Garnishment in Virginia

Charles J. Nabit

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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, the term "garnishment" is used exclusively to denote the postjudgment proceedings in aid of execution; the general term "attachment" describes garnishment.


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). Kelsor 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. Alcr, 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 *fiert facias* against any debt or property due the judgment debtor and in the possession of a third party, the garnishee. 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.

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 *fiert 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. The laws of Virginia before July 1, 1850, reflected this common law tradition. Thus intangible personal property, termed generally “chooses in action,” could not be subjected to levy and public sale under a writ of *fiert facias*, nor was the writ a lien on such personality; it therefore could not be reached to satisfy the creditor’s judgment.

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3. See note 5 infra & accompanying text.


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 “chooses in action.”

8. *The Lien of The Writ of Fieri Facias in Virginia*, 2 Va. L. Reg. 704, 705 (1897). See 1 Rev. Code of Va., ch. 134, § 1 (1819). The writ of *fiert 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 *fiere facias* would be a lien on all the debtor's intangible personal property. This new and extensive lien became effective against the intangible personality from the time the writ was delivered to the sheriff for execution; because the lien was not inchoate or conditional, 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.

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 *fiere facias*, could be made available to the creditor in satisfaction of his judgment. 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* confirmed the sup-

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12. Trevillian's Ex'rs v. Guerrant's Ex'rs, 72 Va. (31 Gratt.) 525, 529-30 (1879); Puryear v. Taylor, 53 Va. (12 Gratt.) 401, 408 (1855). In *Trevillian*, the court held that the lien of a writ of *fiere 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. Puryear 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 insolvenency 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).*

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.”

The court in endowing the writ of *fiere 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. Garnishment is the process by which a judgment creditor enforces the lien created by the writ of *fiere 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.

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

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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.
tory enactment,\textsuperscript{18} and cannot be enforced beyond the scope of the statute in order to fit the exigencies of a particular case.\textsuperscript{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.\textsuperscript{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.\textsuperscript{21}

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

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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.\textsuperscript{24}
\end{quote}

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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). \textit{But see} J. Rood, supra, §§ 8-11.
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. 831 (1853); Travis v. Tartt, 8 Ala. 574 (1846). \textit{See also} J. Rood, supra note 20, § 3.
24. Id. at 325.
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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


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


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.\footnote{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 \textit{fieri facias} and may be reached by garnishment.\footnote{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.\footnote{34} \textit{Boisseau v. Bass Administrator}\footnote{35} is the Virginia case offering the most thorough discussion of this issue. In \textit{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 \textit{fieri facias} constituted a subsisting and continuing lien on all the personal estate of the debtor, including the insurance policy\footnote{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\footnote{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.\footnote{38} Until the insured's death, the policy was liable to forfeiture for nonpayment of the premi-

\footnote{32. Fentress v. Rutledge, 140 Va. 685, 688, 125 S.E. 668, 669 (1924); Fretas 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).}

\footnote{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, 656-66 (1855).}


\footnote{35. 100 Va. 207, 40 S.E. 647 (1902).}

\footnote{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.}

\footnote{37. Id. at 210, 40 S.E. at 649.}

\footnote{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. During this period, the number of garnishment writs the judgment creditor may sue out to obtain satisfaction is unlimited; that the creditor may avail himself of the benefit of other statutory remedies will not impair his lien. 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. 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, 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. 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.

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.
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,\textsuperscript{49} even when the debtor intended to commit a fraud in making the assignment.\textsuperscript{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.\textsuperscript{51} This characterization is not totally accurate, however, when the garnishment process is viewed as a separate civil proceeding.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\begin{flushleft}49. Id., see Virgma 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 \textit{fiere 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:

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 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.
\end{quote}

\textit{Id.} See C. Drake, supra note 2, §§ 450, 456.

54. Bickle v. Chrisman's Adm'x, 76 Va. 678, 692 (1882).\end{flushleft}
sory assignment for the creditor’s benefit. The term “person” is construed broadly to include corporations, partnerships, unincorporated associations, 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.

