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## GARNISHMENT AND BANKRUPTCY

By WILLIAM E. MUSSMAN\* AND STEFAN A. RIESENFELD\*\*

"Law I admire as a science; it becomes tedious and embarrassing only when it degenerates into a trade." Joseph Story, Letter to Thomas Welsh, Esq., 1799. "Life and Letters of Joseph Story." Ed. by Wm. Story, (1851), 81, 83.

THIS article is occasioned by the dissatisfaction of a bankruptcy teacher with a practice of some of our local referees in bankruptcy which stems from an erroneous interpretation of a likewise erroneous decision. It is written in the hope that it may furnish some assistance to the bar which is frequently not too familiar with the intricacies of bankruptcy law for the purpose of remedying a condition of the law which can be best described with a phrase coined by the late Justice Stone of our Supreme Court as a "mess of irreconcilable contradiction."<sup>1</sup>

The problem involved can be stated in its most general form as: "Under what circumstances can a diligent creditor who has obtained a priority over the other creditors through garnishment retain the same in the supervening bankruptcy of the debtor?" Apparently our local referees will permit a creditor who has garnished a person holding assets of, or owing money to, the bankrupt to retain his rights under the garnishment only if he has obtained an order charging the garnishee more than four months before the petition in bankruptcy was filed. The purpose of the following pages is to show that it should suffice if the service of

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\*Cadet in the United States Naval Air Corps, formerly note editor of the Minnesota Law Review. Mr. Mussman's entrance into the United States armed forces prevented him from seeing the manuscript in its final form. While the due share of credit should be given to this author, the final responsibility must be borne by the co-author.

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<sup>1</sup>Midland Loan Finance Co. v. Osterberg, (1937) 201 Minn. 210, 275 N. W. 681, 113 A. L. R. 649.

the garnishment summons was made four months before the filing of the petition.

The decision which apparently has begotten our local practice is the case of *In re West Hotel, Inc.*,<sup>2</sup> decided by Judge Sanborn (District Judge) in 1929. In order to understand and "appreciate" it fully, it is necessary to examine the litigation involved.

## I.

### THE CASE OF IN RE WEST HOTEL

The De Soto Creamery and Produce Company had a claim against the West Hotel Corporation.<sup>3</sup> It commenced an action against the debtor in the state district court on January 18, 1928, and served garnishment summons on two banks in which the debtor had accounts. On May 18, 1928, other creditors of the West Hotel Corporation filed an involuntary petition in bankruptcy against the defendant and it was duly adjudicated a bankrupt on July 26, 1928. On September 10, 1928, the De Soto Company recovered an order for judgment against the defendant.

The plaintiff and the trustee in bankruptcy disagreed upon the disposal of the garnished funds, both claiming to be entitled to them. On November 23, they concluded a stipulation whereby the referee in bankruptcy was to decide what effect the garnishment proceedings had. The stipulation set forth that the "garnishment summons was served upon each of the garnishees in the suit above referred to, which was brought in the District Court of Hennepin County, in Minnesota, on January 18, 1928. . . ." On November 26, 1928, the referee ordered the De Soto Company to dismiss the garnishment proceedings and to release the funds, stating that the garnishment was begun within four months from filing of the petition.

Thereupon the De Soto Corporation filed a petition for review of the order of the referee, assigning as error (besides other points) :

" . . . that the referee erred in finding, as a conclusion of law, that the funds were garnished within four months of the filing of the petition in voluntary bankruptcy against the above party." and praying "for the certification of question or questions of law raised by the foregoing assignment of error."

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<sup>2</sup>*In re West Hotel*, (D.C. Minn. 1929) 34 F. (2d) 832.

<sup>3</sup>The facts of the case are obtained from a study of the file in the clerk's office of the federal district court in Minneapolis, File No. 7699.

The referee thereupon certified that "the following questions arose pertinent to the said proceedings:

1. Is a garnishment within four months of an involuntary petition filed against the Bankrupt on May 18, 1928, so [ ? ] as to render the garnishment null and void pursuant to section 67f of the Bankruptcy Act; the garnishment proceedings having begun on January 18, 1928, ancillary to an action brought in the District Court of H. County, Minnesota, wherein the plaintiff recovered an Order for judgment against the bankrupt on September 10, 1928.

2. Does the filing of a general claim by a creditor against an insolvent for the amount of which is claimed a right to priority payment based on garnishment proceedings against the insolvent commenced prior thereto operate as a waiver of any such right to priority payment, if any right exists?"

The federal district judge then rendered a decision confirming the referee's order, which may be quoted in full:<sup>4</sup>

"The petitioner brought suit in the state court against the bankrupt on the 18th day of January, 1928, and garnished two banks which were indebted to the bankrupt. . . . Judgment for (plaintiff) was ordered in September, 1928. Meanwhile in May, 1928, an involuntary petition in bankruptcy had been filed. The referee refused to allow the petitioner any priority because of its garnishment, and ordered the funds garnished to be delivered to the trustee in bankruptcy. It is this order to which the petitioner objects. The referee was clearly right. At the time the petition in bankruptcy was filed, the petitioner had no lien. The inchoate lien of a garnishment is only perfected by judgment. *Marsh v. Wilson Bros.*, 124 Minn. 254, 144 N. W. 959.

"The order of the referee is confirmed."

It is evident from these quotations that the course of the litigation and the decision of the court comprise a succession of misunderstandings and inconsistencies hardly explainable even as a rush job.

a. The referee in his original ruling stated that the garnishment was begun within four months from the filing of the petition. This fact would have made the garnishment proceedings inoperative against the trustee under section 67f, with hardly a doubt,<sup>5</sup> provided that the debtor was insolvent at the time of the garnishment." This latter condition was not expressly found to be present.

<sup>4</sup>In re West Hotel, (D.C. Minn. 1929) 34 F. (2d) 832.

<sup>5</sup>See the discussion infra, p. 62 ff.

<sup>6</sup>Section 67f of the Bankruptcy Act read at the time of the decision: ". . . all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the

b. The attorney assigned as error that the referee found, as a conclusion of law, that the garnishment was made within four months from the filing of the petition. No reasons are given and it is difficult to think of any. While the attorney could have argued perhaps successfully that it was not found and that the bankrupt in fact was not insolvent when the garnishment summons was served, he did not choose to do so. Conversely it is inconceivable how he could attempt to deny that the garnishment summons was served more than four months from the filing of the petition. The main action was brought on January 18, according to his own stipulation. The garnishment summons certainly could not have been served validly before that day.<sup>7</sup> The petition in bankruptcy was filed on May 18. This was the last day of the four months' period, but was still clearly within the period. This follows from section 31 of the Bankruptcy Act,<sup>8</sup> and has been recognized by a string of decisions.<sup>9</sup>

c. The referee in his certificate to the district judge ignored completely that petitioner had assigned as error that the garnishment was found to be made within the four months' period, and certified instead the question whether a garnishment made within four months of an involuntary petition was null and void pursuant to section 67f of the Bankruptcy Act, a proposition which none of the litigants had contested.

d. Judge Sanborn finally in his opinion dealt neither with the assignment of error nor the certified question. Instead of upholding the referee's order on the grounds given by the referee, which were correct under section 31 of the Bankruptcy Act, he confirmed it on another ground. He stated that the petitioner had

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property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; . . ." 30 Stat. at L. 565, 11 U. S. C. A. sec. 107 (f).

