), *rev'd per curiam sub nom. Kingswood v. Michelman*, 470 F.2d 996 (9th Cir. 1972), *vacated*, 418 U.S. 902 (1974); *cf. Lines v. Frederick*, 400 U.S. 18 (1970) (*per curiam*) (vacation pay accrued but not payable at the time of filing does not pass to the bankruptcy trustee). *Contra, In re Cedor*, 337 F. Supp. 1103, (N.D. Cal.), *aff'd per curiam*, 470 F.2d 996 (9th Cir. 1972), *cert. denied*, 411 U.S. 973 (1973).

121. 15 U.S.C. § 1672(b) (1970) provides, "(b) term 'disposable earnings' means that part of the earnings of any individual remaining after the deduction from those earnings of any amount required by law to be withheld."

122. S. MORGANSTERN, *supra* note 117, at 16.

123. 1 LAB. L. REP., *Wages Hours* (CCH) ¶ 22,501.15 (1979).

124. Wage Hour Opinion Letter No. 1063, *id.* ¶ 22,501.155 (Mar. 16, 1970).

125. *See* note 121 *supra*.

126. *Marshall v. District Court for Forty-First-b Jud. Dist.*, 444 F. Supp. 1110, 1115 (E.D. Mich. 1978); *First Nat'l Bank v. Hasty*, 415 F. Supp. 170, 174 (E.D. Mich. 1976), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977). The district court in *Hasty* was troubled by one consequence of the defendant's contention that a support obligation is an allowable deduction: allowing this deduction would establish a preference for divorced persons over married or separated individuals who have similar expenses for dependent care. 415 F. Supp. at 173. *See generally Kokoszka v. Belford*, 417 U.S. 642, 650-51 (1974); *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857).

127. Note, *Garnishment Under the Consumer Credit Protection Act*, *supra* note 101, at 343. *Contra, Karwacki, Attachment of Wages in Maryland*, 16 Md. L. Rev. 227, 238 (1956).

that deductions to determine disposable earnings should include such items as medical and hospital insurance premiums deducted from an employee's pay

The amount of an individual's earnings subject to garnishment is limited to the lesser of twenty-five percent of his disposable earnings or the amount by which his weekly disposable earnings exceed thirty times the federal minimum hourly wage.¹²⁸ In contrast to the flat dollar amount exemptions characteristic of most state laws, the federal statute uses a percentage restriction coupled with a minimum limitation to keep pace with changes in economic conditions.¹²⁹

Because the current applicable minimum wage is \$3.10 per hour,¹³⁰ the prescribed minimum would amount to \$93 per week and disposable income for any workweek, or lesser period, below this amount would not be subject to garnishment. Weekly disposable earnings between \$93 and \$124 could be garnished for the full amount in excess of \$93, for that amount would always be less than twenty-five percent of the disposable earnings.¹³¹ For disposable earnings above \$124 per week, the amount subject to garnishment would be computed by taking twenty-five percent of the earnings because that sum would be less than the excess over \$93.¹³² The Secretary of Labor, pursuant to authority vested in him by Title III,¹³³ transformed the weekly statutory exemption formula into a formula that provides equivalent restrictions on wage garnishment

128. 15 U.S.C. § 1673(a) (1970).

129. Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act*, 47 S. CAL. L. REV. 383, 394 (1974); Note, *Garnishment Under the Consumer Credit Protection Act*, *supra* note 101, at 344.

130. 29 U.S.C.A. § 206(a)(1) (West 1978) provides as follows:

(a) Every employer shall pay to each of his employees wages at the following rates: (1) not less than \$3.10 an hour during the year beginning January 1, 1980, and not less than \$3.35 an hour after December 31, 1980.

Id.

131. For example, if an individual had weekly disposable earnings of \$120, the excess of this amount over \$93 would be \$27, whereas twenty-five percent of \$120 would be \$30. If, on the other hand, the weekly disposable earnings were \$130, the twenty-five percent limitation would apply because that amount minus \$93 equals \$37, whereas twenty-five percent of \$130 equals \$32.50. When disposable earnings are \$124, the difference between that amount and \$93 equals twenty-five percent of \$124, or \$31.

132. See note 131 *supra*.

133. 15 U.S.C. § 1673(a) (1970).

for disposable earnings that compensate for personal services rendered over a pay period of more than one week.¹³⁴

The above exemptions apply automatically; the debtor must fulfill no conditions precedent before he may receive the protection that the statute affords.¹³⁵ Section 1673(b), however, as amended in 1977, provides for three specific exceptions¹³⁶ to the general restrictions on wage garnishment contained in Title III.¹³⁷ First, the restrictions do not apply when a garnishment order has been imposed by any federal court pursuant to Chapter XIII of the Bankruptcy Act, nor do they apply in the case of a debt due for any state or federal tax.¹³⁸ Therefore, the entire amount of a debtor's wages may be subjected to garnishment.

Second, the 1977 amendment changed the law with respect to garnishments arising out of court orders for child support and alimony. Before this amendment, a debtor's wages were subject to unlimited garnishment to satisfy such support orders,¹³⁹ which pre-

134. 29 C.F.R. § 870.10(c)(2) (1979) provides the following formula: the number of work weeks, or fractions thereof $x \times 30 \times$ the applicable Federal minimum wage, \$3.10. For the purpose of this formula, a calendar month is considered to consist of $4\frac{1}{3}$ work weeks. Thus, the multiple applicable to the disposable earnings for a two week period is \$186 ($2 \times 30 \times \3.10); for a monthly period, \$403 ($4\frac{1}{3} \times 30 \times \3.10); and for a semimonthly period, \$201.34 ($2\frac{1}{6} \times 30 \times \3.10). The multiple for any other pay period longer than one week is computed in a manner consistent with the formula above. *Id.*

135. Note, *Wage Garnishment Under the Consumer Credit Protection Act*, *supra* note 99, at 364. 15 U.S.C.A. § 1673(c) (West Supp. 1979) expressly provides that "[n]o court of the United States or any State may make, execute, or enforce any order or process in violation of this section." See *Higgins v. Wilkerson*, 65 Lab. Cas. ¶ 52,523 (D. Kan. 1970). Although the federal exemption law applied to all employees, the laws of the several states often contain various qualifying conditions premised on residence, family status, type of employment, or other factors. For a discussion of additional Virginia exemptions, see notes 176-93 *infra* & accompanying text.

136. See 15 U.S.C.A. § 1673(b) (West Supp. 1979).

137. When any garnishment order exempt from the general restrictions of § 1673(a) absorbs more than twenty-five percent of an individual's weekly wages, an additional garnishment within the same week apparently will be precluded.

138. 15 U.S.C.A. § 1673(b) (West Supp. 1979).

139. See 15 U.S.C. § 1673 (1970). The problem of enforcement of child support and alimony obligations has received much attention by Congress within the last decade. See *S. Rep. No. 1356*, 93d Cong., 2d Sess. — (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 8133. The growing concern over this thorny problem rests in part on the legal and moral considerations involved when parents capable of fulfilling such obligations disregard their duty. Additional impetus has come from statistical data indicating that a large portion of this financial burden, amounting to billions of dollars annually, is borne by the taxpaying public. Phillips & Dworak, *The Federal Garnishment Statute: Its Impact in the Air Force*,

sumably reflected Congress' conviction that absent parents should be compelled to fulfill their court-ordered family responsibilities. In its present form, subsection 1673(b)(2) represents a compromise among competing interests: the enforcement of such support obligations is balanced against the protection of a debtor whose wages are subjected to garnishment. It now provides that fifty percent of a debtor's disposable earnings is available for garnishment for child support or alimony when the debtor is supporting another spouse or dependents. If the debtor has no such current obligation, sixty percent of his disposable earnings can be garnished. An additional five percent is to be added to the above percentages if there are outstanding arrearages more than twelve weeks old.¹⁴⁰

In addition to restrictions on amounts that may be subjected to garnishment, Title III prohibits an employer from discharging an employee because his earnings have been subject to garnishment "for any one indebtedness."¹⁴¹ The employer is subject to a fine of up to \$1000 or imprisonment for not more than one year, or both, if he willfully violates this provision.¹⁴² But when an employee's

18 A.F.L. REV. 70, 70-71 (Winter, 1976)

The most comprehensive federal legislation on this subject to date is Part D of the Social Services Amendments of 1974, 42 U.S.C.A. §§ 651-660 (West Supp. 1979), which provides for monetary and administrative assistance to state enforcement agencies. Also included in this legislation is a section that provides for a limited waiver of federal governmental immunity to allow for garnishment of all federal employees for collection of court-ordered support obligations. *Id.* § 659. The mechanics of this section are discussed in detail in a later section of this Note. See notes 295-324 *infra* & accompanying text.

140. 15 U.S.C.A. § 1673(b)(2) (West Supp. 1979).

141. 15 U.S.C. § 1674(a) (1970). Prior to this federal legislation, an employee discharged for service of a single garnishment summons on his employer had little recourse unless he could show that the employer somehow had violated his rights under the federal labor laws. See, e.g., *Michigan Lumber Fab., Inc.*, 111 N.L.R.B. 579 (1955). Under § 1674(a) discharge of an employee whose wages have been subject to garnishments for more than one indebtedness ordinarily is permissible. One court has held, however, that the Civil Rights Act of 1964 limits an employer's right to discharge an employee whose wages have been subjected to multiple garnishments, notwithstanding that § 1674(a) impliedly permits discharge in such cases. *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971). A violation may occur even when the discharge policy is adopted in good faith and with no intent to discriminate, if the consequence is to subject a disproportionate number of minority group members to discharge. *Wallace v. Debron Corp.*, 494 F.2d 674 (8th Cir. 1974); *accord*, *Gregory v. Litton Sys., Inc.*, 472 F.2d 631 (9th Cir. 1972). See *generally* Annot., 26 A.L.R. FED. 394 (1976).

142. 15 U.S.C. § 1674(b) (1970). The subjective motives of an employer might be difficult to ascertain, leading to burden of proof problems in establishing the willfulness of the ac-

wages have been garnished before the effective date of Title III, this section will not prohibit an employer from discharging that employee even though his wages have been garnished only once after the effective date.¹⁴³

The phrase "one indebtedness" has been construed to mean a single debt, regardless of the number of garnishment proceedings instituted for its collection.¹⁴⁴ If a pending garnishment for one indebtedness fully absorbs the nonexempt portion of an employee's wages, mere service on the employer of a second garnishment is not justification for dismissal; the employer is not bound to make deductions pursuant to the second summons because of the priority of the first.¹⁴⁵ The protection afforded under section 1674(a) is renewed with each new employment because the new employer would have suffered no inconvenience or expense as a consequence of an earlier garnishment.¹⁴⁶ The suggestion has been made that discharge for a second garnishment may be unlawful when a considerable period of time has elapsed since the first garnishment.¹⁴⁷

Finally, Title III is significant in another respect: it is completely devoid of any procedural guidelines. The absence of procedural provisions indicates that Congress did not intend to alter existing

tion. Such determinations, however, have been common in other contexts. For example, the Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1973), prohibits an employer from discharging an employee because of the employee's union membership or activities. See *Capital Elec. Power Ass'n*, 171 N.L.R.B. 262 (1968), for an illustration of how such proof problems are handled. The factual determination of an employer's motives for discharging an employee of necessity must rest upon inference. Note, *Federal Restrictions of Wage Garnishment*, *supra* note 93, at 278; see *Brunn*, *supra* note 101, at 1229-34.

143. Title III does not purport to erase prior garnishments from the employee's record by defining garnishment to mean garnishment after July 1, 1970, the effective date of the Act. *Cheatam v. Virginia Alcoholic Bev. Control Bd.*, 501 F.2d 1346 (4th Cir. 1974); *accord*, *Hodgson v. Consolidated Freightways, Inc.*, 503 F.2d 797 (9th Cir. 1974); *Brennan v. General Tel. Co.*, 488 F.2d 157 (5th Cir. 1973).