The 1899 Virginia case of *Portsmouth Gas Co. v. Sanford* interpreted the then-recent abolition of sovereign immunity with respect to garnishment of the wages and salaries of municipal and state employees 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.”

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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.


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. McQuillan, 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. 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. The Virginia Code is liberal in its provision for adding new parties at any stage of the proceeding as justice may require.

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 *fiert facias*, some person other than the judgment debtor is liable or that some person has, in his capacity as personal representative of some decedent, 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.


In Virginia, the lien created on the debtor's intangible personal property by the writ of *fiert 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).

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'tx*, 76 Va. 678 (1882); 2 T. Harrison, *Wills and Administration* §§ 533-42 (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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{70}

Following the judgment creditor's suggestion of liability, a summons\textsuperscript{71} 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.\textsuperscript{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.\textsuperscript{73} The statute, however, provides that when service cannot be made on the judgment debtor in the customary fashion,\textsuperscript{74} the clerk may send a copy of the summons by first class mail

\textsuperscript{67. VA. CODE § 8.01-511 (Cum. Supp. 1979).}
\textsuperscript{68. Id.}
\textsuperscript{69. Id. See note 207 infra & accompanying text.}
\textsuperscript{70. A. PHLEPS, HANDBOOK OF VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW 271 (3d ed. 1974); See M. BURKS, supra note 65, § 374 (Supp. 1961).}
\textsuperscript{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.}
\textsuperscript{72. Id. § 8.01-511 (Cum. Supp. 1979). See id. § 16.1-99 (Cum. Supp. 1979) (providing for return of the writ of fieri facias within ninety days to the general district court from which it issued).}
\textsuperscript{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).}
\textsuperscript{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.  

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. 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.

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. 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. 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.

**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; a corporation must appear through its author-

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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.


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 affi-
davit. 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.

When the garnishee is before the court as the personal representa-tive 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. 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.

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 indebtedness 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. The evidence ad-
duced 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.

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.
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.\footnote{VA. CODE § 8.01-516 (Repl. Vol. 1977).} Judgment as to costs will be made against such
party as the court deems just,\footnote{Id. § 8.01-521.} but no such judgment may be
made against the garnishee unless he fails to make appearance or
fails to fully disclose his liability\footnote{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.}

When the garnishee fails to make an appearance or file a state-
ment, the court may either compel him to appear or, in his ab-
sence, hear proof of any liability on his part and make appropriate
orders as if the proof had appeared by his examination.\footnote{Id. §§ 8.01-519, -564.}

**Statutory Exemptions**

*The Federal Wage Garnishment Law: Title III*

On July 1, 1970, Title III of the Consumer Credit Protection Act
strictions 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).} went into force, bringing the subject of garnishment of

\footnote{id. §§ 8.01-1671-1676 (1970), as amended, (West (U.S.C.A.) Supp. 1979). The re-
strictions 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).}

\footnote{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, Con-
gress 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).}

\footnote{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
courts therefore are obligated to accept these findings without further judicial review. Kat-
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. 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; second, a prohibition against discharge of an employee because his earnings have been subjected to garnishment for any one indebtedness.

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. 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. 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


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.


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. Although justified on the ground that its abolition would lead to a tightening in the credit market, garnishment has been criticized severely as a collection device, both because of its potentially drastic effects on the individual debtor and those close to him, and because of the attendant social cost involved when the state is used as a collection agency. Title III represents a congressional effort to strike a balance between these conflicting considerations.

Discharge of a garnished debtor from employment is one common consequence of wage garnishment. 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 6 (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. Survey of Current Business 5-17, 5-18 (July 1970). The level of debt as of July 1979 was $295.234 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, 233-38; 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).


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. 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.

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. To an employee beset by financial difficulties, the prospect of filing for per-

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 & Jantcher, Effects of the Federal Minimum Exemption from Wage Garnishment on Nonbusiness Bankruptcy Rates, 77 COM. L.J. 360 (1972).
personal 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textit{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{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).
\item \textsuperscript{111} See notes 95-96 supra & accompanying text.
\end{itemize}
productive member of society.\textsuperscript{112}

That Congress intended a broad application of Title III is demonstrated by the definitions provided in section 1672.\textsuperscript{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."\textsuperscript{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.\textsuperscript{115}

Similarly, the term "earnings"\textsuperscript{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


\textsuperscript{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."