<sup>7</sup>2 Minn. Stat. 1941, sec. 571.01; 2 Mason's 1927 Minn. Stat., sec. 9356; see also Chapman v. Foshay, (1931) 184 Minn. 318, 238 N. W. 637, construing this section.

<sup>8</sup>The Bankruptcy Act sec. 31, 30 Stat. at L. 554, 11 U. S. C. A. sec. 54, in effect in 1929, read: "Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or legal holiday." This section is now changed in phraseology by the Chandler Act.

<sup>9</sup>In re Warner, (D. Conn. 1906) 144 Fed. 987; Bell v. West, (C.C.A. 4th Cir. 1930) 44 F. (2d) 161; Nicolai-Neppach Co. v. Smith, (1936) 154 Or. 450; 58 P. (2d) 1016. See 1 Remington, A Treatise on the Bankruptcy Law (4th ed. 1934) sec. 202.

no lien, as the garnishment was not perfected to a judgment yet, and before this time amounts only to an inchoate right.

This latter proposition was absolutely unnecessary for the result reached, as the garnishment was commenced within four months. It has had a most unwholesome result because on the strength of this decision many referees have assumed that a garnishment, even if commenced more than four months from the filing of the petition but completed only within four months before bankruptcy or not at all, will not give the creditor any right under the garnishment.

It is believed that the decision, if confined to the real facts before the court, is correct, but that the proposition of law announced therein is at least misleading and that the consequences drawn from it by some of our referees are not tenable. They are at variance with the law in almost all jurisdictions which have passed on the question and in conflict with the law laid down by our own state supreme court. A more detailed consideration of the various questions involved will show that.

## II. THE PERTINENT PROVISIONS OF THE BANKRUPTCY ACT

As the problem is, in the first place, a bankruptcy question, the Bankruptcy Act is the first source to be consulted.

The most pertinent provision is section 67, reading as follows:<sup>10</sup>

*"Liens and Fraudulent Transfers.*—a(1) Every lien against the property of a person obtained by attachment, judgment, levy or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy or of an original petition under chapters X, XI, XII or XIII of this Act, by or against such person shall be deemed null and void (a) if at the time such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act."

It is obvious that this section makes a specific reference only to attachment and not to garnishment. It is likewise clear that garnishment proceedings will fall under the sweep of this provision if and in so far as they constitute a lien against the property of the bankrupt obtained by legal or equitable proceedings.

The answer to that latter problem depends upon two different issues, one involving the construction of the Bankruptcy Act, the other governed by state law. The first question is this: "What is a lien within the meaning of section 67a?" This is a problem

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<sup>10</sup>Bankruptcy Act of 1898. 30 Stat. at L. 564, as amended in 1938, 52 Stat. at L. 875, 11 U. S. C. A. sec. 107, 3 F. C. A., tit. 11, sec. 107.

of interpretation of a federal act in which the federal courts and ultimately the Supreme Court have the last word. It might well be that the legal effect of a proceeding is labeled an inchoate lien by state law and nevertheless is a lien within the meaning of section 67 of the Bankruptcy Act.<sup>11</sup> Unfortunately, the federal courts have never given an all-embracing definition of the word lien within the meaning of the Bankruptcy Act and probably never will. Resort to the famous process of judicial inclusion and exclusion<sup>12</sup> will remain their general technique and the only guide.<sup>13</sup>

The other issue, involving state law, concerns the question: What are the legal incidents under state law which result from garnishment proceedings? There the state supreme court has the last word and the referees in bankruptcy are bound by the rulings of the "men in the state house" much as they may dislike and disagree with them. The state law then determines what the effect of garnishment under state law is and the federal courts whether such effects constitute a lien within the meaning of the Bankruptcy Act. Every nicety or ambiguity as worked out by the state supreme court may thus have its repercussion in the field of bankruptcy or other federal laws. Justice Cardozo has acutely pointed to that fact in his dissent in *Sanders v. Armour Fertilizer Works*, involving the effect of garnishment proceedings under the federal Interpleader Act of May 8, 1926:<sup>14</sup>

"The fact is not ignored that there are other jurisdictions in

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<sup>11</sup>Cf. *In re Knox-Powell-Stockton Co.*, (C.C.A. 9th Cir. 1939) 100 F. (2d) 979, where the court emphasized that in construing what constitutes a lien under section 67d of the Bankruptcy Act, only bankruptcy considerations were applicable and that the fact that certain tax liens were considered as inchoate within the purview of other statutes did not "embarrass" the construction of the Bankruptcy Act. Similarly, the word "tax" as used in the Bankruptcy Act does not depend on the label which the state pins on the particular exaction. "The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, . . . is a Federal question, of ultimate decision in this court." *New Jersey v. Anderson*, (1906) 203 U. S. 483, 492. 27 Sup. Ct. 137, 51 L. Ed. 284. See also *New York v. Feiring*, (1941) 313 U. S. 283, 285, 61 Sup. Ct. 1028, 85 L. Ed. 1333.

<sup>12</sup>Cf. Justice Holmes' celebrated statement of this technique in *Hudson County Water Co. v. McCarter*, (1908) 209 U. S. 349, 358, 28 Sup. Ct. 529, 52 L. Ed. 828; *Schlesinger v. Wisconsin*, (1926) 270 U. S. 230, 241, 16 Sup. Ct. 260, 70 L. Ed. 557.

<sup>13</sup>The term "lien" itself has changed so much since common law days that it is hard to give a general definition. The Supreme Court of Minnesota has said: "A 'lien' is defined as a hold or claim which one person has upon the property of another as security for some debt or charge." *Atwater v. Manchester Savings Bank*, (1891) 45 Minn. 341, 346, 48 N. W. 187, 12 L. R. A. 741, quoted with approval in *Marquette National Bank of Minneapolis v. Mullin*, (1939) 205 Minn. 562, 287 N. W. 233.

<sup>14</sup>*Sanders v. Armour Fertilizer Works*, (1934) 292 U. S. 190, 54 Sup. Ct. 677, 78 L. Ed. 1206.

which the process of garnishment receives a different meaning. Sometimes the service of the writ is held to impose upon the debt a fixed and present lien which will have recognition and enforcement everywhere. Sometimes the lien is spoken of as a *quasi* lien or an inchoate one. In the conflict of laws the difference may be important between realities and metaphors, between the organism and the germ. Sometimes the Illinois rule is accepted, and there is said to be no lien, or one that does no more than restrain the garnishee from making voluntary payments. Little is to be gained by dilating here upon these and like decisions, for they are rooted in local laws and customs. Garnishment and attachment today are statutory remedies. They are what the state creating them declares that they shall be."