144. Wage-Hour Opinion Letter No. 1099, 1 LAB. L. REP., Wages Hours (CCH) ¶ 22,501.612 (July 6, 1970).

145. *Brennan v. Kroger Co.*, 513 F.2d 961 (7th Cir. 1975). "[T]he use of the present tense, rather than the future tense, in the phrase 'are required to be withheld' [in § 1672(c)] supports a construction that in order for earnings to 'have been subjected to garnishment,' those earnings must first be *actually* withheld pursuant to a garnishment order." *Id.* at 963 (emphasis supplied).

146. 1 LAB. L. REP., Wages Hours (CCH) ¶ 22,501.60 (1976).

147. *Id.*, see Note, *Garnishment Under the Consumer Credit Protection Act*, *supra* note 101, at 348.

state garnishment procedures other than by creating a statutory minimum exemption standard.¹⁴⁸ State garnishment statutes thus detail and regulate the procedural steps that a creditor must take to subject the debtor's personal earnings to garnishment proceedings.

Enforcement Provisions

Authority to enforce the provisions of Title III is vested in the Secretary of Labor, who is directed to act through the Wage and Hour Division of the Department of Labor.¹⁴⁹ This grant of authority must be read in light of the provisions of the Fair Labor Standards Act (FLSA),¹⁵⁰ which regulates the activities of the Wage and Hour Division. Under the provisions of the FLSA, the Secretary has authority to initiate injunctive proceedings in the federal courts.¹⁵¹ Judicial interpretation of this power further has implied a right to request reinstatement and reimbursement of lost wages of an individual who has been discharged wrongfully.¹⁵² The federal courts interpreting Title III thus far have held that it provides the right to similar remedial action.¹⁵³ Although Title III expressly states that the Secretary of Labor shall enforce its provisions,¹⁵⁴ when read in conjunction with the FLSA, the Secretary's power to initiate such action appears to be discretionary in nature.¹⁵⁵

Despite the language of Title III, which grants enforcement power of its provisions solely to the Secretary of Labor,¹⁵⁶ author-

148. Note, *Federal Restrictions of Wage Garnishment*, *supra* note 93, at 276.

149. 15 U.S.C. § 1676 (1970).

150. 29 U.S.C.A. §§ 201-219 (West 1965, 1975, 1978 & Supp. 1979).

151. 29 U.S.C. § 217 (1970).

152. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 296 (1960); *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152, 155-66 (5th Cir. 1962); *Mitchell v. Goodyear Tire & Rubber Co.*, 278 F.2d 562, 564-65 (8th Cir. 1960).

153. *Hodgson v. Consolidated Freightways, Inc.*, 503 F.2d 797 (9th Cir. 1974); *Hodgson v. General Tel. Co.*, 70 Lab. Cas. ¶ 32,827 (M.D. Fla. 1972).

154. 29 U.S.C. § 211(a) (1970).

155. See *Powell v. Washington Post Co.*, 267 F.2d 651, 652 (D.C. Cir.) (per curiam), *cert. denied*, 360 U.S. 930 (1959). But see *Simpson v. Sperry Rand Corp.*, 350 F. Supp. 1057 (W.D. La. 1972), *vacated and remanded per curiam*, 488 F.2d 451 (5th Cir. 1973) (emphasizing that the legislation itself specifies the Secretary of Labor as the party who *shall* enforce the provisions of the CCPA).

156. See 29 U.S.C. § 211(a) (1970).

ity exists to support the argument that a private cause of action should be implied as a supplementary means of debtor protection.¹⁵⁷ One district court in the Fourth Circuit, however, has determined that Congress neither provided for nor contemplated a private cause of action based on Title III.¹⁵⁸ The principal reason cited by this court for its decision was that the criminal sanctions and enforcement mechanism specifically articulated in Title III constitute an adequate and effective remedy and obviate any need for implying a private cause of action.¹⁵⁹

157. The implication of a private civil remedy as an aid to enforcing federal statutes first was recognized by the Supreme Court in 1916 in *Texas & P. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916). Since that time, private causes of action for violations often have been implied, even when criminal sanctions and administrative enforcement are expressly authorized. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Bell v. Hood*, 327 U.S. 678 (1946). But see *Cort v. Ash*, 422 U.S. 66 (1975). See generally Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Symposium - *Private Rights from Federal Statutes: Toward a Rational Use of Borak*, 63 NW. U.L. REV. 454 (1968).

In *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974), the court held that when an employee had been discharged due to garnishment of his wages for a single indebtedness, a private civil action was appropriate because the employee was within the class of persons that the statute was designed to protect and his discharge was the type of harm the statute was designed to prevent. *Id.* at 110. The court found that, although alternative remedies existed under Title III, nothing on the face of the statute or in its legislative history evinced a clear congressional intent to exclude private civil remedies. *Id.* at 111-12. Therefore, the implication of appropriate civil remedies was justified to ensure the full effectiveness of the purposes underlying the CCPA. *Id.* at 114; accord, *Maple v. Citizens Nat'l Bank & Trust Co.*, 437 F. Supp. 66 (W.D. Okla. 1977); *Nunn v. City of Paducah*, 367 F. Supp. 957 (W.D. Ky. 1973) (by implication) (mem.). For a discussion of the implication of a private cause of action under Title III, see Note, *Federal Restrictions of Wage Garnishment*, *supra* note 93, at 278-82; Note, *Private Cause of Action*, *supra* note 129, at 403-21.

158. *Western v. Hodgson*, 359 F. Supp. 194 (S.D. W. Va. 1973), *aff'd on other grounds*, 494 F.2d 379 (4th Cir. 1974); accord, *Simpson v. Sperry Rand Corp.*, 350 F. Supp. 1057 (W.D. La. 1972), *vacated per curiam on other grounds*, 488 F.2d 450 (5th Cir. 1973); *Oldham v. Oldham*, 337 F. Supp. 1039 (N.D. Iowa 1972) (relying on *Jordon v. Montgomery Ward & Co.*, 442 F.2d 78 (8th Cir.), *cert. denied*, 404 U.S. 870 (1971)); *Higgins v. Wilkerson*, 65 Lab. Cas. ¶ 32,379 (D. Kan. 1970); *Hooter v. Wilson*, 273 So. 2d 516, 519 (La. 1973).

159. *Western v. Hodgson*, 359 F. Supp. 194, 200 (S.D. W. Va. 1973), *aff'd on other grounds*, 494 F.2d 379 (4th Cir. 1974). The court cited *Breitwieser v. KMS Indus., Inc.*, 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973), as authority for the position that the federal courts will permit litigants to enforce the provisions of federal statutes if a federal right is clearly involved, but no federal remedy is available, or the federal remedy provided is grossly inadequate. *Id.* *Breitwieser* addressed whether the child labor provisions of the Fair Labor Standards Act, 29 U.S.C. § 212 (1970 & Supp. V 1975), created a private cause of action for damages for wrongful death. The federal courts in both *Western* and

Exemption for State-Regulated Garnishments

The federal restrictions on garnishment of wages imposed by Title III are intended to supersede all state garnishment laws that offer less protection to employees.¹⁶⁰ Section 1675, however, authorizes the Secretary of Labor to exempt from the operation of the federal restrictions the garnishment provisions of any state statute providing the same or greater restrictions on the garnishment of an individual's earnings.¹⁶¹ The exemption is available only from the general restrictions contained in section 1673. No provision is made for a state to obtain exemption from coverage of section 1674, which prohibits discharge for a garnishment arising out of a single indebtedness.¹⁶²

The regulations promulgated pursuant to section 1675 provide that in assessing the merits of a state's application for exemption

the laws of the State shall be examined with particular regard to the classes of persons and of transactions to which they may apply; the formulas provided for determining the maximum part of an individual's earnings which may be subject to garnishment; restrictions on the application of the formulas; and with regard to procedural burdens placed on the individual whose earnings

Breitwieser held that the remedy provided by the statute at issue was adequate.

In contrast, the court in *Stewart v. Travelers Corp.*, 503 F.2d 108, 112 (9th Cir. 1974), stated that the mere existence of some enforcement mechanism was insufficient; rather the issue was whether the statute's protection might be *enhanced* by allowing private civil relief. The court considered the effectiveness of the criminal and administrative remedies now provided to be dubious. The remedies available pertained only to violations of the § 1674 wrongful discharge proscription, while no corresponding remedy was provided for garnishment illegally in excess of the maximum allowed by § 1673. The criminal sanctions covered only *willful* violations; negligent violations were untouched, and the burden involved in proving willfulness might be an onerous one. *Id.* at 113. Furthermore, application of the enforcement authority vested in the Secretary of Labor is discretionary, not mandatory, causing doubt that an adequate remedy exists because it is contingent on some positive action from an already overburdened administrative agency. See Note, *Private Cause of Action*, *supra* note 129, at 398-99. Finally, the enforcement scheme provided is society's remedy for deterring future violations while the violation of the statutory duty owed to the jobless individual goes unvindicated. *Breitwieser v. KMS Indus., Inc.*, 467 F.2d at 1394-95 (Wisdom, J., dissenting).

160. See notes 93-98 *supra* & accompanying text.

161. 15 U.S.C.A. § 1675 (West Supp. 1979).

162. Note, *Wage Garnishment Under the Consumer Credit Protection Act*, *supra* note 99, at 368-69.

are subject to garnishment.¹⁶³

The basic test for exemption, however, is whether the state statute is "substantially similar" to the provisions of the federal legislation.¹⁶⁴ Under this standard, consideration is limited to the provisions of state laws that can be compared with Title III, whereas supplementary state provisions are not considered.¹⁶⁵

To date, of the dozen states¹⁶⁶ that have made application for exemption, only the statutes of Virginia¹⁶⁷ and Kentucky¹⁶⁸ have been found "substantially similar" so as to qualify for exemption from Title III's general restrictions on wage garnishment.¹⁶⁹ The Virginia General Assembly has adopted the restrictions of section 1673 *verbatim et literatim*,¹⁷⁰ including the 1977 amendments

163. 29 C.F.R. § 870.51(b) (1979). For a compilation of the procedural requisites to apply for state exemption, see *id.* §§ 870.52 to .55. Provision also is made for the exemption to be terminated if the state amends its garnishment laws so that they no longer comply or if the terms or conditions of the exemption have been violated. *Id.* § 870.56.

164. 15 U.S.C.A. § 1675 (West Supp. 1979); S. MORGANSTERN, *supra* note 117, at 41; Note, *Federal Restrictions of Wage Garnishment*, *supra* note 93, at 287-88.

165. 1 LAB. L. REP., *Wages Hours* (CCH) ¶ 22,501.30 (1979).

166. The following states have had applications for exemption rejected by the Secretary of Labor: Illinois, Kansas, Louisiana, Minnesota, New Hampshire, North Carolina, North Dakota, Ohio, South Carolina, and Utah; reasons for denial of the exempt status have varied with the particular provisions found in individual states' statutes. See 1 LAB. L. REP., *Wages Hours* (CCH) ¶ 22,501.301 (1975). For example, Ohio, the first state to apply for exemption, had a statute providing for only one garnishment per month and limiting the garnishment to 17.5% of monthly earnings after deductions required by law. See *Hodgson v. Cleveland Mun. Court*, 326 F Supp. 419, 427 (N.D. Ohio 1971). Although counsel for the state argued that the provision was intended to be read in a manner consistent with the CCPA, the Secretary found that application of the state's exemption formula could result in the garnishment of 70% of an individual's weekly earnings and thus was not "substantially similar" to the federal restrictions. See *id.* at 425. See generally *Hodgson v. Hamilton Mun. Court*, 349 F Supp. 1125 (S.D. Ohio 1972).