\textsuperscript{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 Opnum 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). \textit{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).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{119} Furthermore, a tax refund representing compensation
previously withheld does not become "earnings" when received by
the employee.\textsuperscript{120}

\textsuperscript{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 760, 753 (Mo. App.
1974). The Missouri court in \textit{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. \textit{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). \textit{In re Cedor}, 337 F. Supp. 1103, 1108 (N.D. Cal.), \textit{aff'd per
curiam}, 470 F.2d 996 (9th Cir. 1972), \textit{cert. denied}, 411 U.S. 973 (1973). See \textit{generally}
(1957). The following are illustrative of administrative opinions on what constitutes "earn-
ing": (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, \textit{id.} ¶ 22,501.159 (Sep. 23, 1970);
(3) meals and lodgings provided under an employment contract, Wage-Hour Opinion Letter
No. 1142, \textit{id.} ¶ 22,501.16 (Dec. 9, 1970); (4) sick pay, Wage-Hour Opinion Letter No. 1249,

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

Nat'l Bank, 586 F.2d 107 (9th Cir. 1978). The district court in \textit{Dunlop} interpreted Title III
as governing the relationship between employer and employee. 399 F. Supp. at 856. The
court stated that to assume that Congress intended to impose the significant burdens re-
quired to make exemption determinations on banks and other financial institutions was un-
realistic, especially because such institutions are not mentioned in the statute or the legisla-
Rptr. 56 (1975).

\textsuperscript{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.\footnote{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.\footnote{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.\footnote{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.\footnote{124} Furthermore, the phrase “required by law to be withheld”\footnote{125} does not include any amount withheld pursuant to any court order for support of any person.\footnote{126} At least one commentator\footnote{127} has suggested
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. 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.

Because the current applicable minimum wage is $3.10 per hour, 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. 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. The Secretary of Labor, pursuant to authority vested in him by Title III, transformed the weekly statutory exemption formula into a formula that provides equivalent restrictions on wage garnishment.

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

The above exemptions apply automatically; the debtor must fulfill no conditions precedent before he may receive the protection that the statute affords.\textsuperscript{132} Section 1673(b), however, as amended in 1977, provides for three specific exceptions\textsuperscript{135} to the general restrictions on wage garnishment contained in Title III.\textsuperscript{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.\textsuperscript{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,\textsuperscript{139} which pre-
assumably 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.

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

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\(^{143}\) 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., 468 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.\textsuperscript{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.

\textit{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.\textsuperscript{149} This grant of authority must be read in light of the provisions of the Fair Labor Standards Act (FLSA),\textsuperscript{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.\textsuperscript{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.\textsuperscript{152} The federal courts interpreting Title III thus far have held that it provides the right to similar remedial action.\textsuperscript{153} Although Title III expressly states that the Secretary of Labor shall enforce its provisions,\textsuperscript{154} when read in conjunction with the FLSA, the Secretary's power to initiate such action appears to be discretionary in nature.\textsuperscript{155}

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

\textsuperscript{148} Note, \textit{Federal Restrictions of Wage Garnishment}, supra note 93, at 276.
\textsuperscript{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).
\textsuperscript{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


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 203-21.


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. 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. 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.

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 unavenged. Breitwieser v. KMS Indus., Inc., 467 F.2d at 1394-95 (Wisdom, J., dissenting).

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


are subject to garnishment.\textsuperscript{163}

The basic test for exemption, however, is whether the state statute is "substantially similar" to the provisions of the federal legislation.\textsuperscript{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.\textsuperscript{165}

To date, of the dozen states\textsuperscript{166} that have made application for exemption, only the statutes of Virginia\textsuperscript{167} and Kentucky\textsuperscript{168} have been found "substantially similar" so as to qualify for exemption from Title III's general restrictions on wage garnishment.\textsuperscript{169} The Virginia General Assembly has adopted the restrictions of section 1673 verbatim et literation,\textsuperscript{170} including the 1977 amendments

\textsuperscript{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.