Thus before the application of section 67a of the Bankruptcy Act to the garnishment proceedings can be determined, a scrutiny of state law on the subject of garnishment must be made.

Other provisions of the Bankruptcy Act which bear on our problem are section 11,<sup>15</sup> and section 2,<sup>16</sup> of the Bankruptcy Act empowering the Bankruptcy court to stay proceedings which may harass or impair a successful administration of the estate, and of course the sections concerning the discharge.<sup>17</sup>

### III. THE NATURE AND EFFECT OF GARNISHMENT PROCEEDINGS

#### A. HISTORICAL CONSIDERATIONS

It is hornbook law that garnishment proceedings today are entirely a matter of statutory law.<sup>18</sup> They have no common law

<sup>15</sup>The pertinent parts of Bankruptcy Act, sec. 11, U. S. C. (1940 ed.) tit. 11, sec. 29, 11 U. S. C. A. (1941 supp.) sec. 29, 3 F. C. A. tit. 11, sec. 29, reads: "*Suits by and against bankrupts.* (a) A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined. . . ."

<sup>16</sup>Bankruptcy Act, sec. 2 (15), U. S. C. (1940 ed.) tit. 11, sec. 11, 11 U. S. C. A. (1941 supp.) sec. 11, 3 F. C. A. tit. 11, sec. 11 provides: "a. The courts of the United States . . . are hereby created courts of bankruptcy and are hereby invested . . . with such jurisdiction at law and in equity . . . to . . . (15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title. . . ."

<sup>17</sup>Bankruptcy Act, secs. 14, 15, 16, 17, 63, U. S. C. (1940 ed.) tit. 11, secs. 32, 33, 34, 35, 103, 11 U. S. C. A. secs. 32, 33, 34, 35, 103, 3 F. C. A. tit. 11, secs. 32, 33, 34, 35, 103.

<sup>18</sup>Cf. Cardozo, J., in *Sanders v. Armour Fertilizer Works*, (1934) 292 U. S. 190, 208, 54 Sup. Ct. 677, 78 L. Ed. 1206: "Garnishment and attachment today are statutory remedies."



ancestry in the strict sense. Yet they are truly blue-blooded legal institutions that can claim a family tree reaching back into the Middle Ages. For they are the offspring of the institute of "foreign attachment" which was well-developed in the customs of the medieval boroughs in England<sup>19</sup> as well as on the continent.<sup>20</sup> It permitted plaintiff who brought suit against a non-resident defendant (a foreign merchant, chiefly) to attach goods of such defendant found in the hands of third persons and to stop payment of debts owed to him. If defendant defaulted, plaintiff could seek satisfaction out of the assets thus impounded.

London and its Mayor's Court was the most important center for the application and development of the foreign attachment proceedings. The celebrated *Liber Albus*, a book containing the laws and customs of the City of London, written in 1419 by the town clerk John Carpenter, has preserved a detailed description of "foreign attachments" at this period.<sup>21</sup> Similar proceedings (partly

<sup>19</sup>2 Holdsworth, *A History of English Law* (3rd ed. 1923) 387; Brandon, *Law of Foreign Attachments* (1861); see also the decision of the House of Lords in *The Mayor and Aldermen of the City of London v. Cox*, (1867) L. R. 2 H. L. 239, 36 L. J. (N.S.) Ex. 226. The most careful study is by Morris, *Select Cases of the Mayor's Court of New York City 1674-1784*, (1935) Introduction, 14.

<sup>20</sup>See, for instance, *Custom of Paris, 1510*, translated by Dawson, *Materials on Comparative Law* (Mimeo. mat. 1938) art. 192, p. 52.

<sup>21</sup>*Munimenta Gildhallae Londoniensis*, 1 *Liber Albus* (ed. by Riley) *Rolls Series* (1859) 207; translation in *Munimenta Gildhallae Londoniensis*. 3 *Liber Albus* (ed. by Riley) *Rolls Series* (1862) 41. The statement begins with the following passage: "Item, when plaint of debt is made before one of the said Sheriffs, and it is testified by the officer that the defendant has not sufficient assets in the City, and allegation is made by the plaintiff that the defendant has goods and chattels, or debts in other hands or in other keeping within the said city; and it is prayed by the same plaintiff that such goods and chattels may be arrested and the debts stopped, then, at the suit and suggestion of such plaintiff, such goods and chattels . . . shall be arrested and the debts stopped in the hands of the debtors. . . ." Then follows a long description of the further procedure. Similarly famous is the statement in the certificate made by the Recorder of London in the case of *Bowser v. Collins*, (1483) which reads as follows in a translation from the Norman-French original of the Yearbook: "That if a plaint be affirmed in London before, &c., against any person, and it be returned *nihil*, if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him to warn him to come in and answer whether he be indebted in the manner alleged by the other; and if he comes and does not deny the debts, it shall be attached in his hands, and after four defaults . . . judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other, after execution sued out by the plaintiff." Locke, *The Law and Practice of Foreign Attachment* (1853) reprinted in 2 *Drake, Suits by Attachment* (2d ed. 1858) 699; Norman-French original in *Y. B.* (1483) 22 *Edw.* 4, 30; quoted also in 1 *Rolle's Abridgment* (1668), sub. *Customs de London*, (k) 554.

copied from London) were used in many other towns, for instance Lincoln,<sup>22</sup> Hereford<sup>23</sup> and the Cinque Ports.<sup>24</sup>

From England, this custom came in early colonial days to the American shores.<sup>25</sup> Court usage and statutes gave it permanent standing. Professor Morris in his *Introduction to the Edition of Select Cases of the Mayor's Court of New York City* has given a careful discussion of the transplantation of "foreign attachment" into the east coast colonies.<sup>26</sup> Records and statutes of the early colonial days show an interesting picture.

Blended with the institute of foreign attachment, however—and this is a fact which has been commonly overlooked—we find in the early colonial days an amazing use of the attachment process in general, for the purpose of compelling appearance. While the attachment was, of course, frequently an attachment of the body it was equally frequently an attachment of assets, especially chattels. This attachment of chattels to compel the appearance of a defaulting defendant was a common law proceeding<sup>27</sup> and had been used in manorial<sup>28</sup> and probably also in the kings' courts since ancient days.<sup>29</sup> Evidently its use was even in England, at

<sup>22</sup>(1904) 1 Borough Customs (18 Selden Society, ed. by Bateson) 127. The Lincoln customs were written in 1480 by Thomas Grantham. They use the word "garnysment" which was not used in the Liber Albus. The word garnishment was also employed in the certificate by the Recorder, mentioned above.

<sup>23</sup>Morris, *Select Cases of the Mayor's Court of New York City 1674-1784*, (1935) 16; (1904) 1 Borough Customs (18 Selden Society, ed. by Bateson) 127, note 4.

<sup>24</sup>Cinque Port Costumals, chapters 28, 43, 44; reprinted in (1908) 1 *Selected Cases Concerning the Law Merchant*, (23 Selden Society) LIII.