167. VA. CODE §§ 8.01-511 to 525 (Repl. Vol. 1977 & Cum. Supp. 1979).

168. KY. REV. STAT. §§ 425.501 to .526 (Cum. Supp. 1978).

169. 1 LAB. L. REP., *Wages Hours* (CCH) ¶22,501.301 (1975). Virginia's application for exemption was accepted subject to two conditions: (1) whenever garnishments ordered within the state are deemed to be governed by the laws of another state, and those laws are applied, the restrictions of § 1673 still will be applied; (2) whenever the earnings of an individual subject to garnishment are withheld and a suspending or supersedeas bond is undertaken in the course of an appeal from a lower court decision, § 1963 will apply to the withholding of such earnings under this procedure. 29 C.F.R. § 870.57(b)(1), (2) (1979).

170. See 15 U.S.C.A. § 1673 (West 1974 & Supp. 1979); VA. CODE § 34-29 (Cum. Supp. 1979).

made by the Tax Reduction Act.¹⁷¹ Because no Virginia cases that construe the definitions of "garnishment," "earnings," and "disposable earnings," are available the judicial and administrative interpretations of these terms¹⁷² are crucial to an understanding of the scope and operation of Virginia's garnishment statute.

The Virginia statutory restrictions on wage garnishment apply automatically *in all cases*, unless they have been *specifically* disallowed by the court.¹⁷³ The blanket exemption created cannot be considered a mere personal privilege of the debtor because he cannot waive it.¹⁷⁴ To reinforce this concept, the Virginia statute provides that an assignment, sale, transfer, pledge, or mortgage of wages or salary made by an individual is void and unenforceable by any process of law to the extent of the statutory exemption.¹⁷⁵

Additional Exemptions

The laws of Virginia offer further debtor protection when the debtor is a householder or head of a family.¹⁷⁶ The homestead exemption provision entitles such a debtor to exempt from any process of execution, including garnishment, his real or personal property, including money and debts due to him, having an aggregate value of not more than \$5,000.¹⁷⁷ This general homestead exemp-

171. See notes 136-40 *supra* & accompanying text.

172. See notes 107-34 *supra* & accompanying text.

173. The application of restrictions without exception in Virginia unless *specifically* disallowed by the court, see VA. CODE §§ 8.01-516, -517 (Repl. Vol. 1977), is an improvement over the federal scheme which provides that the general restrictions are *automatically* inapplicable if the garnishment is to satisfy a judgment by a bankruptcy court, for delinquent taxes, or for child support and alimony obligations. See notes 136-39 *supra* & accompanying text. The Virginia employer is authorized to rely on the information contained in the employee's withholding exemption certificate filed for federal income tax purposes in determining to which exemption he is entitled. VA. CODE § 8.01-515 (Cum. Supp. 1979).

174. VA. CODE §§ 34-22, -29 (Repl. Vol. 1976 & Cum. Supp. 1979).

175. *Id.* § 34-29(e) (Cum. Supp. 1979). Thus, by statute, Virginia has resolved the question that remains with respect to the effect of the federal restrictions of Title III on wage assignments, which are by nature private contractual agreements. See note 115 *supra* & accompanying text.

176. The term "householder" means any married or unmarried person who maintains a separate residence, regardless of whether others are living with him. VA. CODE § 34-1 (Cum. Supp. 1979). The term "head of a family" means one who occupies a relationship to persons living with him, entitling them to a legal or moral right to support from him. *Oppenheim v. Myers*, 99 Va. 582, 586, 39 S.E. 218, 219 (1901).

177. VA. CODE § 34-4 (Cum. Supp. 1979). An additional exemption of \$2000 is provided

tion is available in addition to the specific restrictions on wage garnishment contained in section 34-29.¹⁷⁸ Because the determination of what property shall be exempted is wholly within the discretion of the householder,¹⁷⁹ the extent of exempted property that otherwise would be subject to the garnishment process cannot be determined in advance. Theoretically, the householder could apply the entire homestead exemption to a bank account¹⁸⁰ consisting of \$5,000 or to a debt due from another for that amount and thereby deprive his creditor of that source of funds to satisfy his judgment.

At common law,¹⁸¹ and in Virginia prior to 1898,¹⁸² the wages and salaries of all state employees and the employees of all political subdivisions of the state were exempt from garnishment. The basis of this broad governmental immunity was the public policy of securing efficiency in the public service of such employees.¹⁸³ Public policy on this issue since has changed,¹⁸⁴ and it is now expressly provided by statute that the wages and salaries of all state employees,¹⁸⁵ and those of all city, town, and county employees,¹⁸⁶ are subject to garnishment following any judgment rendered against them. This general waiver of sovereign immunity is subject to a single exception: when a state officer holds his office by virtue of the Virginia Constitution¹⁸⁷ the common law rule is applied and his

for veterans having a service-connected disability. *Id.* § 34-4.1. For a survey of the historical background and interpretations of the homestead provision, see M. BURKS, *supra* note 65, at §§ 439-54. See also Note, *The Failure of the Virginia Exemption Plan*, *infra* this issue.

178. VA. CODE § 34-4 (Cum. Supp. 1979).

179. See *id.*, *Linkenhoker's Heirs v. Detrick*, 81 Va. 44, 52-53 (1885).

180. See *Wilson v. Virginia Nat'l Bank*, 214 Va. 14, 196 S.E.2d 920 (1973) (per curiam) (holding that a homestead deed may be filed to exempt a bank account from garnishment).

181. See Annot., 56 A.L.R. 601 (1928).

182. See, e.g., *Blair v. Marye*, 80 Va. 485 (1885); *Rollo v. Andes Ins. Co.*, 64 Va. (23 Gratt.) 509 (1873).

183. *Hilton v. Amburgey*, 198 Va. 727, 730, 96 S.E.2d 151, 153 (1957); *Knight v. Peoples Nat'l Bank*, 182 Va. 380, 388, 29 S.E.2d 364, 368 (1944); *Blair v. Marye*, 80 Va. 485, 487 (1885).

184. See *Boyd, Higgins & Goforth, Inc. v. Mahone*, 142 Va. 690, 695-96, 128 S.E. 259, 261-62 (1925) (noting that the duty and public policy of the state, as expressed in decisions of the supreme court and statutory law, is to provide appropriate remedies for creditors to satisfy their judgments). See also *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 127, 33 S.E. 516, 517 (1899).

185. VA. CODE § 8.01-522 (Repl. Vol. 1977).

186. *Id.* § 8.01-524.

187. VA. CONST. art. VII, § 4 provides as follows:

compensation is exempt from garnishment.¹⁸⁸ Thus, sheriffs,¹⁸⁹ treasurers,¹⁹⁰ commonwealth attorneys,¹⁹¹ and commissioners of revenue¹⁹² who do not hold their offices by virtue of the General Assembly or by virtue of the authority of a municipality or county are not subject to garnishment for their debts lawfully incurred. Finally, it is provided by statute that the wages of a minor are not subject to garnishment to pay the debts of his parents.¹⁹³

PROPERTY SUBJECT TO GARNISHMENT

Although wages or other personal earnings usually are considered the principal object sought by a process of garnishment, a wide range of property may be taken by such proceedings. Bank accounts, debts, or accounts receivable due to the debtor, equitable interests in trusts, and other funds held for the debtor's benefit all are available to the creditor in satisfaction of his judgment.¹⁹⁴ Thus, any person, corporation, or organization that is indebted to the judgment debtor or in possession of property belonging to him may be summoned as a garnishee in the garnishment proceedings.¹⁹⁵

In Virginia, the garnishment process reaches not only an indebtedness presently existing, but also such debts or other obligations coming into existence between the date of issuance of the summons and its return date.¹⁹⁶ The summons must be returned

There shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act.

Id.

188. *Hilton v. Amburgey*, 198 Va. 727, 729-31, 96 S.E.2d 151, 153 (1957).

189. *Id.*

190. See notes 187-88 *supra* & accompanying text.

191. See *Burnett v. Brown*, 194 Va. 103, 105, 72 S.E.2d 394, 395 (1952); notes 187-88 *supra* & accompanying text.

192. See *McGinnis v. Nelson County*, 146 Va. 170, 172, 135 S.E. 696, 697 (1926); notes 187-88 *supra* & accompanying text.

193. VA. CODE § 34-33 (Repl. Vol. 1976).

194. See notes 205-79 *infra* & accompanying text.

195. See notes 3-5 *supra* & accompanying text.

196. VA. CODE § 8.01-478, -501 (Repl. Vol. 1977); see *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S.E. 596 (1897).

within ninety days to the court from which it is issued, whether it is a general district court or a circuit court.¹⁹⁷ The creditor's lien on a debtor's intangible personal property may be defeated by a assignee for valuable consideration and without notice.¹⁹⁸ By negative implication, a reasonable assumption is that when the transfer is made without such consideration or with the assignee's knowledge of the fraud, the statutory provisions dealing with fraudulent or voluntary conveyances¹⁹⁹ would be applicable and the transfer would be void as to creditors. Courts in Virginia, however, have held that the garnishment statutes do not contemplate or operate on the estate in possession of the garnishee to which he has title.²⁰⁰ In *Freitas v. Griffith & Boyd*,²⁰¹ the court determined that personal property fraudulently transferred to a wife by her husband could not be reached by a summons in garnishment on the wife based on an execution against her husband.²⁰² This decision is difficult to reconcile with Virginia cases dealing with fraudulent conveyances generally²⁰³ and with those decisions in other jurisdictions considering the effect of a fraudulent conveyance on the availability of garnishment proceedings.²⁰⁴

197. VA. CODE § 8.01-514 (Cum. Supp. 1979).

198. See notes 49-50 *supra* & accompanying text.

199. VA. CODE §§ 55-80 to 82 (Repl. Vol. 1974).

200. See note 202 *infra*.

201. 112 Va. 343, 71 S.E. 531 (1911).

202. *Id.* at 345-46, 71 S.E. at 531-32. The court in *Freitas* sought to justify its holding by labeling the garnishment process a "special procedure" and narrowly construing the statute so that it no longer provides an appropriate remedy at law. *Id.* Concurrent jurisdiction over alienations made to defraud creditors, however, long has been exercised by courts of law and equity. See, e.g., *Hoge v. Turner*, 96 Va. 624, 32 S.E. 291 (1899); 1 R. BARTON, PLEADING AND PRACTICE IN THE COURTS OF CHANCERY 587 (3d ed. 1926). Given the Virginia courts' wide latitude of authority to determine liability in garnishment proceedings, the court in *Freitas* should have treated the wife as an adverse claimant and adjudicated the validity of the transfer. *Freitas* has been cited in only two other Virginia cases, as supplementary authority for the proposition that a present fixed liability must exist before a judgment creditor can maintain an action at law. See *Lynch v. Johnson*, 196 Va. 516, 520, 84 S.E.2d 419, 422 (1954); *Combs v. Hunt*, 140 Va. 627, 631, 125 S.E. 661, 662 (1924). See also Correspondence, 17 VA. L. REG. 645 (1911) (criticizing the *Freitas* decision).

203. See, e.g., *McClintock v. Royall*, 173 Va. 408, 4 S.E.2d 369 (1939) (by implication) (holding that creditors may avoid conveyance at their instance); *Davis v. Southern Distrib. Co.*, 148 Va. 779, 139 S.E. 495 (1927) (stating that transactions between spouses will be regarded with suspicion).

