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Foreword: Wage Garnishment—An Extraordinary Remedy Run Amok

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PROJECT

FOREWORD: WAGE GARNISHMENT—AN EXTRAORDINARY REMEDY RUN AMUCK

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Statutes authorizing garnishment in Washington are not, by themselves, of extraordinary import.[1] If the state had retained its rural character and the collection of debts had remained in the hands of the original creditor or his attorney these statutes would rarely work any injustice. In such a rural environment there is usually a personal relationship between creditor and debtor that enables the creditor to know firsthand whether his debtor is about to abscond or become insolvent. However, urbanization has become the dominant fact of life for most of us and the collection of debts has become the province of the professional bill collector on a mass collection basis. As a result, statutes designed for use in the extraordinary case are systematically applied to produce efficient collection results regardless of particular justification for their use in individual cases.

In 1967 one thousand cases filed in Everett District Justice Court were sampled (500 from January to March and 500 from July to September). This sample revealed that 86 percent of these cases were filed by professional collectors. Garnishments were filed in 311 of the 1,000 cases. The first writ was filed before judgment in 227 cases and after judgment in 84 cases. Of the writs before judgment, 10 were filed by private litigants (6 of whom were small loan companies). Of the writs after judgment, 2 were by private parties. In the 227 cases

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[Ed. Note: Everett, Snohomish County, is a city of about 50,000 located to the north of Seattle, Washington. Its principal industries are aerospace, forest products, and light manufacturing.]

[1] WASH. REV. CODE § 12.32.010 (Supp. 1967):

> The Justices of the Peace in this state may issue writs of garnishment . . . where the plaintiff sues for a debt which is just, due and unpaid; . . .

WASH. REV. CODE § 12.32.020 (Supp. 1967):

> Before the issuance of the writ of garnishment, the plaintiff, or someone in his behalf, shall make application therefor by affidavit, stating the facts authorizing the issuance of the writ and that he has reason to believe and does believe that the garnishee is indebted to the defendant, . . .

For the Superior Court counterpart, see WASH. REV. CODE §§ 7.32.010-030 (1967).

involving garnishment before judgment not one went to trial. The usual notation on the docket was "Dismissed with Prejudice—settled." The writer recalls only one case of the 2,600 cases filed in the Everett Court in 1967 in which a defendant went to trial after a prejudgment garnishment.

The Washington statutes have been quite uniformly interpreted by justice courts and county clerks to allow a writ of garnishment to be filed before a complaint has been served on the principal defendant.[2] Under this interpretation many collectors bring in a stack of complaints accompanied by an equal number of writs of garnishment. The clerk stamps the writs with the judge's name and leaves priority of service to the informed discretion of a professional process server. The primary complaint may not be served on the defendant until up to 15 days after the writ of garnishment is served on his employer.[3] Collectors who regularly use prejudgment garnishment admit that they serve the garnishment first so that the defendant will come to them without their having to go to him.

After presiding on the civil claims bench of the Everett District Justice Court for a year, the writer is convinced that prejudgment writs of garnishment are usually sought not as much for the purpose of safeguarding funds as for the purpose of indirectly destroying the ability of the principal defendant to assert any defense he might have to the action. There are a number of facts which suggest this conclusion: first, some agencies are able to do well enough without using prejudgment writs at all, while those who use them to any extent seem to use them in all cases without apparent discrimination; second, a person who has a job is usually a reasonably good risk because few men will quit their job to beat a collector; finally, the type of company which makes extensive use of prejudgment writs will file garnishments on any size claim, even claims with less than twenty dollars at issue. In one day's filing in the Everett District Justice Court the writer found eight complaints from one collector accompanied by eight writs of garnishment against eight different defendants, none of whom

[2] In Snohomish County the judges of the district and superior courts have reconsidered this interpretation and concluded that the legislature intended that at a minimum the principal suit must be served on the principal defendant prior to the issuance of the writ. Therefore writs are not available in this county until after the affidavit of service is on file. This rule came after the sampling of cases from the Everett District Court. A sample of 500 cases during the last three months of 1967 which came after the adoption of the above rule shows that there were 100 garnishments, and of these, 40 occurred before and 60 after judgment had been granted.

[3] WASH. CIV. R.J. CT. 4(b) and 4(e).

were alleged to owe more than sixteen dollars. One of these writs was for the grand total of five dollars.