<sup>25</sup>See *Ownbey v. Morgan*, (1921) 256 U. S. 94, 41 Sup. Ct. 433, 65 L. Ed. 837.

<sup>26</sup>Morris, *Select Cases of the Mayor's Court of New York City 1674-1784*, (1935) 19.

<sup>27</sup>Blackstone, *Commentaries on the Laws of England*, 280. It is noteworthy that Chief Justice Gilbert (1726) spoke of attachment as the "great process in courts of judicature . . . which lies as well in inferior courts, not of record, as in superior courts. . . ." Gilbert, *Law and Practice of Distress and Replevin* (2d ed. 1792) 18. Gilbert emphasized that it is not a process against the body of the defendant, but against his goods and chattels. Originally, attachment was a bodily seizure for contempt, etc.

<sup>28</sup>As an early example for the case of an attachment of a horse for default in an action for trespass brought in a hundred court see the case of *Saxlingham v. Attewode*, Y. B. (1312) 6 Edw. II, 34 Selden Society, (1918) 142. Similarly, in 1316, the manorial court of Wakefield ordered two defendants to "be attached by one cow" to answer a plea of Agreement, (1930) 4 *Court Rolls of the Manor of Wakefield*, (LXXVIII Yorkshire Archeological Society) 132.

<sup>29</sup>Cf. *Stat. Westm. I*, (3 Edw. I) ch. XLV; 1 Coke, *Second Institutes*, (1797) 254. Little research seems to have been done in this respect.

least in the days of the colonies,<sup>30</sup> much more common than we are used to think. Certainly, the colonial courts themselves granted writs of attachment to an astounding extent.<sup>31</sup> Early charters and statutes authorized their use<sup>32</sup> and later colonial legislation regulated and perfected the proceedings.<sup>33</sup>

Originally the colonial courts seem to have made no distinction between common law or "domestic" attachment and "foreign"

<sup>30</sup>The process of attachment to compel appearance easily can be traced back to Bracton's days (about 1256). Bracton in his celebrated treatise speaks of the "solemnity of attachments," used in civil suit to compel appearance. Unlike distress for services which was made by seizure of chattels, the attachment in civil suits was made by sureties. Only after several defaults, distress by land and chattels in various degrees of severity could be made. Bracton, *De Legibus Angliae*, (1569) Book 5, Treatise 5, ch. XXXI, nos. 2-7, pp. 439-441. But Bracton was dissatisfied with the clumsiness of the procedure and suggested in most progressive spirit that in civil suits for money, chattels of the value of the debt should be attached and given to the plaintiff in case of default. Britton who wrote 25 years later reports that immediate attachment of chattels was permitted in cases of trespass against the peace in suits in the king's court, and that furthermore, in suits for debts and smaller trespasses without royal writ in county courts, attachment of chattels was had after the first default. Britton, (Nichols ed. 1901) Book I, ch. XXVII, sec. 1, p. 105; ch. XXIX, sec. 9, p. 132. Later attachment seems to have come more and more into use; see the citations in Brooke, *Graunde Abridgement*, (1573) sub. Attachment en Assise et Attachment de biens, p. 68, and Dalton, *Sheriff*, (1623) 62. However, the distinction from other writs like distress seems to have made trouble; cf. the discussion in Cowel, *The Interpreter*, (1672) sub "Attache." For other references to attachment cases, particularly during the reign of Queen Elizabeth and her successors, see 3 Viner, *General Abridgement*, (1747) sub Attachment, p. 236; 7 Comyns, *Digest of the Laws of England* (5th ed. 1822), sub Process D-6.

<sup>31</sup>See, for example, the many warrants of arrest granted by the Provincial Court of Maryland, Maryland Archives, vols. 4, 10, 41, 49, 57, covering the period between 1637 and 1670, and by the Maine courts, reported in Province and Court Records of Maine, vol. 1 (1928) and 2 (1931). Of course, when the assembly of Maryland restricted the use of attachment to non-residents, the attachments there all became "foreign attachment."

<sup>32</sup>The oldest act was apparently a Massachusetts statute of Oct., 1644. See Charters and General Laws of the Colony and Province of Massachusetts Bay (1814) 49; in Virginia a statute of March, 1658, permitted attachments after return "non est inventus," 1 Hening, *Statutes at Large* (1823) 466. A still older instrument relating to the power of granting attachments is the "Commission to Justices of Isle of Kent," (1637) 3 Maryland Archives (1855) 62.

<sup>33</sup>Common law attachment in contrast to foreign attachment according to the customs of London did not permit any satisfaction of plaintiff out of the attached chattels but they were forfeited to the king. In the colonies, legislation, and, probably in some instances, practice, permitted plaintiff to have execution in the assets attached, even in case of "domestic" attachment. The first act to this effect was passed in Massachusetts in 1650. See Charters and General Laws of the Colony and Province of Massachusetts Bay (1814) 50. See the discussions on this point by Chief Justice Parsons in *Bond v. Ward*, (1810) 7 Mass. 193 and Chief Justice Parker in *Kittredge v. Warren*, (1844) 14 N. H. 509. In Virginia, the statute of 1658 granting attachments against the estate of defendants after a return "non est inventus" permitted judgment to be taken in such case. Later legislation granted execution expressly.

attachment.<sup>34</sup> Attachment was almost the regular mode to begin a civil action.<sup>35</sup> But in some colonies attachments of assets were soon restricted to non-resident and absconding defendants. For instance, in the province of Maryland, during the very early days, the courts seemed to have granted warrants of attachments regardless of whether defendants were residents or non-residents. But no later than 1647, the assembly for the province was constrained, because of numerous complaints, to restrict the use of attachments to non-resident defendants.<sup>36</sup> In 1650, Connecticut had to pass similar legislation and restrict the use of attachment of assets to foreign, absconding and fraudulent debtors.<sup>37</sup> But within a few years, it again authorized attachments in cases of debts in money or special pay<sup>38</sup> and the restriction disappeared.<sup>39</sup>

In 1683, an act was passed by the province of Maryland<sup>40</sup> which regulated in detail attachment proceedings against absentee defendants when third persons had "goods, chattels or credits" belonging to them in their hands or possession. The liability of such persons, whom the statute called "garnishees," likewise was provided for in detail. This statute is thus the oldest garnishment statute in America known to the writers.

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<sup>34</sup>Typical early instances of "foreign attachments" are the following: "Capt. Francis Champernown cometh into this court and attacheth in the hands of Mr. John Treworgy all such some or somes of money which are in his hands of Mr. William Paynes of Ipswich, to answer him in an action in the case at the next Generall Court. . . ." Court at Pascatagnace 1647, 1 Province and Court Records of Maine (1928) 104. "Attachment is granted unto Thomas Bettcher and Rich Smith upon the estate of Richard True in the hands of Giles Glover to be responsible for a debt claimed by them . . . from the said True upon legall determination." Provincial Court of Maryland 1657, 10 Maryland Archives (1891) 500.