\textsuperscript{165} 1 LAB. L. REP., Wages Hours (CCH) ¶ 22,501.30 (1979).

\textsuperscript{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).


\textsuperscript{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).

made by the Tax Reduction Act. Because no Virginia cases that construe the definitions of "garnishment," "earnings," and "disposable earnings," are available the judicial and administrative interpretations of these terms 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. The blanket exemption created cannot be considered a mere personal privilege of the debtor because he cannot waive it. 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.

Additional Exemptions

The laws of Virginia offer further debtor protection when the debtor is a householder or head of a family. 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. This general homestead exempt-
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Garnishment 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

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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.

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).
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, 83 S.E. 516, 517 (1899).
186. Id. § 8.01-524.
187. Va. Const. art. VII, § 4 provides as follows:
compensation is exempt from garnishment. Thus, sheriffs, treasury, commonwealth attorneys, and commissioners of revenue 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.

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. 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.

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. The summons must be returned

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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.


189. Id.

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


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

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

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 an 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

198. See notes 49-50 supra & accompanying text.
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).
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." 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. 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.

In operation, the statute prohibits a judgment creditor from is-
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 salary 208.

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 county 215.

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.
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{216} See Annot., 37 A.L.R.2d 268 (1954).
\textsuperscript{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 per curiam, 273 A.D. 952, 78 N.Y.S.2d 228, aff'd mem., 298 N.Y. 778, 83 N.E.2d 469 (1948).
\textsuperscript{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, Lile'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).
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than those designated in the policy. 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; 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.

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. 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. 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. 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.


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.


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

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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 § 38.1-482 (Repl. Vol. 1976);


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).


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. 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.

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 extent 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." 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
change in beneficial ownership.\textsuperscript{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.\textsuperscript{238} To the extent that such contributions cannot be proved, a court in all probability would divide the account equally among the parties.\textsuperscript{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.\textsuperscript{240}

\textit{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 in Virginia in 1918.\textsuperscript{241} With the adoption of the UPA, a new form of co-ownership was created, that of the tenancy in partnership.\textsuperscript{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;\textsuperscript{243} his interest in the assets

\textsuperscript{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).

\textsuperscript{238} See Hayden v. Gardner, 238 Ark. 351, 361 S.W.2d 752 (1964).

\textsuperscript{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).


\textsuperscript{243} Savings & Loan Corp. v. Bear, 155 Va. 312, 331, 154 S.E. 587, 593-94 (1930); Maddock’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. Accordingly, the judgment creditor of an individual partner cannot subject a specific portion of any partnership asset to execution or garnish a debt owing from a third person to the partnership 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. 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. 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. 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. An individual partner thus may find debts or property owing to him from a third person being garnished at the

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.
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.
250. Savings & Loan Corp. v. Bear, 155 Va. 312, 330 154 S.E. 597, 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. In Virginia, the equitable interests of a beneficiary may be subjected to legal process, including garnishment, to satisfy debts incurred by him. 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. 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. 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.

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.


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.\textsuperscript{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.\textsuperscript{257} The garnishment process thus is ineffective to reach funds held in such an arrangement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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;\textsuperscript{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.\textsuperscript{262} The courts are directed by statute to suspend the garnishment proceedings until the amounts owed can be ascertained definitely.\textsuperscript{263}

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

\textsuperscript{256} Alderman v. Virginia Trust Co., 181 Va. 497, 512, 25 S.E.2d 333, 340 (1943); see Dunlop v. Dunlop’s Ex’t, 144 Va. 297, 309, 132 S.E. 351, 354 (1926).
\textsuperscript{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. denued, 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).
\textsuperscript{259} Rountree v. Lasse, 155 F.2d 471, 474-75 (4th Cir. 1946).
\textsuperscript{261} Id. § 8.01-518 (Repl. Vol. 1977).
\textsuperscript{263} VA. CODE § 8.01-518 (Repl. Vol. 1977).
\textsuperscript{264} See Brown v. Hargraves, 198 Va. 749, 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 assurance and security of his interest. 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.