It is in collection of small debts that the most objectionable features of the present system prevail. In both justice court and superior court, garnishments are issued by the clerks of the court on the basis of affidavits, written in the language of the statutes, in which the only things not printed long in advance are the names of the defendant, garnishee defendant, affiant and notary. The judges, by and large, never see a writ until long after it has been issued. Once issued, the writ will usually tie up until after judgment all wages[4] owed the principal defendant at the time of service of the writ. The debtor-defendant, if he has a wife and two children, may claim an exemption of fifty dollars for each week's wages held.[5] For most wage earners weekly wages are the only asset of any real importance. Where there are neither savings, benevolent friends, nor relatives to fall back on, the loss of garnished wages, even for the three-week period between garnishment and default judgment, may well mean eviction on a three-day notice for failure to pay rent,[6] repossession of the car necessary for transportation to the job, arrest for failure to make support payments, or any number of hazards which afflict the man who is unable to meet his obligations when due. If the defendant has a defense to a claim which he wishes to assert at trial, he can expect to be parted from his wages for an additional thirty to sixty days or more. Furthermore, there is nothing to prevent the plaintiff from filing additional writs pending trial save the anticipated displeasure of a judge known not to favor such maneuvers. The coercive nature of prejudgment garnishment upon the poor is clear.

To illustrate the practicalities of the situation let us suppose that *A* is sued by *X* for a bill originally in the amount of twenty dollars. *X* is demanding thirty dollars plus interest since 1958. He further demands a twenty-five dollar attorney fee. Besides his defense of the statute of limitation, of which *A* is probably unaware, he has a defense of discharge in bankruptcy. *A* is already one payment behind on his car payment and has to commute thirty miles to work. The garnishment has tied up $150.00. *X* will settle for $55.00 but will not recognize the bankruptcy defense. Usually *A* will pay to get his money released.

[4] Garnishment of wages is the area of most serious abuse and the remarks made in the course of this foreword should be construed to apply primarily to wages.
[5] WASH. REV. CODE §§ 12.32.250, 7.32.280 (Supp. 1967).
[6] WASH. REV. CODE § 59.12.030(3) (1958).

There are other adverse social aspects of garnishment in addition to those outlined above. It is widely known that many employers discharge their employees for having garnishments filed against them.[7] For a person employed by a company which considers garnishment a form of misconduct, the pressure is almost unendurable. He must settle quickly or lose his job. This form of coercion rarely comes to light in a court because people working for such employers either pay what the collector asks or file bankruptcy on receipt of a letter threatening garnishment.

For the man who has little in the world but his wages, the power to garnish before judgment results in the de facto elimination of any defenses that he may have in law. Also, the not-so-poor man who has many years invested in a job will hesitate to put it in peril by fighting an unjust claim for a small amount of money. Indeed, it can be said that in the context of our present credit economy and urban environment, Washington's garnishment statutes amount to a substantial deprivation of a debtor's constitutional rights to due process and equal protection of the law. However, such claims may not be accepted by the Supreme Court given the present state of the law.

Under present garnishment procedures there is doubt whether adequate notice or opportunity to be heard is afforded the principal defendant before his right to accrued wages is taken from him.[8] Ser-

[7] The writer knows of no accurate list of employers who discharge for this cause, but it is known that the state's largest employer, the Boeing Company, will discharge after the second garnishment and the Simpson Paper Company, a large employer in the Everett Area, will discharge on the first garnishment. Other employers follow similar practices. There are some that do not discharge for garnishment, however. The Weyerhaeuser Company is representative of this group.

[8] *See generally* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and hearing appropriate to the case. . . .

But see Family Finance Corp. of Bayview v. Sniadich, 37 Wis. 2d 163, 154 N.W.2d 259 (1967), where it was held that while garnishment before judgment does not provide adequate notice or hearing to the principal defendant,

> . . . garnishment before judgment proceedings do not involve any final determination of the title to a defendant's property, but merely preserve the status quo thereof pending determination of the principal action. The defendant receives notice and a hearing before being permanently deprived of his or her property.

Id., 154 N.W.2d at 262. The court refused to consider most of the abuses which have been discussed above on grounds that a party will not be heard to urge the unconstitutionality of a statute upon points not affecting his rights. The court failed to elaborate how the man who has to settle an outrageously unfair claim in order to get food on the table for his children is supposed to get his claim reviewed by any court.

The Wisconsin court's reliance on the concept of title, which may be useful in other matters such as a replevin of sales, is something less than convincing in the garnish-

vice of the writ of garnishment on the employer may well be the first notice the defendant debtor has that he is being sued. As much as two weeks can then elapse before he is served with notice of the actual lawsuit on the debt itself. How soon the debtor will have the opportunity to be heard in court on any defenses he might have depends entirely on the condition of a particular court's calendar. In the court in which the writer sits, this will be thirty to sixty days after service of the writ. It is reasonable to expect that one who contests a suit on which a writ has been issued and served on the date of filing will be without his property for a minimum of sixty days.

Garnishment statutes, which allow plaintiffs, without any grounds other than their status as plaintiffs, to take a defendant's property out of his effective control deprive many persons of their right to be heard in a court of law. To the small debtor, loss of a paycheck for a period of six weeks may be the final straw driving him into bankruptcy. One seriously doubts that it is any consolation to these defendants that legal title to their property is unaffected by a prejudgment garnishment. Every day people are losing their jobs because of this procedure and because of employers' attitudes toward it. These evils turn what was initially intended as an extraordinary remedy into a systematically applied weapon for collection totally destructive of all rights of defendants in the collector's court.