204. See, e.g., *R.S. Carson Co. v. Hartman*, 144 W. Va. 790, 111 S.E.2d 346 (1959); *Southern Coop. Foundry Co. v. Warlick Furn. Co.*, 117 W. Va. 336, 185 S.E. 773 (1934). See gener-

Wages or Salary

The wages or salary of a debtor have been described as a "specialized type of property, presenting distinct problems in our economic system."²⁰⁵ Often a judgment creditor seeks to garnish an individual's wages or salary because these periodic payments represent the debtor's only available material asset. The dangers inherent in permitting a creditor to divert the individual's wages or salary from himself and his family are well documented.²⁰⁶ As a result, stringent restrictions on wage garnishment have been enacted at the state and federal levels to mitigate the harsh consequences of the garnishment process.

The Virginia statute enumerates six categories, one of which must be alleged to justify the issuance of the summons to garnish a judgment debtor's wages or salary:

1. The summons is based upon a judgment upon which a prior summons has been issued but not fully satisfied; or
2. No summons has been issued upon his suggestion against the same judgment debtor within a period of eighteen months, other than under the provisions of subdivision paragraph 1, above; or
3. The summons is based upon a judgment granted against a debtor upon a debt due or made for necessary food, rent or shelter, public utilities including telephone service, drugs, or medical care supplied the debtor by the judgment creditor or to one of his lawful dependents, and that it is not for luxuries or nonessentials; or
4. The summons is based upon a judgment for a debt due the judgment creditor to refinance a lawful loan made by an authorized lending institution; or
5. The summons is based upon a judgment on an obligation incurred as an endorser or comaker upon a lawful note; or
6. The summons is based upon a judgment for a debt or debts reaffirmed after bankruptcy.²⁰⁷

In operation, the statute prohibits a judgment creditor from is-

ally, 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 65-69, 73(a) (rev. ed. 1940); see also C. DRAKE, *supra* note 2, § 458.

205. *Snadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969).

206. See notes 99-110 *supra* & accompanying text.

207. VA. CODE § 8.01-511 (Cum. Supp. 1979).

suing multiple summons against the same judgment debtor's wages or salary within an eighteen-month period unless he falls within one of the prescribed classifications. If a previous garnishment has not been filed against the judgment debtor, there are no prerequisites other than a valid, enforceable judgment, to the garnishment of his wages or salary²⁰⁸

As a practical matter, the judgment creditor must ascertain the amount of the judgment debtor's wages or salary and the periodicity of payment. Knowledge of the precise payment dates will enable the judgment creditor to determine what issuing date of the summons will result in reaching the maximum amount of the debtor's nonexempt earnings available between that issuing date and the return date.²⁰⁹ This information, as well as the employer's correct name and address necessary for filing purposes, may be obtained from the employer in the interrogatory proceeding.²¹⁰ In addition, the creditor should determine whether the debtor is a "householder" or "head of a family" qualifying for the homestead exemption,²¹¹ because this may bear on the amount of his wages or salary actually subject to garnishment.²¹² When the judgment creditor seeks to garnish the wages or salary of a state employee, the summons must be served either on the officer or supervisor who is head of the department, agency, or institution at which the debtor is employed, or on any other officer through whom his salary is paid;²¹³ the summons cannot be served on the State Treasurer or State Comptroller, except as to employees of their respective departments.²¹⁴ A similar method of service would be followed when the debtor is an officer or employee of a city, town, or county²¹⁵

208. *Id.* § 8.01-511(2).

209. Such knowledge is particularly important when an employee is paid on other than a weekly basis. For example, when an employee receives his wages at two-week intervals, the creditor will want the summons served on the garnishee no earlier than six days before pay day to enable the creditor to reach the nonexempt portion of the following seven pay dates within the 90 day period. Otherwise, he only could reach the available earnings on six pay dates. *See* notes 196-97 *supra* & accompanying text.

210. *See* VA. CODE § 8.01-515 (Cum. Supp. 1979).

211. *See* notes 176-80 *supra* & accompanying text.

212. This determination would be relevant only if the employee claimed his wages or salary due as part of the \$5000 allowable exemption. *See* note 177 *supra* & accompanying text.

213. VA. CODE § 8.01-522 (Repl. Vol. 1977).

214. *Id.*

215. *See id.* §§ 8.01-524, -525.

Insurance Proceeds

As a general rule, the prospective proceeds of a life insurance policy, even when the policy is fully paid, are not subject to garnishment.²¹⁶ Payment of such proceeds is contingent on the death of the insured and the insurance company therefore has no present obligation to disburse the funds.²¹⁷

Although the proceeds themselves cannot be garnished prior to the death of the insured, authority in some jurisdictions suggests that the cash surrender value, loan value, or accumulated dividends of a life insurance policy may be reached during the insured's lifetime.²¹⁸ In Virginia, however, that a judgment creditor cannot compel his debtor, through a garnishment proceeding, to make the necessary election to receive these optional funds is reasonably certain.²¹⁹ The right to exercise such stipulations in the insurance contract is generally considered to be personal to the insured, or, more accurately, it cannot be exercised by persons other

216. See Annot., 37 A.L.R.2d 268 (1954).

217. See *White v. Pacific Mut. Life Ins. Co.*, 150 Va. 849, 864, 143 S.E. 340, 344 (1928); *Boisseau v. Bass' Adm'r*, 100 Va. 207, 213-15, 40 S.E. 647, 650 (1902).

218. In New York, for example, statutory provisions allow for garnishment of the cash surrender value or loan value of an insurance policy, even if the conditions precedent to the insured's exercise of such option are unfulfilled. See, e.g., *Rubenstein v. Rubenstein*, 105 N.Y.S.2d 24 (Sup. Ct. 1951); *Silverman v. Levy*, 75 N.Y.S.2d 797 (Sup. Ct. 1947), *aff'd curiam*, 273 A.D. 952, 78 N.Y.S.2d 228, *aff'd mem.*, 298 N.Y. 778, 83 N.E.2d 469 (1948).

219. See *White v. Pacific Mut. Life Ins. Co.*, 150 Va. 849, 864, 143 S.E. 340, 344 (1928); *Boisseau v. Bass' Adm'r*, 100 Va. 207, 214-15, 40 S.E. 647, 650 (1902); *Worthington, Exemption of the Debtor's Life Insurance in Virginia*, 42 VA. L. REV. 239, 247 (1956). See Note, *The Failure of the Virginia Exemption Plan*, *infra* this issue. The cash surrender value, loan value or accumulated dividends seemingly can be reached by a creditor in satisfaction of his judgment. The proper procedure by which this may be accomplished is through a creditor's bill in equity. *Worthington, supra*, at 250. See E. MEADE, *LIFE'S EQUITY PLEADING AND PRACTICE* §§ 417-20 (3d ed. 1952). The Virginia Code specifically provides that, unless the insured is a householder, a creditor of the insured may claim in full the cash surrender value or loan value of any policy under which the insured has the power to change beneficiaries. If the insured debtor is a householder, then the cash surrender values of policies up to \$10,000 are exempt. VA. CODE § 38.1-449 (Repl. Vol. 1976).

Furthermore, two decisions in the Fourth Circuit, both involving the satisfaction of tax liens in favor of the federal government, have held that the government has a right to such funds. This right cannot be defeated by the failure of the insured to elect the option. *United States v. Metropolitan Life Ins. Co.*, 256 F.2d 17 (4th Cir. 1958); *United States v. Ball*, 207 F. Supp. 835 (W.D. Va. 1962), *rev'd on other grounds*, 326 F.2d 898 (4th Cir. 1964); see VA. CODE §§ 55-142.1, 58-1014 (Repl. Vol. 1974 & Cum. Supp. 1979).

than those designated in the policy²²⁰ Allowing the creditor to demand the exercise of such options in effect would permit him to change insured's contract or to make a new and different one in order to subject it to the payment of his debt;²²¹ ordinarily, the creditor only can subject to his benefit an existing contract in favor of the debtor. When an insured already has exercised the option on the insurance contract and complied with all the valid conditions entitling him to receive payment, such funds are subject to the claims of the insured's creditors through garnishment. If the insured has designated a beneficiary of the insurance proceeds, absent an intent to defraud creditors, the named beneficiary is entitled upon the death of the insured to receive the proceeds free of the claims of the insured's creditors.²²²

Insurance contracts designed to cover risks other than death, such as liability or fire insurance, generally build no cash value and are payable only upon the happening of the named contingency. The obligation of the insurance company to distribute the proceeds may become fixed and definite at that point and the company could be summoned as garnishee prior to payment to the insured.²²³ If liability insurance is involved, the obligation of the insurance company becomes fixed when it is reduced to a sum certain by recovery of a judgment against the insured.²²⁴ The terms of the individual policy will control when liability actually attaches to the company and what defenses, if any, are available in an action to enforce compliance with its terms.²²⁵ Any defenses available to the company to negate its liability to the presumably insured could be asserted against his judgment creditor in a garnishment proceeding.

220. *Scruggs v. Jefferson Standard Life Ins. Co.*, 125 W. Va. 89, 94, 23 S.E.2d 74, 76 (1942); *Farmers' & M. Bank v. National Life Ins. Co.*, 161 Ga. 793, 797, 131 S.E. 902, 903 (1926). See generally Annot., 37 A.L.R.2d 268 (1954).

221. *Boisseau v. Bass' Adm'r*, 100 Va. 207, 214, 40 S.E. 647, 650 (1902).

222. VA. CODE § 38.1-448 (Repl. Vol. 1976).

223. The Virginia Code provides that payment to an insured in accordance with the terms of the policy will discharge all liability, unless the company receives written notice from a creditor prior to payment. *Id.* § 38.1-450.

224. See *Union Indem. Co. v. Small*, 154 Va. 458, 463, 163 S.E. 685, 687 (1930); *Indemnity Ins. Co. v. Davis' Adm'r*, 150 Va. 778, 784-85, 143 S.E. 328, 329 (1928).

225. Compare *Fentress v. Rutledge*, 140 Va. 685, 125 S.E. 668 (1924) with *Combs v. Hunt*, 140 Va. 627, 125 S.E. 661 (1924).

The Virginia Code designates specific instances when payments made by an insurance company to an insured will be exempt from the claims of the insured's creditors.²²⁶ Accident or sickness benefits paid in weekly or monthly installments to the holder of any policy covering such situations may be paid to the recipient free from garnishment or other legal process.²²⁷ Similarly, disability benefits accruing to the insured under a life insurance policy are exempt from the claims of his creditors.²²⁸ Finally, the proceeds of a group life insurance policy, which might be instituted or maintained by a private employer for the benefit of his employees, are not subject to garnishment or other legal process.²²⁹ Presumably, this exemption extends to retirement or pension proceeds or annuity payments made under such a policy, as well as to funds received by a beneficiary after the death of the insured.²³⁰

Bank Accounts

A general deposit of money in a financial institution may provide the judgment creditor with a fertile source of funds to garnish. The relationship between a bank and its depositor is that of debtor and creditor; title to the money is vested in the bank and the depositor has the right to claim an amount equivalent to the deposit.²³¹ Through the garnishment process,²³² the judgment creditor accedes

226. VA. CODE §§ 38.1-346, -448 to 451, -482, -488 (Repl. Vol. 1976). See generally Faris, *Exemption of Insurance and Other Property in the Virginias and Carolinas*, 17 WASH. & LEE L. REV. 19 (1960); Worthington, *supra* note 219.

227. VA. CODE § 38.1-346 (Repl. Vol. 1976). The legislative intent of this section is to protect the policyholder overcome by accident or sickness who is entitled to benefit payments, so as to prevent him and his family from turning to public charity for support. *Atlantic Life Ins. Co. v. Ring*, 167 Va. 121, 126, 187 S.E. 449, 451 (1936).