<sup>35</sup>The Massachusetts act of 1644 gave the plaintiff the choice between proceeding by summons or attachment.

<sup>36</sup>Proceedings and Acts of the General Assembly of Maryland 1647, 1 Maryland Archives (1883) 232. A further restriction was erected in 1669, 2 Maryland Archives (1884) 206.

<sup>37</sup>Connecticut, Code of 1650, (Andrus' ed. 1822) p. 21, under "Attachment."

<sup>38</sup>Laws of Connecticut, Revision of 1672 (reprint of 1865) under "Attachment," p. 4.

<sup>39</sup>Laws of Connecticut, Revision of 1702 (reprint of 1901), under "Actions," p. 4, authorized summons or attachment of goods, chattels or land in any civil action against any defendant.

<sup>40</sup>Proceedings and Acts of the General Assembly of Maryland of 1683, 7 Maryland Archives (1889) 606. The attachment was executed by notifying the garnishee that the chattels and credits of the absent defendant shall be attached and requiring him to show cause why the chattels and credits so attached should not be condemned. No personal judgment against the garnishee was rendered at this period. Foreign attachment cases involving the act of 1683 and later amendments are contained in Proceedings of the Maryland Court of Appeals 1695-1729, 1 American Legal Records (1933). For a list of these cases, see pp. XLV, XLVI of the Introduction.

Pennsylvania, under the proprietary government of Penn, enacted its first statute regulating attachment of assets in the hands of the defendant or of third persons, called garnishees, in 1699.<sup>41</sup> It was superseded in the following year by a statute permitting foreign attachments only and regulating them in detail.<sup>42</sup> The latter act was repealed by the Queen in Council in 1705, but replaced by a similar statute in the same year.<sup>43</sup> The colony of Massachusetts Bay had authorized attachments as a method to commence a law suit in 1644.<sup>44</sup> In 1708 the colonial legislature passed an act regulating attachments against absent or absconding debtors.<sup>45</sup> It had the purpose of enabling the creditors to reach the assets of such debtors in the hands of third persons where they could not be attached by the ordinary process of law. It was re-enacted and amended many times.<sup>46</sup> South Carolina passed similar legislation in 1693, and 1712.<sup>47</sup> Connecticut, which had regulated attachments since 1650,<sup>48</sup> copied substantially the Massachusetts law of 1708, in 1726.<sup>49</sup> In New York, the Duke of York's laws (1665) had authorized attachments as methods of commencing law suits in terms substantially identical with the Massachusetts

<sup>41</sup>Charter of William Penn and Laws of the Province of Pennsylvania 1682-1700, (1879) 289. The statute authorized attachment proceedings, whose legality had become doubtful for lack of a statute, and legalized all ". . . writts or warrants heretofore granted . . . pursuant to anie Customs of cities or corporations in England or according to anie Custom or usage in these parts of America. . . ." It gave detailed provisions relating to the method of attachment of goods, chattels and effects in the hands of third persons, called garnishees. The statute was in terms not confined to non-resident defendants. Attachments had been authorized by the Duke of York's Laws (1665) which William Penn had made applicable to the colony in 1676. Charter to William Penn and Laws of the Province of Pennsylvania, (1879) 10.

<sup>42</sup>Stat. at L. of Penna. 1682-1801, (1896) 27.

<sup>43</sup>Stat. at L. of Penna. 1682-1801, (1896) 231.

<sup>44</sup>Supra, note 32.

<sup>45</sup>1 Acts and Resolves of the Province of Massachusetts Bay (1874) 629.

<sup>46</sup>Act of 1715, 2 Acts and Resolves of the Province of Massachusetts Bay (1874) 27; Act of 1723, 2 Acts and Resolves of the Province of Massachusetts Bay (1874) 285, both continuing the Act of 1708. New Act of 1728, 2 Acts and Resolves of the Province of Massachusetts Bay (1874) 493. New Act of 1739, 2 Acts and Resolves of the Province of Massachusetts Bay (1874) 965, continued in 1748, 3 Acts and Resolves of the Province of Massachusetts Bay (1874) 420. The last colonial act on the subject was passed in 1758, 4 Acts and Resolves of the Province of Massachusetts Bay (1874) 168.

<sup>47</sup>The act of 1712 is printed in 1 South Carolina, Stats. 1837, 588. The original act of 1693 cannot be found, see *infra*, note 78.

<sup>48</sup>See *supra*, text to notes 37, 38, 39.

<sup>49</sup>Connecticut, 7 Col. Rec. 28, Revision of 1750, Connecticut Acts and Laws, 1754, p. 36. See also about the history *Hayes v. Weisman*, (1922) 97 Conn. 387, 116 Atl. 878; *Medlyn v. Ananieff*, (1939) 126 Conn. 169, 10 A. (2d) 367.

statute of 1644.<sup>50</sup> Foreign attachments by garnishment were quite frequent in the Mayor's court<sup>51</sup> even in the absence of an express statutory authorization. Such legislation was passed only as late as 1751.<sup>52</sup>

After the revolution, the states continued and reformed this type of legislation.<sup>53</sup> The territories followed suit. The oldest of them, the Territory of the United States Northwest of the Ohio (established in 1787) adopted from Pennsylvania in 1795 two acts allowing and regulating "domestic" attachments in county courts,<sup>54</sup> and by justices of the peace;<sup>55</sup> in addition thereto, the New Jersey statute regulating foreign attachments was borrowed.<sup>56</sup> The evolution of these statutes in the territories and states deriving from the old Northwest territory will be studied in greater detail in the following chapter. Similar legislation took place in the other original territories. The Territory South of the River Ohio, which was created in 1790, pursuant to a cession by North Carolina and later became the state of Tennessee, adopted in 1794, a new attachment and garnishment statute<sup>57</sup> in place of the North Carolina Act of 1777.<sup>58</sup> The Territory of Mississippi, created in 1798, was governed at first by the laws of the Northwest Territory which at that time in its turn had adopted the domestic attachment law of Pennsylvania and the foreign attachment act of New Jersey.<sup>59</sup> In 1800 certain changes were made and in 1807 a detailed statute regulating attachment by seizure and garnishment was passed.<sup>60</sup> The Orleans Territory, organized in 1804, erected attachment provisions in the statutes of 1805 governing<sup>61</sup> proceed-

<sup>50</sup>The Colonial Laws of New York (1894) 15.

<sup>51</sup>Morris, *Select Cases of the Mayor's Court of New York City 1674-1784*, (1935) 75, and cases pp. 85-110.

<sup>52</sup>3 The Colonial Laws of New York (1894) 835, 841.

<sup>53</sup>Chief Justice Parsons, for instance, drew up a new statute for Massachusetts in 1794. 2 *Laws of the Commonwealth of Massachusetts 1780-1800*, (1801) 673; cf. *Burlingame v. Bell*, (1820) 16 Mass. 317; *Jarvis v. Mitchell*, (1868) 99 Mass. 530. For a good survey of early state laws on foreign attachment, see 2 *Kent Commentaries* (2 ed. 1832) 403, noted.