In addition to taking the defendant's property without notice or hearing, these statutes, in practice, continually deprive defendants of their right to any kind of a trial—fair or unfair.[9] It would not seem amiss to note at this point that the Supreme Court of the United States

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ment context. Loss of beneficial use of property is obviously as damaging, or more so, than loss of title.

[9] The Wisconsin court decided this question of due process by reliance on three United States Supreme Court decisions from the 1920's. McInnes v. McKay, 279 U.S. 820 (1928); Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928); Owenby v. Morgan, 256 U.S. 94 (1921). *McInnes,* in a one line per curiam decision, approved the constitutionality of a Maine statute which gave plaintiffs a right of attachment without affidavit or bond. In deciding the case, the Court relied on *Coffin* and *Owenby.* The *Coffin* case involved the placing of a lien on the property of stockholders of an insolvent bank for one hundred percent contribution, as was required by the Georgia banking act. *Owenby* involved a procedure in which the plaintiffs were entitled to attach the property of a foreign debtor and the defendant debtor was not allowed to defend without posting bond for the total amount of plaintiff's complaint. The first thing that will be noted about the latter two cases is that they present special situations: insolvency in the first, and a debtor beyond the reach of the court in the second. Further, the *Coffin* case presented a situation in which a large segment of the public was to be protected. In view of these differences the court was perhaps a bit cavalier in deciding the *McInnes* case by citing them. Except for *Owenby,* the cases have hardly been cited since they were decided, nor have these points been reconsidered by the Supreme Court since *McInnes.*

has changed its views on due process in recent years. It is true that most of the changes have been in the area of criminal procedure, but they have often been made in decisions based ostensibly on the premise that due process requires that the poor defendant before the court have the same opportunity for presenting his case as the rich defendant.[10] A fair trial requires that a person not be prejudiced in his presentation because of his economic status.

On a careful reading of the garnishment statutes one will observe that all the plaintiff need set forth in his affidavit is that he is the plaintiff and that he seeks the writ without intention to injure the defendant. This affidavit says no more than the complaint. In effect, then, the state legislature has authorized garnishment solely on the basis that the plaintiff is the plaintiff. No special reason is required for issuance such as the defendant's being beyond the jurisdiction of the court, or about to flee, or about to become insolvent, or about to hide his assets.[11] One is hard pressed to justify as rational the present categorization of the parties when one is talking about the burden of requiring the defendant, at the pleasure of the plaintiff, to post as security one or more pay checks for the right to come into court and assert his defense. To justify such a distinction one would have to make a legislative finding that defendants uniformly owe what plaintiffs say they owe and that defendants are therefore wasting everyone's time by litigating, and that in order to discourage litigation defendants should be penalized for defending. Experience in the writer's court indicates that such a finding would be less than accurate. There are some collection companies that seem utterly incapable of filing a complaint that is supportable in full by the evidence. Nor is there any indication that plaintiffs are more virtuous than defendants. For example, one of my colleagues on a justice court bench found that one of the collection companies was uniformly padding the mileage on its affidavits of service. In addition, under the new check collection statute, RCW § 62A.3-501, requiring notice of dishonor as a prerequisite to a claim for a collection charge, the collectors always allege having given such notice. However, in those cases which the writer has been able to check, it is quite clear that such notice has not been

[10] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Gilbert v. California, 388 U.S. 263 (1967).

[11] The equal protection clause allows the legislatures of the several states to make classifications so long as the classifications are reasonable, Kidd v. Alabama, 188 U.S. 730 (1903), "rational in nature," Rinaldi v. Yeager, 384 U.S. 305 (1966), and not "invidiously discriminatory," Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955).

given and that the collection charge was attempted to be exacted illegally. No doubt there are many dishonest defendants who use the legal process to avoid or delay the payment of their just debts, but experience shows no such overbalance of virtue in favor of plaintiffs as to justify adding to their arsenal such a weapon as prejudgment garnishment.

CONCLUSION

There are cases on the basis of which the present Washington statute can be upheld as constitutional. Whether these cases actually remain the law of the land although they have not been expressly overruled is open to question. It cannot be denied, however, that a case can be made for legislative change in the interest of the people of the state. The facts are clear to anyone who wishes to seek them out. Because of the defendants' financial inability to withstand the pressure of a writ of garnishment, unscrupulous collectors through the use of this statute are every day recovering unjust judgments and depriving defendants of their day in court. It is equally clear that the remedy is used primarily by professional bill collectors and not for the protection of plaintiffs. The statute is being used so unfairly that, constitutional or not, it should at least be changed substantially by the legislature for the protection of the people of this state.[12]

[12] For a practicing attorney's views on wage garnishment see Friedman, *The Repossessed,* THE NEW REPUBLIC, April 27, 1968, at 8.