ERISA Benefits

As a general rule, the Employee Retirement Income Security Act of 1974 (ERISA) prohibits the assignment or alienation of employee pension benefits received under qualified pension plans. ERISA's anti-assignment or alienation provisions have been construed by the Treasury Department to preclude garnishment or attachment of such benefits by creditors. 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. 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, ensuring his ability to meet his family obligations.


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.


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.\(^\text{272}\)

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.\(^\text{273}\) 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.\(^\text{274}\) 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.\(^\text{275}\)

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.\(^\text{276}\) Accordingly, the maker of a negotiable note cannot be garnished by the judgment creditor of the payee before the maturity of the note.\(^\text{277}\)

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

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\(^\text{273}\) See, e.g., Saunders v. Adcock, 249 Ark. 856, 462 S.W.2d 219 (1971); Leatherman v. Gimougas, 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).


\(^\text{277}\) 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. 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.

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 fieri facias issuing from that judgment. It is a direct proceeding attacking the judgment and may be made at any time, even after the return day of the garnishment summons. 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. If the court vacates or annuls the judgment, it is deemed void ab initio 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. In Powell v. Beneficial Finance Co., the court held that when knowledge of

279. See Frost v. Davis, 288 F.2d 497, 498 (5th Cir. 1961).
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. An action for excessive garnishment essentially comprises the tort of abuse of process. 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. 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.

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.


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 Allstock v. Moore Lime Co., 104 Va. 565, 52 S.E. 213 (1905).


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 seized or compensation for deprivation of the value of the use of such property. 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. If the debtor is unable to prove actual damages, nominal damages may be recoverable for the wrongful invasion of his property rights.

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. In response to this serious problem, Congress enacted the Social Services Amendments of 1974, 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. This general rule, however, was subject to one well-recognized exception. When Congress had established an

TRACTS §§ 990-1077 (1964).


295. See note 139 supra & accompanying text.


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. This waiver of governmental immunity in the case of such autonomous federal agencies was affirmed recently in two decisions of the Eastern District of Virginia which held the United States Postal Service was subject to garnishment procedures to effect state court judgments.

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. 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


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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{303}

Judicial decisions construing the phrase “remuneration for employment” have further delineated its meaning. The district court in Watson v. Watson\textsuperscript{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.\textsuperscript{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 payments\textsuperscript{306} and federal i-
come tax refunds\textsuperscript{307} 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.\textsuperscript{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,\textsuperscript{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."\textsuperscript{310} The federal statute specifically excludes from the definition of "alimony" any division of property in the nature of property settlement between former spouses.\textsuperscript{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. \textit{Id.} at 179, 244 S.E.2d at 675.


308. \textit{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, \textit{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. \textit{Id.}, see Crawley v. Crawley, 358 So. 2d 456 (Ala. Civ. App.) (award of "alimony in gross" not alimony under the statute), \textit{cert. demed}, 358 So. 2d 468 (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. \textit{See}, \textit{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. \textit{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.\textsuperscript{312}

The proper method of service of the garnishment summons on the federal government is prescribed by the Virginia Code.\textsuperscript{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.\textsuperscript{314} In addition, the summons must contain sufficient data to permit prompt identification of the judgment debtor and the money involved.\textsuperscript{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.\textsuperscript{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.\textsuperscript{317} The pertinent federal statute also provides that certain additional deductions are to be made\textsuperscript{318} beyond those provided for under the Virginia Code or the CPPA\textsuperscript{319} 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.\textsuperscript{320} Those who do not work for the federal government do not enjoy as extensive wage protection.

\textsuperscript{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).
\textsuperscript{314} 42 U.S.C.A. § 659(b) (West Supp. 1979).
\textsuperscript{315} Id.
\textsuperscript{316} See notes 93-193 supra & accompanying text.
\textsuperscript{318} 42 U.S.C.A. § 662(g) (West Supp. 1979).
\textsuperscript{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.
\textsuperscript{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. 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. 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.

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.


Some of the litigants have sought to contest the validity off 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).

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.\textsuperscript{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

\textsuperscript{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 Code 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 wage per work-week 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
states 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).