<sup>54</sup>The Laws of the Northwest Territory 1788-1800, (1925) 17 *Illinois State Historical Library* 137.

<sup>55</sup>The Laws of the Northwest Territory 1788-1800, (1925) 17 *Illinois State Historical Library* 139.

<sup>56</sup>The Laws of the Northwest Territory 1788-1800, (1925) 17 *Illinois State Historical Library* 269.

<sup>57</sup>1 *Laws of the State of Tennessee*, including those of North Carolina 1715-1820, (1821) 457, 462.

<sup>58</sup>1 *Laws of the State of Tennessee*, including those of North Carolina 1715-1820, (1821) 165, 172.

<sup>59</sup>See editors' note in *Toulming, Digest of the Laws of the State of Alabama* (1823) 11.

<sup>60</sup>Mississippi Territory Statutes (1816) 146, 150.

<sup>61</sup>Orleans Territory Acts (1805) 145, 158, 211, 224.

ings in courts of inferior jurisdiction and in the Superior Court and added special garnishment provisions in 1811.<sup>62</sup> The Territory of Louisiana enacted in 1807 a detailed statute regulating "domestic" and "foreign" attachments.<sup>63</sup> The states arising on the areas of these territories retained this kind of legislation and today attachment, including attachment of garnishment, exists in one form or another in all states of the Union.

In the course of time, naturally many important changes have been made and the institute of garnishment or trustee process has undergone a veritable metamorphosis. Garnishment was originally in the colonies, as we have seen, the method by which an attachment of property or credits of a debtor (resident or non-resident) in the hands of or owed by a third person could be executed. In contrast to common law attachment as well as the customs of London, attachment by garnishment was not necessarily confined to foreign attachment.<sup>64</sup> To be sure, where the attachment process as such was restricted to absent or absconding debtors, garnishment was likewise confined to such cases, and in Massachusetts and the colonies following its law the trustee process was granted originally only in such cases, though ordinary attachment had much more general scope of application.<sup>65</sup> However, this did not make garnishment a different process from attachment, but only a method of executing the writ in special cases, and in many instances garnishment was available in domestic attachment as well as in foreign attachment.<sup>66</sup> Only in more recent days garnish-

<sup>62</sup>Orleans Territory Acts (1811) 24.

<sup>63</sup>1 Laws of a Public and General Nature of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri and of the State of Missouri (1842) ch. 43, p. 145.

<sup>64</sup>It is noteworthy also that the English common law attachment could not be executed either on land or on debts, while attachment of land, even by garnishment if it was in the possession of a third person, was permitted in some colonies. Today some states, though a small minority, still permit garnishment of land.

<sup>65</sup>The Massachusetts statute of 1708 creating the trustee process was passed to supplement the ordinary attachment process "where no goods, effects or credits of an absent or absconding debtor, in the hands of his attorney, factor, agent or trustee, shall be exposed to view or can be come at so as to be attached." Massachusetts Acts and Resolves of the Province of Massachusetts Bay (1674) 629. The condition for the issuance of a garnishment summons that the attaching sheriff "cannot come at the actual possession" was incorporated in many statutes. See Delaware Act of 1770, sec. 2, Delaware Laws (1829) 46; Act of 1802 of the Territory Northwest of the River Ohio, sec. 4, 3 Laws of the Territory Northwest of the River Ohio (1802) 5, 7; from the latter statute it went into many early midwestern territorial laws. See e. g. the Wisconsin Act of 1839, Wis. Territory Stats., (1839) 166.

<sup>66</sup>See, for instance, the Delaware Act of 1770, Delaware Laws (1829) 46.

ment has become separated from attachment as a separate proceeding and this by far not in all states.<sup>67</sup>

New York seems to be the only state in which the development has taken a somewhat different course. The Duke of York's laws had permitted attachment in all civil suits by domestic creditors.<sup>68</sup> The garnishment practice had been pursued as a matter of custom.<sup>69</sup> A statute of 1751 "to prevent frauds in debtors" set up a detailed and somewhat cumbersome procedure to attach the assets of absconding and absent debtors.<sup>70</sup> It provided for attachment by seizure of all assets and evidences of indebtedness and for the publication of a notice of attachment and the appointment of three trustees for all the creditors of the debtor charged with the collection of all assets. No special garnishment proceeding beyond the public notice was provided for. A new statute of 1786 left the essential features unchanged.<sup>71</sup> It is obvious that these measures were in the nature of a liquidation and therefore in 1801 after the passage of the first federal Bankruptcy Law the application of such proceedings were limited to debtors outside the coverage of the federal act.<sup>72</sup> The revision of 1827 eliminated this restriction, but otherwise left the procedure substantially unchanged.<sup>73</sup> An amendment of 1840 authorized the sheriff to collect debts and credits, if necessary by legal proceedings.<sup>74</sup> The great procedural reform of 1848, 1849 and 1851 made some far-reaching simplifications. While the first part of the step of the modernization left the provisional remedies untouched, the amended Code of 1849 overhauled the attachment proceedings considerably.<sup>75</sup> Attachment was made by levy and seizure or in case of debts or property incapable of manual delivery by leaving a copy of the warrant of attachment. It is interesting to note that the draft of the Code Commissioners had not expressly provided for the method of attaching debts,<sup>76</sup> but that the legislature inserted a special provision.<sup>77</sup> The amended code retained two none

<sup>67</sup>Garnishment or trustee process and attachment are today separate proceedings, in Minnesota, Wisconsin and Massachusetts. See the discussion in the following chapter.

<sup>68</sup>Cf. *supra* text to note 50.

<sup>69</sup>Cf. *supra* text to note 51.

<sup>70</sup>3 The Colonial Laws of New York (1894) 835.

<sup>71</sup>1 New York Laws (1798) 214.

<sup>72</sup>1 New York Rev. Laws (1813) 214.

<sup>73</sup>2 New York Rev. Stat. (1829) 3.

<sup>74</sup>2 New York Rev. Stat. (3rd ed. 1842) 64, 65.

<sup>75</sup>New York Laws (1849) ch. 438.

<sup>76</sup>New York, Third Report of the Commissioners on Practice and Pleadings (1849) 39.

<sup>77</sup>New York Laws 1849, ch. 438, sec. 235, p. 661.



too clear references to the old method of attachment against absent debtors.<sup>78</sup> The commissioners proposed their elimination in 1850,<sup>79</sup> but the legislature did not adopt this proposal in the final form of the Code of Procedure of 1851.<sup>80</sup> The amended code explicitly authorized the sheriff to collect debts and credits by judicial proceedings if necessary.<sup>81</sup> It will be seen that no special garnishment proceeding was provided for. The attachment of choses in action by notice was held sufficient. Interrogations could be had only after judgment by way of supplementary proceedings.<sup>82</sup> Only during the present century a proceeding sometimes called "garnishee execution" was introduced as a special form of the execution process for the purpose of reaching current earnings.<sup>83</sup>

Garnishment originally seems to have created no personal liability of the garnishee,<sup>84</sup> though such liability was established comparatively early in Massachusetts.<sup>85</sup> Likewise, originally no court order or judgment specially charging the garnishee was necessary though it became gradually an essential feature.<sup>86</sup> Likewise, only gradually, though in some jurisdictions at an early date,<sup>87</sup> garnishment has become an execution process for reaching

<sup>78</sup>New York Laws 1849, ch. 438, secs. 232, 233, p. 661.