228. VA. CODE § 38.1-488 (Repl. Vol. 1976).

229. VA. CODE § 38.1-482 (Repl. Vol. 1976); see *Manufacturers Life Ins. Co. v. Johnson*, 385 F. Supp. 852 (E.D. Va. 1974); *John Hancock Mut. Life Ins. Co. v. Sykes*, 106 F. Supp. 116 (E.D. Va. 1952).

230. The word "proceeds," when used in insurance exemption statutes, comprehends the protection values built up and payable during the life of the insured as well as death benefits. *In re White*, 185 F. Supp. 609 (N.D. W. Va. 1960); see Comment, *Bankruptcy—Life Insurance—Trustee Not Entitled to Cash Surrender Value of Policy*, 63 W. VA. L. REV. 162 (1961).

231. *W.L. Chase & Co. v. Norfolk Nat'l Bank*, 151 Va. 1040, 1050, 145 S.E. 725, 728 (1928); *Miller v. Norton*, 114 Va. 609, 612-13, 77 S.E. 452, 453 (1913); see VA. CODE §§ 8.4-201(1), -213(3) (Added Vol. 1965).

232. As a practical matter, the garnishment summons must be served on the branch or

to all the rights that the judgment debtor has in the bank account. If the debtor's authority to withdraw from the account is qualified the creditor's ability to reach the funds likewise will be limited.

The portion of an employee's wages or salary exempted by the restrictions on wage garnishment loses its exempt status when deposited in a financial institution.²³³ Thus, a debtor cannot protect his earnings from unlimited garnishment once title has passed to the bank and the money is commingled with its general assets. The Virginia Supreme Court, however, has held that the head of a family may claim funds in a bank account as part of his homestead exemption and deprive the judgment creditor of these funds to the extent of the statutory limitations.²³⁴

If the judgment debtor holds title to a bank account jointly with one or more persons, the modern trend is to allow the judgment creditor to garnish the account only to the extent²³⁵ of the debtor's actual ownership of the funds in that account. The Virginia statute relating to multiple-party accounts has been amended recently to reflect this trend; effective July 1, 1980, the statute provides, "A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a contrary intent."²³⁶ The statute assumes that a person who deposits funds in a joint account usually does not intend to make an irrevocable gift of all or any part of the funds deposited; rather, he intends no

the main office supposedly holding the funds for the debtor because the other branches are not concerned with accounts maintained at other locations. *See* Annot., 12 A.L.R.3d 1088 (1967).

233. *See* note 119 *supra* & accompanying text. *Contra*, *Williams v. United States Fidelity & Guar. Co.*, 107 F.2d 210 (D.C. Cir. 1939); *Rutter v. Shumway*, 16 Colo. 95, 26 P. 321 (1891); *Sherwin-Williams Co. v. Morris*, 25 Tenn. App. 272, 156 S.W.2d 350 (1941).

234. *Wilson v. Virginia Nat'l Bank*, 214 Va. 14, 196 S.E.2d 920 (1973) (*per curiam*).

235. Annot., 11 A.L.R.3d 1465, 1473 (1967).

236. VA. CODE § 6.1-125.3 (Repl. Vol. 1979). The language of this section, and that of the other sections comprising the new legislation, is drawn verbatim from Article VI of the Uniform Probate Code. *See* UNIFORM PROBATE CODE § 6-103(a). The principal purpose of Article VI, which deals with nonprobate transfers generally, is to establish uniformity of state law with respect to joint and survivorship accounts, Totten trust accounts and accounts providing straight death benefits through "pay on death" provisions. *See id.* § 6-101, Comment. *See generally* Johnson, *Joint, Totten Trust and P.O.D. Bank Accounts: Virginia Law Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41 (1973) (advocating the adoption of the uniform legislation).

change in beneficial ownership.²³⁷ The rights of the parties and the extent of the vulnerability of the account therefore must be determined by examining extrinsic evidence as to the respective contributions of each depositor.²³⁸ To the extent that such contributions cannot be proved, a court in all probability would divide the account equally among the parties.²³⁹

If the judgment debtor dies before the creditor has obtained satisfaction of his judgment, the creditor is nevertheless protected. If the probate assets are insufficient to pay the creditor's claim, the creditor may make a written demand on the personal representative to proceed against a surviving party to the joint account to recover amounts necessary to discharge the claim. The amount recovered by the personal representative may not exceed the amount the deceased debtor owned immediately before death.²⁴⁰

Partnership Assets

The laws governing the rights and obligations of partners within a general partnership and the preferences among creditors of the partnership and of the individual partners have been codified in the Uniform Partnership Act (UPA), which was adopted by Virginia in 1918.²⁴¹ With the adoption of the UPA, a new form of co-ownership was created, that of the tenancy in partnership.²⁴² An individual partner owns no ascertainable portion of the specific partnership assets until all the debts of the partnership, including those due the other partners, are paid;²⁴³ his interest in the assets

237. UNIFORM PROBATE CODE § 6-103(a) & Comment. The presumption when the joint owners are not married to each other that the account is for convenience only has its origins in the common law. *See Quesenberry v. Funk*, 203 Va. 619, 622, 125 S.E.2d 869, 872 (1962); *King v. Merryman*, 196 Va. 844, 856, 86 S.E.2d 141, 147 (1962); VA. CODE § 6.1-125.16 (Repl. Vol. 1979). *See generally* *Wilkinson v. Witherspoon*, 206 Va. 297, 142 S.E.2d 478 (1965).

238. *See* *Hayden v. Gardner*, 238 Ark. 351, 381 S.W.2d 752 (1964).

239. UNIFORM PROBATE CODE § 6-103(a) & Comment; *see* Annot., 43 A.L.R.3d 971(1972), 11 A.L.R.3d 1465, 1477 (1967).

240. VA. CODE § 6.1-125.8 (Repl. Vol. 1979); *see* 2 R. WELLMAN, UNIFORM PROBATE CODE PRACTICE MANUAL 564-74 (2d ed. 1977); notes 260-66 *infra* & accompanying text.

241. VA. CODE §§ 50-1 to 43 (Repl. Vol. 1974 & Cum. Supp. 1979).

242. *Id.* § 50-25(1) (Repl. Vol. 1974). *See generally* 1 R. ROWLEY, ROWLEY ON PARTNERSHIP §§ 25.0 to 25.2 (2d ed. 1960).

243. *Savings & Loan Corp. v. Bear*, 155 Va. 312, 331, 154 S.E. 587, 593-94 (1930); *Mad-dock's Adm'r v. Skinker*, 93 Va. 479, 484-85, 25 S.E. 535, 537 (1896); *Christian v. Ellis*, 42 Va. (1 Gratt.) 396, 402 (1845).

is merely his share of the profits and surplus after payment of all such debts.²⁴⁴ Accordingly, the judgment creditor of an individual partner cannot subject a specific portion of any partnership asset to execution²⁴⁵ or garnish a debt owing from a third person to the partnership²⁴⁶ to satisfy a judgment against that partner.

The legal effect of a general partnership is to segregate certain assets contributed by the individual partners into a common fund out of which the partnership debts are paid.²⁴⁷ When a judgment is secured against the partnership, however, the lien created fixes on all partnership assets and on the individual assets of each partner.²⁴⁸ Therefore, if the partnership assets are insufficient to meet its liabilities, the partnership creditors may look to the separate property of any one of the partners for payment.²⁴⁹ The creditor's lien on the separate estate of a partner will have priority over the liens of judgments subsequently rendered on individual obligations of the partner.²⁵⁰ An individual partner thus may find debts or property owing to him from a third person being garnished at the

244. VA. CODE § 50-26 (Repl. Vol. 1974).

245. *Id.* § 50-25(2)(c). The Code provides that a judgment creditor of an individual partner may petition a competent court for a charging order directed against the debtor partner's interest in the partnership; thereafter, the court may appoint a receiver to collect the partner's share of the profits or other monies due to him. This procedure provides an exclusive remedy. *Id.* § 50-28(1); see 1 R. ROWLEY, *supra* note 242, § 28.1.

246. See *Lacy v. Greenlee*, 75 W. Va. 517, 84 S.E. 921 (1915); *Grogan v. Egbert*, 44 W. Va. 75, 79, 28 S.E. 714, 715 (1897).

247. *Pettyjohn's Ex'rs v. Woodruff's Ex'r*, 86 Va. 478, 479, 10 S.E. 715, 715 (1890); see VA. CODE § 50-8(1) (Repl. Vol. 1974); J. CRANE, *HANDBOOK ON THE LAW OF PARTNERSHIP AND OTHER UNINCORPORATED ASSOCIATIONS* § 37 (2d ed. 1952); 1 R. ROWLEY, *supra* note 242, § 6.1.

248. *Savings & Loan Corp. v. Bear*, 155 Va. 312, 329-30, 154 S.E. 587, 593 (1930). When a judgment is rendered against the partnership, the partners are in the position of joint obligors and a judgment creditor may proceed against them jointly or severally to satisfy his judgment. See *Ashby's Adm'r v. Porter*, 67 Va. (26 Gratt.) 455, 465 (1875); VA. CODE § 50-15 (Repl. Vol. 1974). Yet each partner retains the right to demand exhaustion of the partnership assets before he is subjected to personal liability. *Id.* § 50-38.

249. See VA. CODE §§ 50-18(a), -40(d) (Repl. Vol. 1974); note 248 *supra*.

250. *Savings & Loan Corp. v. Bear*, 155 Va. 312, 330, 154 S.E. 587, 593 (1930); *Straus v. Kerngood*, 62 Va. (21 Gratt.) 584, 588 (1871). The general rule, codified in the U.P.A. and adopted in Virginia, VA. CODE § 50-40(h) (Repl. Vol. 1974), is that partnership creditors are entitled to a preference over the creditors of individual partners in the administration of partnership assets, who in turn are entitled to preference in the administration of the separate estate. In Virginia, however, this general rule will not be construed so as to disturb a partnership creditor's lien on a partner's separate estate. *Savings & Loan Corp. v. Bear*, 155 Va. at 330, 154 S.E. at 593.

instance of partnership creditors to satisfy their judgments rendered against the partnership.

Equitable Interests

The beneficiary in a trust arrangement is the equitable owner of the property held in trust for his benefit and has the right to compel performance of the trust in accordance with the terms of the trust instrument.²⁵¹ In Virginia, the equitable interests of a beneficiary may be subjected to legal process, including garnishment, to satisfy debts incurred by him.²⁵² As a precondition to invoking the garnishment remedy, however, the beneficiary must possess an absolute right to receive the funds allotted to him by the trust instrument, for the judgment creditor can reach no more than the beneficiary himself is entitled to.²⁵³ If the beneficiary's interests are indefinite or rest upon some contingency, as when a trustee is vested with discretionary powers to administer the trust funds, they are not subject to garnishment, though the proper remedy may be found in a court of equity.²⁵⁴ Likewise, when the beneficiary is granted an income interest from the property held in trust, his judgment creditor may not reach the corpus of the trust estate through the garnishment process.²⁵⁵

By statute, spendthrift trusts are recognized in Virginia as a

251. 2 A SCOTT, *THE LAW OF TRUSTS* § 130 (3d ed. 1967). Although equitable title is held by the beneficiary, legal title is vested in a trustee who is charged with the duty of administering the trust in good faith and in accordance with its express terms. Because the trustee holds the funds in a fiduciary capacity, he is limited severely in what actions he may take with respect to the trust property; as such, a judgment creditor of the trustee would be unable to garnish the funds in his hands to satisfy his judgment. See 2 G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 146 (rev. 2d ed. 1979).

When a person deposits money in a savings account in his own name in trust for another, termed a tentative or Totten trust, and retains full control over the trust, including the power of revocation, the creditors of the trustee have the right to reach the funds on deposit. *Prestige Vacations, Inc. v. Kozak*, 471 F. Supp. 410 (N.D. Ohio 1979); 4 A. SCOTT, *supra*, § 330.12.

252. See VA. CODE § 55-19 (Repl. Vol. 1974).

253. See A. SCOTT, *supra* note 251, §§ 153-57, 160-61.

254. Courts of equity have inherent jurisdiction over the control and administration of trusts. Therefore, when a trust is uncertain or indefinite in some respect and no adequate remedy as such exists at law, the funds may be reached in a court of equity. See *Coutts v. Walker*, 29 Va. (2 Leigh) 268, 275-76 (1830); 2 A. SCOTT, *supra* note 251, § 162.

255. 2 A. SCOTT, *supra* note 251, § 147.2.

valid means of providing for the maintenance and support of a beneficiary.²⁵⁶ The Virginia Code provides that an estate, not exceeding \$200,000, may be created that is neither subject to alienation by the beneficiary nor liable for his debts lawfully incurred.²⁵⁷ The garnishment process thus is ineffective to reach funds held in such an arrangement.²⁵⁸ This is true even when the amount is far in excess of what is reasonably necessary or proper for the beneficiary's maintenance or support.²⁵⁹

Decedent's Estates

The Virginia Code authorizes garnishment of the personal representative of a decedent when the judgment debtor stands in the position of beneficiary or creditor of the decedent's estate.²⁶⁰ The garnishment process cannot be effective to reach such funds, however, until the fiduciary has determined finally what portion of the estate is owed to the judgment debtor;²⁶¹ before this determination, the personal representative of a decedent is deemed to be an officer of the court holding the funds *in custodia legis*.²⁶² The courts are directed by statute to suspend the garnishment proceedings until the amounts owed can be ascertained definitely.²⁶³

If the judgment debtor has died, his estate remains liable on his just obligations incurred during his lifetime.²⁶⁴ The creditor's exclusive remedy under these circumstances is to file a bill in the

256. *Alderman v. Virginia Trust Co.*, 181 Va. 497, 512, 25 S.E.2d 333, 340 (1943); see *Dunlop v. Dunlop's Ex'r*, 144 Va. 297, 309, 132 S.E. 351, 354 (1926).

257. VA. CODE § 55-19 (Repl. Vol. 1974). Compare RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1959).

258. See *UMW v. Boyle*, 418 F. Supp. 406 (D.D.C. 1976), *aff'd per curiam*, 567 F.2d 112 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 956 (1978) (holding that a valid and enforceable spendthrift trust is not subject to garnishment or other legal process). On public policy grounds, however, certain narrowly delineated classes of creditors have been excepted from application of the spendthrift doctrine and permitted to reach the beneficiary's interest in the trust. 2 A. SCOTT, *supra* 251, § 157; RESTATEMENT (SECOND) OF TRUSTS § 157 (1959); Annot., 174 A.L.R. 310 (1948).

259. *Rountree v. Lasse*, 155 F.2d 471, 474-75 (4th Cir. 1946).

260. VA. CODE § 8.01-511 (Cum. Supp. 1979).

261. *Id.* § 8.01-518 (Repl. Vol. 1977).

262. See Annot., 60 A.L.R.3d 1301, 1310-11 (1974).

263. VA. CODE § 8.01-518 (Repl. Vol. 1977).

264. See *Brown v. Hargraves*, 198 Va. 748, 750, 96 S.E.2d 788, 790 (1957); *Trevillian's Ex'rs v. Guerrant's Ex'rs*, 72 Va. (31 Gratt.) 525, 529 (1879).

nature of a creditor's bill for settlement of the estate and ascertainment and security of his interest.²⁶⁵ Administration of a decedent's estate is a function reserved for the probate courts; as such, garnishment proceedings would constitute an impermissible interference with its jurisdiction and processes.²⁶⁶

ERISA Benefits

As a general rule, the Employee Retirement Income Security Act of 1974 (ERISA)²⁶⁷ prohibits the assignment or alienation of employee pension benefits received under qualified pension plans. ERISA's anti-assignment or alienation provisions²⁶⁸ have been construed by the Treasury Department to preclude garnishment or attachment of such benefits by creditors.²⁶⁹ There is authority, however, for the existence of an implied exception to these provisions for the limited purpose of satisfying spousal and child support obligations issued by a competent state court.²⁷⁰ The rationale for this exception is that the anti-assignment or alienation provisions are intended only to protect an employee from the claims of business creditors,²⁷¹ ensuring his ability to meet his family obligations

265. See 2 T. HARRISON, *WILLS AND ADMINISTRATION* §§ 538-42 (2d ed. 1961). See generally 2 J. LOMAX, *A TREATISE ON THE LAW OF EXECUTORS AND ADMINISTRATORS* 642-49 (2d ed. Richmond 1857).

266. See *Bickle v. Christman's Adm'x*, 76 Va. 678, 692 (1882); Annot., 60 A.L.R.3d 1301, 1308-10 (1974). Another reason for disallowing garnishment of the judgment debtor's personal representative is he "stands in the shoes" of his decedent, rather than being a third person holding property of the debtor as is contemplated by the garnishment statute. Annot., *supra*, at 1304.

267. 29 U.S.C. §§ 1001-1381 (1975); I.R.C. §§ 401-04.

268. 29 U.S.C. § 1056(d)(1); I.R.C. § 401(a)(13).

269. Treas. Reg. § 1.401(a)-13(c)(1)(ii) (1976). Compare *Cody v. Riecker*, 454 F Supp. 22 (E.D.N.Y. 1978), *aff'd*, 594 F.2d 314 (2d Cir. 1979) (accord) with *National Bank of N. America v. International Bd. of Elec. Workers Local 3*, 93 Misc. 2d 590, 400 N.Y.S.2d 482 (Sup. Ct. 1977) (contra).

270. *Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979); *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Seneco of Florida, Inc. v. Clark*, 473 F Supp. 902 (M.D. Fla. 1979); *Cartlege v. Miller*, 457 F Supp. 1146 (S.D.N.Y. 1978); *Stone v. Stone*, 450 F Supp. 919 (N.D. Cal. 1978). *Contra*, *General Motors Corp. v. Townsend*, 468 F Supp. 466 (E.D. Mich. 1976).

271. *Seneco of Florida v. Clark*, 473 F Supp. at 907; *Stone v. Stone*, 450 F Supp. at 926. The support claims of an ex-spouse are distinguishable from claims of business creditors in that "Congress intended that ERISA protect employees and their families who will depend upon the benefits for security, but intended no such protection for business creditors." *Seneco v. Clark*, 473 F Supp. at 907 (emphasis supplied).

after retirement. To interpret the provisions to allow an employee to insulate himself from valid support claims would frustrate, rather than further, the policies underlying these provisions.²⁷²

Other Property or Interests

Courts uniformly have held that funds in the custody of a court pending determination of entitlement are not subject to garnishment.²⁷³ Once the proceedings have been concluded and a final determination of the party entitled to the money and the extent of that entitlement has been made, the court officer generally is regarded as the agent of such party and the funds in his custody therefore are subject to garnishment.²⁷⁴ Although an attorney is considered an officer of the court in many instances, the general rule with respect to a client's funds in his possession is that he holds such funds as an agent of the client and that the funds are not immune from garnishment.²⁷⁵

Because of the unique rules governing commercial paper, the holder in due course of a negotiable instrument is generally exempt from the claims of all other persons to the instrument.²⁷⁶ Accordingly, the maker of a negotiable note cannot be garnished by the judgment creditor of the payee before the maturity of the note.²⁷⁷

Shares of corporate stock cannot be reached by garnishment proceedings. Under the Uniform Commercial Code, the instrument

272. *Cartledge v. Miller*, 457 F. Supp. at 1156; *Stone v. Stone*, 450 F. Supp. at 926. A congressional policy of noninterference with state enforcement of family support obligations may be inferred from judicial interpretation of exemption provisions in other federal statutes. See *Wissner v. Wissner*, 378 U.S. 655 (1950) (National Service Life Insurance Act); *Wetmore v. Markoe*, 196 U.S. 68 (1904) (Bankruptcy Act of 1898).

273. See, e.g., *Saunders v. Adcock*, 249 Ark. 856, 462 S.W.2d 219 (1971); *Leatherman v. Gimougnas*, 192 So. 2d 301 (Fla. Dist. Ct. App. 1966); Annot., 1 A.L.R.3d 936, 939-41 (1965). But see VA. CODE § 8.01-558 (Repl. Vol. 1977) (providing that when an officer of the court has money or effects of the defendant held under an executed attachment or other legal process, a delivery to such officer of an attachment will be deemed a levy on such money or effects and constitute a lien from the time of delivery).

274. See, e.g., *Hooten v. Conklin*, 236 Ark. 911, 370 S.W.2d 607 (1963); Annot., *supra* note 266, at 939. *Contra*, *Dale v. Brumbly*, 98 Md. 468, 56 A. 807 (1904).

275. E.g., *K-M Auto Supply, Inc. v. Reno*, 236 A.2d 706, 706 (Del. Sup. 1967); Annot., 35 A.L.R.3d 1094, 1097 (1971).

276. See VA. CODE §§ 8.3-302, -305 (Added Vol. 1965).

277. See 2 R. BARTON, *THE PRACTICE IN THE COURTS OF LAW IN CIVIL CASES* § 191 (2d ed. 1892).

evidencing the corporation's liability to the shareholder is vital and must actually be seized by an officer of the court before any execution process is valid against it.²⁷⁸ Therefore, mere service of a garnishment summons on a third person holding the judgment debtor's stock certificates would be ineffective to secure them for the creditor's satisfaction.²⁷⁹

MOTION TO QUASH AND REMEDY FOR EXCESSIVE GARNISHMENT

A motion to quash the execution is the proper means by which a judgment debtor may challenge the regularity and validity of the creditor's underlying judgment and the writ of *fiery facias* issuing from that judgment.²⁸⁰ It is a direct proceeding attacking the judgment and may be made at any time, even after the return day of the garnishment summons.²⁸¹ The Virginia Code authorizes the court, upon application by the judgment debtor and receipt of such bond as the court may prescribe, to issue an order staying the garnishment proceedings until the motion is heard and determined.²⁸² If the court vacates or annuls the judgment, it is deemed void *ab initio*²⁸³ and no further executions may be commenced under it.

In addition, the Virginia courts have held that under certain limited circumstances the process of garnishment against a judgment debtor may be set aside by equitable procedures.²⁸⁴ In *Powell v. Beneficial Finance Co.*,²⁸⁵ the court held that when knowledge of

278. VA. CODE § 8.8-317 (Added Vol. 1965).

279. See *Frost v. Davis*, 288 F.2d 497, 498 (5th Cir. 1961).

280. See *Broyhill v. Dawson*, 168 Va. 321, 324, 191 S.E. 779, 781 (1937); *Sutton v. Marye*, 81 Va. 329 (1886); *Snively v. Harkrader*, 71 Va. (30 Gratt.) 487, 492 (1878); M. BURKS, *supra* note 65, § 377.

281. See *Johnston v. Pearson*, 121 Va. 453, 457-58, 93 S.E. 640, 641-42 (1917); *Lowenbach's Adm'r v. Kelley*, 111 Va. 439, 441-43, 69 S.E. 352, 353-54 (1910).

282. VA. CODE § 8.01-477 (Repl. Vol. 1977). The statute makes clear that notice must be given to the adverse party when making a motion to quash. See *Snively v. Harkrader*, 71 Va. (30 Gratt.) 487, 492-93 (1878); *Dillard v. Thornton*, 70 Va. (29 Gratt.) 392, 398 (1877).

283. *Riely v. Solenberger*, 18 VA. L. REC. 352, 354 (Cir. Ct. Va. June, 1912).