<sup>79</sup>New York the Code of Civil Procedure (Reported Complete by the Commissioners of Practice and Pleadings 1850) secs. 729, 731.

<sup>80</sup>New York Code of Procedure, (1851) secs. 232 and 233.

<sup>81</sup>New York Code of Procedure, (1851) sec. 232.

<sup>82</sup>New York Code of Procedure, (1851) secs. 292, ff.

<sup>83</sup>New York Laws, (1908) ch. 148, amending sec. 1391 of the Code of Civil Procedure, now sec. 684 of the Civil Practice Act of 1920.

<sup>84</sup>The goods and debts attached in the hands of the garnishee were ". . . condemned to the use of the plaintiff. . ." See Rules of the Mayor's Court of New York City 1674-1784, 76.

<sup>85</sup>The Massachusetts Act of 1708 seems to have been the first enactment of this kind. Section 5 provided: "And in case any attorney, factor, agent or trustee from and after the time of his being served with summons . . . shall transfer, remit, dispose of or convert any of the goods, effects or credits of such debtor, in his hands at the time of such service . . . or that he shall not discover, expose and subject the goods or credits of the debtor's, in his hands, to be taken in execution for or towards the satisfaction of the judgment . . . shall be liable to satisfy the same of his own proper goods and estates. . ." The liability was enforced by *scire facias*. This system was maintained under the act of 1795.

<sup>86</sup>In Massachusetts, it was not before the Revision of 1835 that the garnishee had to be "adjudged a trustee." See *Jarvis v. Mitchell*, (1868) 99 Mass. 530. However, a general charging order seems to have been an older practice. See *Smith v. Stearns*, (1837) 19 Pick. (Mass.) 20.

<sup>87</sup>In Maryland, attachment (including attachment by garnishment) was given as execution process instead of *feri facias* by the statute of 1683. This was called "a new law" by the attorney for defendant in *Tench v. Chew, Garnishee of Clappell*, (1795) Proceedings of the Maryland Court of Appeals 1695-1729, (ed. by Bond and Morris, 1933) 3, 5. In Wisconsin, for example, attachment became an execution process only in 1849. Wis. Rev. Stats. 1849, ch. 102, sec. 118, p. 550. See also Wis., Report and Explanatory Notes of the Revisers of the Statutes, (1878) ch. CXXV, p. 198.

debts owed to the judgment debtor, probably due to the fact that under *fiery facias* (the original writ of execution) choses in action or debts could not be reached.<sup>88</sup>

Thus the question as to the effect and nature of garnishment proceedings can be answered only by examination of the particular garnishment statute and its evolution in the particular jurisdiction. Nevertheless, the tenacity of legal concepts and the clinging of the courts to former decisions even after changes in the phraseology of a statute show that it is important to remember that the garnishment of a third person was originally the method of executing an attachment of assets of a defendant in his control.

## B. COMPARATIVE CONSIDERATIONS: THE NATURE OF GARNISHMENT PROCEEDINGS IN EASTERN AND MIDWESTERN STATES

### A. EASTERN STATES

For obvious historical reasons a comparative survey of the nature of garnishment proceedings in Eastern and Midwestern States must start out with the former. For reasons of space only four eastern states were examined.

#### 1. MASSACHUSETTS

Garnishment or trustee process as it is now called in Massachusetts, has a long history in that commonwealth. It has already been mentioned that the first colonial act creating a procedure which can be considered as the original statutory regulation of the trustee process was passed in 1708.<sup>89</sup> It was subsequently re-enacted many times with progressive amendments.<sup>90</sup> The first statute regulating<sup>91</sup> the trustee process after the establishment of the Commonwealth was adopted in 1794;<sup>92</sup> its author was Chief Justice Parsons.<sup>93</sup> This statute marks the final separation of the trustee process from the "ordinary" attachment. The status of

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<sup>88</sup>Whether they could be reached by creditors' bills in equity in the absence of statutory authorization was an unsettled question, even as late as in Chancellor Kent's days, 2 Kent Commentaries, (2d ed. 1832) 443.

<sup>89</sup>Cf. *supra*, note 45.

<sup>90</sup>Cf. *supra*, note 46.

<sup>91</sup>In 1788 an "Act to prevent Fraud and Perjury" was passed which extended the trustee process provided for by the colonial acts to judgment creditors. 1 Mass. Laws 1780-1800, (1801) 427.

<sup>92</sup>Perpetual Laws of the Commonwealth, (1794) ch. 65. The act bears the title "Act to enable creditors to receive their just demands out of the goods, effects and credits of their debtors when the same cannot be attached by the ordinary process of law."

<sup>93</sup>See *Jarvis v. Mitchell*, (1868) 99 Mass. 530.

the latter remained somewhat obscure<sup>94</sup> until the Revised Statutes of 1835 took care of the matter.<sup>95</sup> Thus, Massachusetts now has two remedies: attachment and trustee process.<sup>96</sup> We are concerned only with the latter.

The effect of trustee process under the act of 1794 came squarely before the court in the case of *Burlingame v. Bell*.<sup>97</sup> In this case the plaintiff B had summoned one N as trustee of his debtor W. N had in his possession certain carriages of W. Later the defendant, a sheriff, attached the carriages in favor of another creditor of W. B later recovered a judgment against W and tried to levy upon the carriages garnished. The defendant sheriff refused to execute the writ. The court held the defendant liable in an action on the case. In his opinion, Chief Justice Parker stated at the outset that the recovery "depends upon the question, whether the plaintiff, by the service of his trustee process upon N had acquired a lien upon the goods in his possession, which were the property of W; for if he had such lien, it could not be defeated by the subsequent attachment of the goods by the defendant." The court held that the plaintiff had acquired a qualified lien upon the goods which could not be defeated by a subsequent attachment, and this despite the fact that the goods could have been physically attached by the garnishing creditor. The court reviewed the history of the trustee process and the wording of the various statutes and reached the conclusion that "the service of the trustee process upon a person having goods, effects, or credits of another in his hands, is virtually an attachment of those goods, effects and credits and creates a lien thereon." When defendant seized the goods under the writ of attachment in favor of the other creditor, he took them "subject to the lien before created by the trustee process in favor of the plaintiff."

The doctrine of *Burlingame v. Bell* regarding the effect of the service of the trustee process has been followed in a long line of Massachusetts cases. The court has clung firmly to the lien theory, even

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<sup>94</sup>See *Bond v. Ward*, (1810) 7 Mass. 123, 5 Am., sec. 28.