284. A modern rule has evolved that strictly limits the availability of equitable relief from a judgment otherwise valid on its face. Because of the tremendous increase in the frequency of litigation, public policy requires that a high degree of finality be given to judgments rendered, thereby promoting efficiency in the judicial system. A broad rule permitting otherwise would diminish the effect of *res judicata*. See RESTATEMENT OF JUDGMENTS § 126, Comment a (1942).

285. 213 Va. 647, 194 S.E.2d 742 (1973). In *Powell*, one of the defendant's daughters exe-

the proceedings resulting in a default judgment was withheld from the defendant and the judgment was based on a forged instrument, a court of equity was open to the injured party

When a judgment creditor makes illegitimate use of the garnishment process to tie up more of the debtor's money or property than is reasonably necessary to satisfy his claim, he cannot be shielded from liability for such abuse by demonstrating the validity of his claim.²⁸⁶ An action for excessive garnishment essentially comprises the tort of abuse of process.²⁸⁷ The abuse of process action presupposes an originally valid and regular process, duly and properly issued, and relies primarily on abuses after it has been sued out.²⁸⁸ In order to recover in such an action, the judgment debtor must demonstrate not only that the garnishment was excessive, but also that there was a willful and intentional abuse or misuse of the process to accomplish some wrongful objective beyond that of satisfying the judgment.²⁸⁹

The damages available in an action for excessive garnishment are to be assessed in accordance with the general rules of damages. Hence, they must result naturally and proximately from the judgment creditor's conduct and not be too speculative or remote.²⁹⁰

cuted a promissory note by forging her father's signature, and another daughter later received substituted service of the garnishment summons on her father. The father had no knowledge of the circumstances until the sums were deducted from his wages. *Id.* at 647-48, 194 S.E.2d at 743-44.

286. Annot., 56 A.L.R.3d 493, 504-05 (1974) *See generally* Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U.L.Q. 1 (1972); Hurt, *Debt Collection Torts*, 67 W. VA. L. REV. 201 (1965).

287. *See* American Credit Bureau, Inc. v. Bel-Aire Interiors, Inc., 105 Ariz. 590, —, 469 P.2d 75, 76-77 (1970); Nevada Credit Rating Bureau, Inc. v. Williams, 88 Nev. 601, 503 P.2d 9, 12 (1972). The two fundamental elements of the tort of abuse of process are an ulterior motive and a willful act in the use of the process not proper in the regular course of the proceedings. *Mullins v. Sanders*, 189 Va. 624, 633, 54 S.E.2d 116, 121; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 121 (4th ed. 1971).

Abuse of process differs from the tort of malicious prosecution because in the former action, the plaintiff need not allege and prove that the suit was instituted maliciously and without probable cause. *Mullins v. Sanders*, 189 Va. at 633, 54 S.E.2d at 121; *see* W. PROSSER, *supra*, §§ 119, 121. Although the elements of a malicious prosecution are probably lacking in an excessive garnishment action, this action may lie when a judgment creditor has caused a garnishment summons to issue on a judgment that has been satisfied. *See Ailstock v. Moore Lime Co.*, 104 Va. 565, 52 S.E. 213 (1905).

288. *See Mullins v. Sanders*, 189 Va. 624, 633-34, 54 S.E.2d 116, 121-22 (1949).

289. *See Glidewell v. Murry-Lacy & Co.*, 124 Va. 563, 570-71, 98 S.E. 665, 668 (1919).

290. *See* 30 AM. JUR. 2d *Executions* §§ 763-769 (1967). *See generally* 5 A. CORBIN, CON-

Under the proper circumstances, the judgment debtor may recover damages for the diminished market value of the property seized²⁹¹ or compensation for deprivation of the value of the use of such property.²⁹² When it is apparent that the judgment creditor's motive was to oppress or harass the debtor, punitive or exemplary damages also should be recoverable.²⁹³ If the debtor is unable to prove actual damages, nominal damages may be recoverable for the wrongful invasion of his property rights.²⁹⁴

GARNISHMENT OF THE UNITED STATES FOR COLLECTION OF SUPPORT OBLIGATIONS

The incidence of marital breakdown in the United States has grown at an unparalleled rate. One of the more pernicious results of this growth has been that an increasing number of families are forced to seek public assistance because of recalcitrant spouses who fail to carry out their legal support obligations.²⁹⁵ In response to this serious problem, Congress enacted the Social Services Amendments of 1974,²⁹⁶ creating a network of federally assisted and supervised state enforcement agencies to exact compliance with domestic support decrees.

Before the enactment of these amendments, the rule firmly established by judicial precedent was that public policy considerations precluded a creditor from garnishing a debt due to his debtor by the United States.²⁹⁷ This general rule, however, was subject to one well-recognized exception. When Congress had established an

TRACTS §§ 990-1077 (1964).

291. *See* *Rosenberg v. Stone*, 160 Va. 381, 388, 168 S.E. 436, 438 (1933). *See also* *Slaughter v. Denmead*, 88 Va. 1019, 1021, 14 S.E. 833, 834 (1892).

292. *See* *State v. United States Fidelity & Guar. Co.*, 81 W. Va. 749, 752-54, 95 S.E. 783, 785 (1918).

293. *See* *Baker v. Marcus*, 201 Va. 905, 909-10, 114 S.E.2d 617, 621 (1960); *Turk v. Martin*, 124 Va. 103, 109-13, 97 S.E. 351, 353-54 (1918).

294. *See* *News Leader Co. v. Kocen*, 173 Va. 95, 107-08, 3 S.E.2d 385, 390-91 (1939); *Building, Light & Water Co. v. Fray*, 96 Va. 559, 565-66, 32 S.E. 58, 60-61 (1899).

295. *See* note 139 *supra* & accompanying text.

296. Pub. L. No. 93-647, 88 Stat. 2337 (codified in scattered sections of 26, 42 U.S.C.).

297. *See* *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846) (holding that to allow garnishment of funds in the hands of a federal disbursing officer would defeat the purposes for which such moneys were appropriated and interfere generally with the processes of public administration). *See also* *United States v. Shaw*, 309 U.S. 495 (1940); *Applegate v. Applegate*, 39 F. Supp. 887 (E.D. Va. 1941).

independent agency with the power to engage in commercial and business transactions and endowed it with the authority to "sue or be sued," that agency was no less amenable to judicial process than would be a private enterprise under like circumstances.²⁹⁸ This waiver of governmental immunity in the case of such autonomous federal agencies was affirmed recently in two decision of the Eastern District of Virginia which held the United States Postal Service was subject to garnishment procedures to effect state court judgments.²⁹⁹

Section 659 of the amendments is particularly significant because it authorizes the garnishment of all federal employees including military personnel, whether active or retired, as a means of collecting court-ordered alimony and child support payments.³⁰⁰ The net effect of section 659 is to make the federal government amenable to process as a garnishee in state court proceedings to the same extent as a private individual. It represents a waiver of sovereign immunity in one narrow class of actions involving the

298. *FHA v. Burr*, 309 U.S. 242, 245 (1940); see *Reconstruction Fin. Corp. v. Menihan Corp.*, 312 U.S. 81 (1941); *Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939). This trilogy of Supreme Court cases established the rule that a federal agency "launched into the commercial world" is amenable to judicial process. But see *De Paul Community Health Center v. Campbell*, 445 F. Supp. 484 (E.D. Mo. 1977) (holding that the United States Veterans Administration was not subject to garnishment). See generally Annot., 38 A.L.R. Fed. 546 (1978).

299. *Bank of Va. v. Tompkins*, 434 F. Supp. 787 (E.D. Va. 1977); *United Va. Bank/Nat'l v. Eaves*, 416 F. Supp. 518 (E.D. Va. 1976); accord, *May Dep't Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Standard Oil Div., Am. Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975). *Contra*, *Kann Corp. v. Monroe*, 425 F. Supp. 169 (D.D.C. 1977); *Lawhorn v. Lawhorn*, 351 F. Supp. 1399 (S.D. W. Va. 1972). 39 U.S.C. §§ 201, 401(1) (1970), grants the Postal Service wide and distinct powers, separate from the federal government, including the power to sue or to be sued in its official name.

300. 42 U.S.C.A. § 659 (West Supp. 1979) provides in pertinent part as follows:

(a) Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

Id. See the discussion in Note, *Enforcement of Family Support Obligations in Virginia*, *infra* this issue.

enforcement of garnishment writs issued by state courts to satisfy familial support obligations.³⁰¹

A broad range of funds ordinarily payable by the federal government to its civil servants and military personnel are available for garnishment under section 659. The definitional section accompanying section 659 provides a detailed description of what monies are deemed to be payments "based on remuneration for employment."³⁰² This general classification includes all compensation paid for personal services rendered by an individual, regardless of how the payments are denominated. In addition, all periodic benefits or other payments to an individual are subject to garnishment, including pensions, retirement pay, annuities, dependent's or survivor's benefits, and similar amounts paid on account of personal services performed by the individual or any other person.³⁰³

Judicial decisions construing the phrase "remuneration for employment" have further delineated its meaning. The district court in *Watson v. Watson*³⁰⁴ confronted whether the defendant's military retirement pay was to be considered salary or a vested sum earned by his prior service. The court determined that a retired officer retains his status as an officer and earns the payments as compensation for obeying military discipline and being subject to recall to active military service, rather than receiving them as a vested pension or annuity.³⁰⁵ The distinction is an important one because it follows that the anticipated future retirement pay, like the prospective earnings of an employee, are entirely speculative and therefore, are not subject to garnishment; only when such payments remain accumulated and unpaid may they be reached. Other courts have held that disability payments³⁰⁶ and federal in-

301. *Overman v. United States*, 563 F.2d 1287, 1291 (8th Cir. 1977).

302. 42 U.S.C.A. § 662(f) (West Supp. 1979).

303. *Id.* Certain types of benefits are specifically exempt from garnishment. Any payments made as compensation for death or the contraction of "black lung" disease are exempt. Furthermore, any pensions or payments as compensation for a service-connected disability or death made by the Veterans' Administration are exempt.

304. 424 F Supp. 866 (E.D.N.C. 1976).

305. *Id.* at 868. The district court relied on two earlier cases for its interpretation, *Hooper v. Hartman*, 163 F Supp. 437 (S.D. Cal. 1978), *aff'd per curiam*, 274 F.2d 429 (9th Cir. 1959), and *Hostinsky v. United States*, 292 F.2d 508 (Ct. Cl. 1961). *See also* *Badeau v. United States*, 130 U.S. 439 (1889).

306. *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978). The court stressed that

come tax refunds³⁰⁷ are not "remuneration for employment" as contemplated by section 659.

When support obligations are involved, section 659 operates to subject the federal government to liability as a garnishee to the same extent as a private person under the laws of the state in which the garnishment proceedings are commenced.³⁰⁸ The laws of the forum state generally determine what steps are necessary to obtain issuance of a valid alimony or child support order and its enforcement through the garnishment process,³⁰⁹ but the federal statutes are deemed controlling in certain limited aspects. For example, with respect to section 659, federal rather than state law controls the definition of "alimony" and "child support."³¹⁰ The federal statute specifically excludes from the definition of "alimony" any division of property in the nature of property settlement between former spouses.³¹¹ The statute specifically includes within the ambit of "alimony" and "child support" attorney's fees, interest, and court costs to the extent that they are expressly re-

such disability benefits are more closely akin to benefits payable pursuant to the Workmen's Compensation Act, for disability by accident arising out of and in the course of employment. *Id.* at 179, 244 S.E.2d at 675.

307. *Enfinger v. Enfinger*, 452 F. Supp. 553 (M.D. Ga. 1978). The court noted that the tax refund payment did not arise out of any employment relationship between the debtor and the federal government. *Id.* at 555.

308. See note 300 *supra* & accompanying text.

309. For a thorough exposition of Virginia statutory and case law pertaining to divorce, alimony and child support, see A. PHELPS, *DIVORCE AND ALIMONY IN VIRGINIA AND WEST VIRGINIA* (2d ed. 1963).

310. *Murray v. Murray*, 558 F.2d 1340, 1341-42 (8th Cir. 1977) (per curiam).

311. 42 U.S.C.A. § 662(c) (West Supp. 1979). The term "alimony" contemplates periodic payments of funds for support and maintenance to the spouse. It does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between them. *Id.*, see *Crawley v. Crawley*, 358 So. 2d 456 (Ala. Civ. App.) (award of "alimony in gross" not alimony under the statute), *cert. denied*, 358 So. 2d 458 (Ala. 1978); *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978) (claim to community property not alimony under the statute); *Butler v. Butler*, 219 Va. 164, 165, 247 S.E.2d 353, 354 (1978) (per curiam) (dismissing appeal from trial court holding that judgment for arrearages for support and maintenance not alimony). Courts uniformly have held that the United States is immune from suit except when specifically authorized by an act of Congress, and then, only to the extent that the act clearly grants consent to specific types of suits. See, e.g., *Kelley v. Kelley*, 425 F. Supp. 181, 182 (W.D. La. 1977); *United States v. Stelter*, 567 S.W.2d at 797. Statutes waiving sovereign immunity are to be construed strictly. See *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141-43 (1972); *United States v. Sherwood*, 312 U.S. 584, 590-91 (1941).

coverable in the state divorce decree.³¹²

The proper method of service of the garnishment summons on the federal government is prescribed by the Virginia Code.³¹³ The federal statute, however, further clarifies this procedure by providing that service shall be accomplished by certified or registered mail, return receipt requested, or by personal service on the appropriate agent designated for receipt.³¹⁴ In addition, the summons must contain sufficient data to permit prompt identification of the judgment debtor and the money involved.³¹⁵

The federal and state statutory exemptions from garnishment are fully applicable when determining what portion of the funds owing from the federal government to the judgment debtor are actually available for garnishment.³¹⁶ Because such funds generally are denominated as "remuneration for employment," the percentage limitations on wage garnishment apply whether the individual receives the money as compensation for current employment or as a pension, annuity, or other benefit payment for past employment.³¹⁷ The pertinent federal statute also provides that certain additional deductions are to be made³¹⁸ beyond those provided for under the Virginia Code or the CPPA³¹⁹ in calculating the amount of the individual's disposable earnings. In addition to those amounts "required by law to be withheld," any amounts paid by the individual through salary deductions for health or life insurance premiums or as normal retirement contributions are excluded when determining his garnishable disposable earnings.³²⁰ Those who do not work for the federal government do not enjoy as extensive wage protection.

312. 42 U.S.C.A. §§ 662(b), (c) (West Supp. 1979). See *Murray v. Murray*, 558 F.2d 1340, 1341 (8th Cir. 1977) (per curiam).

313. See VA. CODE § 8.01-523 (Repl. Vol. 1977).

314. 42 U.S.C.A. § 659(b) (West Supp. 1979).

315. *Id.*

316. See notes 93-193 *supra* & accompanying text.

317. See *Samples v. Samples*, 414 F. Supp. 773 (W.D. Okla. 1976).

318. 42 U.S.C.A. § 662(g) (West Supp. 1979).

319. VA. CODE § 34-29(d)(2) (Cum. Supp. 1979) and 15 U.S.C. § 1672(b) (1970) both provide that "disposable earnings" means that part of the earnings of any individual remaining after the deduction of any amounts required by law to be withheld. See notes 121-27 *supra* & accompanying text.

320. 42 U.S.C.A. § 662(g) (West Supp. 1979).

The federal courts have limited jurisdiction and are empowered to hear only those cases authorized by a jurisdictional grant from Congress pursuant to article III of the United States Constitution.³²¹ The federal courts thus far have rejected uniformly jurisdiction over ordinary garnishment proceedings under section 659, whether the parties have sought removal of the action or the action has been commenced initially in a federal court.³²² The purpose and effect of section 659 is to waive sovereign immunity in the limited circumstance when support obligations are involved. It neither purports to, nor does it, create a statutory right to relief by way of garnishment; it merely removes the government's immunity from such proceedings to the extent authorized under state law.³²³ As

321. C. WRIGHT, *FEDERAL COURTS* §§ 7-8 (3d ed. 1976). The presumption is that a given federal court lacks jurisdiction to entertain a particular suit. This presumption must be overcome by a conclusive showing that the court in fact has jurisdiction over the subject matter. *Id.* Before a party can bring suit in a federal court, he must allege and prove that, absent a special jurisdictional grant, his cause of action falls within one of the following statutory bases for jurisdiction: 28 U.S.C.A. § 1331 (West Supp. 1979) (federal question jurisdiction); 28 U.S.C.A. § 1346 (West 1976 & Supp. 1979) (claims against the United States); 28 U.S.C.A. § 1441 (West 1973 & Supp. 1979) (actions generally removable); 28 U.S.C. § 1442 (1970) (removal of suits against federal officers or agencies). *Id.* at § 69. Each basis has been held unavailable to a person suing under § 659. See note 300 *supra* & accompanying text.

322. See *Diaz v. Diaz*, 568 F.2d 1061 (4th Cir. 1977); *Overman v. United States*, 563 F.2d 1287 (8th Cir. 1977); *Wilhelm v. United States Dep't of the Air Force, Accounting and Fin. Center*, 418 F Supp. 162 (S.D. Tex. 1976); *Popple v. United States*, 416 F Supp. 1227 (W.D.N.Y. 1976); *Golightly v. Golightly*, 410 F Supp. 861 (D. Neb. 1976); *Morrison v. Morrison*, 408 F Supp. 315 (N.D. Tex. 1976); *West v. West*, 402 F Supp. 1189 (N.D. Ga. 1975); *Bolling v. Howland*, 398 F Supp. 1313 (M.D. Tenn. 1975). *Contra*, *Williams v. Williams*, 427 F Supp. 557 (D. Md. 1976).

Some of the litigants have sought to contest the validity of the underlying divorce decree. These attempts have failed because of the well settled doctrine that domestic relations involve questions of singular significance to the administration of state affairs that cannot be resolved appropriately in a federal forum. *Diaz v. Diaz*, 568 F.2d 1061, 1062 (4th Cir. 1977); see, e.g., *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Barber v. Barber*, 62 U.S. 582, 584 (1859). One court, in refusing jurisdiction, was prompted to write the following:

[This court] will not readily infer that Congress intended to permit federal agencies to be dragged in as defendants by any federal employee or spouse of an employee who, unhappy with a prior state adjudication, seeks to contest it by suing the Government over wage garnishment rather than challenging the divorce decree in an appropriate state forum. To have federal courts adjudicating such disputes, where the only federal connection is the garnishment of government wages, would truly be a case of the tail wagging the dog.

Overman v. United States, 563 F.2d 1287, 1292-93 (8th Cir. 1977).

323. *Morrison v. Morrison*, 408 F Supp. 315, 317 (N.D. Tex. 1976).

such, section 659 does not provide an independent jurisdictional basis on which an action can be maintained in the federal courts. Section 660, however, does create original jurisdiction in the federal district courts to enforce certain support orders.³²⁴ Under this section, consent and certification from the Secretary of Health, Education and Welfare are jurisdictional prerequisites to suing in the federal courts.

CONCLUSION

The foregoing exposition is intended as a comprehensive survey of current garnishment practice in Virginia as it has been affected by existing federal legislation. To this end, little commentary as to what the law could or should be has been presented. Nevertheless, several inequitable aspects to the Virginia scheme exist, notably with regard to garnishment of an employee's wages or salary. Virginia provides the minimum acceptable standard mandated by federal statute for debtor protection in this area. In light of the often devastating effects that wage garnishment can have on a debtor and his family, further safeguards are warranted.

First, the class of allowable deductions to be made in arriving at an employee's disposable earnings should be expanded to protect certain other important basic expenses. In addition to those amounts "required by law to be withheld," the definition should include amounts deducted from the employee's paycheck for health insurance, life insurance, normal retirement benefits, and union dues. Because these expenses currently are included within the classification of disposable earnings, the debtor, during a period of financial difficulty, may be forced to cease making these vital payments in order to provide daily necessities for himself and his family.

Second, the current Virginia law allows a stated percentage of earnings to be subjected to garnishment and does not differentiate

324. 42 U.S.C. § 660 (Supp. V 1975) reads as follows:

The district courts of the United States shall have jurisdiction, without regard to any amount in controversy, to hear and determine any civil action certified by the Secretary of Health, Education, and Welfare under section 652(a)(8) of this title. A civil action under this section may be brought in any judicial district in which the claim arose, the plaintiff resides, or the defendant resides.

Id.

between a married person with children and a single person. The exemption statute should be amended to provide a differential percentage scale that accords the head of a family an exemption of an additional ten percent of his wages and makes the maximum garnishable portion fifteen percent of his total earnings. This change would not create any additional burden or expense on the employer, who is authorized by statute to rely on the information contained in the employee's federal withholding exemption certificate when determining the employee's exemption status.

Finally, the statutory requirement that a judgment creditor allege one of six specific circumstances before a wage garnishment summons will issue, though intended as supplementary protection for the debtor, in practice provides little protection, if any, to most debtors. Similarly, the special treatment of debts incurred in purchasing necessary items such as food or shelter is difficult to justify. The General Assembly apparently felt that those who extend credit for such basic needs are entitled to preference in their attempts to recover payment. This belief is paradoxical because the statute puts the low income family, which can afford only necessary items, in a worse position than the family that buys nonessential or luxury items on credit.

Virginia should formulate a comprehensive consumer credit code, incorporating the garnishment statutes within a broader framework of legislation designed to achieve a more equitable balance between the competing interests of creditors and debtors. The Uniform Consumer Credit Code³²⁵ and versions adopted in various

325. The Uniform Consumer Credit Code [hereinafter cited as U.C.C.C.] differs from the C.C.P.A. in a few major respects. First, its limitations on garnishment are applicable only if the garnishment summons is issued to enforce payments of a judgment arising out of a consumer credit sale, consumer loan, or consumer lease. *See* U.C.C.C. § 5.102. Second, it provides that forty, rather than thirty, times the federal minimum hourly wage per workweek is exempt from garnishment. *Id.* § 5.105. Third, the U.C.C.C. prohibits employee discharge resulting from garnishment without reference to the number of garnishments involved. *Id.* § 5.106. In addition, a discharged employee is granted the right to bring a civil action for recovery of lost wages and reinstatement. *Id.* § 5.202(6). *See generally* Johnson, *The Uniform Consumer Credit Code and the Credit Problems of Low Income Consumers*, 37 GEO. WASH. L. REV. 1117 (1969); Note, *Garnishment Under the Consumer Credit Protection Act*, *supra* note 101.

The Consumer Credit Study Commission was created in Virginia in 1970 to investigate the U.C.C.C. and other present laws relating to consumer credit. The 1974 report of the commission recommended against adoption of the U.C.C.C. or any of its versions primarily

states³²⁶ are available as cogent models to guide the Virginia Code Commission in this necessary task.

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because adoption would not produce the uniformity of the laws among the several states that the U.C.C.C. was intended to foster. To date, only nine states have adopted the U.C.C.C. in its entirety. The Commission recommended instead only piecemeal changes to the existing legislation. See REPORT OF THE CONSUMER CREDIT COMMISSION, VA. S. Doc. No. 20 (1974).

326. See, e.g., S.C. CODE §§ 37-4-101 to 6-610 (1977 & Cum. Supp. 1979). The South Carolina consumer code prohibits wage garnishment for debts arising from consumer credit sales, consumer leases, or consumer loans. *Id.* § 37-5-104.