<sup>95</sup>Mass. Rev. Stats., (1836) ch. 90. The trustee process is regulated in chapter 109. The Report of the Commissioners to revise the General Statutes, part III, (1834) explains the development of the ordinary attachment in Massachusetts, pp. 78, 79.

<sup>96</sup>Mass. General Laws, (Tercentenary ed. 1932) ch. 223 and ch. 246.

<sup>97</sup>(1820) 16 Mass. 317. The case was followed in *Platt v. Brown*, (1835) 16 Pick. (Mass.) 553; but cf. *Rockwood v. Varnum*, (1835) 17 Pick. (Mass.) 289 which contains language to the effect that the trustee has a right and duty to object to later attachment by other creditors.

after the statute was amended so as to create a personal liability of the trustee in case of his failure to expose the garnished property to the sheriff.<sup>98</sup> While it is not necessary to discuss in detail all the cases which hold or contain dicta to the effect that service of the process creates a lien,<sup>99</sup> it may be specifically mentioned that the Supreme Court of Massachusetts has expressly held that the trustee process creates a lien which will be valid against the trustee in bankruptcy, if the summons were served more than four months prior to the filing of the petition in bankruptcy.<sup>100</sup>

<sup>98</sup>The Act of 1794 did not provide for any judgment or order against the trustee. His liability, if he did not pay over the assets in his hands on the execution, was left to be settled under a *scire facias*. *Dyer v. Stevens*, (1810) 6 Mass. 389; *Bickford v. Boston & Lowell Railroad Corp.*, (1838) 21 Pick. (Mass.) 109; *Jarvis v. Mitchell*, (1868) 99 Mass. 530. The Revised Statutes of 1835 provided later that the person summoned may be "adjudged a trustee," Mass. Rev. Stats., (1836) ch. 109, secs. 14, 38, 42. The judgment was not separate from that against the debtor, *Jarvis v. Mitchell*, (1868) 99 Mass. 530.

<sup>99</sup>See, for instance, *Kimball v. Morris*, (1841) 2 Metc. (Mass.) 573 (trustee process is an attachment within the meaning of the state insolvency act making failure to dissolve attachments an act of bankruptcy). There the court, at page 578, said: "In fact it may be, and often is, virtually an attachment of specific property which might have been reached by the ordinary mode of attachment; and this process is resorted to as a more convenient, but equally effectual, mode of acquiring a lien upon the property." The important case of *Allen v. Hall*, (1842) 5 Metc. (Mass.) 263 (where Chief Justice Shaw explained the effect of the service of a trustee summons on goods and chattels on the one hand and on credits on the other); *American Bank v. Rollins*, (1868) 99 Mass. 313 (prior foreign garnishment is a good plea in a domestic trustee proceeding because the debt is sequestered); *Arlington Trust Co. v. Le Vine*, (1935) 291 Mass. 245, 197 N. E. 195 (trustee process applied to reach credits is an attachment within the meaning of a commonwealth statute providing for dissolution of attachment by giving bond): "It has always been the theory of our trustee process that, after service of the writ upon him, the trustee is holding the defendant's property, whether it be tangible property or 'credits' under attachment for the benefit of the plaintiff." *Phelan v. Atlantic National Bank of Boston*, (1938) 301 Mass. 463, 17 N. E. (2d) 697 (trustee process is an attachment within U. S. Rev. Stats., sec. 5242, U. S. C., 1940 ed., tit. 12, sec. 91). One of the most important consequences of this view is the holding of the court that "tangible property of the defendant outside the Commonwealth . . . is not affected by a trustee writ served in the state." *Arlington Trust Co. v. Le Vine*, (1935) 291 Mass. 245, 250, 197 N. E. 195; *Van Camp Hardware & Iron Co. v. Plimpton*, (1899) 174 Mass. 208, 54 N. E. 538; *Cox v. Central Vermont Railroad Co.*, (1905) 187 Mass. 596, 609, 73 N. E. 885.

<sup>100</sup>*Snyder v. Smith*, (1904) 195 Mass. 58, 61, 69 N. E. 1089: "Undoubtedly an attachment by trustee process gives a lien upon the property which will be good against bankruptcy if more than four months old." *Zani v. Phandor Co.*, (1932) 281 Mass. 139, 147, 183 N. E. 500: "We think it plain that . . . if any other creditor prior to the defendant prior to its bankruptcy had attached its credit . . . by trustee writ served in accordance with the statute, such creditor would have acquired a lien upon that credit and the present plaintiff would have been without remedy against such lien."

## 2. MARYLAND

Maryland is another of the pioneer states in the development of the attachment and garnishment process. Its first garnishment statute was passed in 1683 and appears to be the oldest of its kind in the United States.<sup>101</sup> The statutes which have shaped the modern practice are two acts of 1715 and 1795.<sup>102</sup> The provisions of both are substantially still in force.<sup>103</sup> Maryland has no separate garnishment or trustee process. Garnishment is simply a form of attachment, the statute providing:<sup>104</sup>

"Any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due."

If the person is some one different from the defendant, he is called "garnishee."<sup>105</sup> The leading modern case on the law of garnishment in Maryland is the case of *International Bedding Company v. Terminal Warehouse Company*, in which the Court of Appeals of Maryland made an extensive survey of the Maryland cases.<sup>106</sup>

The Maryland court has consistently adhered to the view that the service of the writ of attachment creates an "inchoate" lien on the specific property<sup>107</sup> or credits<sup>108</sup> attached. If the prop-

<sup>101</sup>See supra text to note 40. The Maryland law of attachment has been treated in several monographs. Hinkley, Acts of the General Assembly of Maryland on the Subject of Attachment, (1836). Hinkley and Mayer, The Law of Attachment in Maryland (1869); Hodge and McLane, The Law of Attachment in Maryland (1895); Gomborov, The Law of Attachment in Maryland (1926). The history of the Maryland law has been discussed by the court in Hepburn's Case, (1830) 3 Bland. Ch. (Md.) 95, 119, and *International Bedding Co. v. Terminal Warehouse Co.*, (1924) 146 Md. 479, 126 Atl. 902.

<sup>102</sup>(1910) 30 Maryland Archives 236, 1 Kilty, The Laws of Maryland, (1799) ch. 40, 2 Kilty, The Laws of Maryland, (1800) ch. 56.

<sup>103</sup>1 Maryland Anno. Code, (1939) art. 9, Attachments. The (first) Maryland Code of 1860 contained the provisions on Attachments in art. 10.

<sup>104</sup>1 Maryland Code, (1860) art. 10, sec. 11; 1 Maryland Anno. Code, (1939) art. 9, sec. 10.

<sup>105</sup>1 Maryland Code, (1939) art. 9, sec. 12.

<sup>106</sup>(1924) 146 Md. 479, 126 Atl. 902.

<sup>107</sup>*Rhodes & Williams v. Amsinck*, (1873) 38 Md. 345 (attachment lien, whether obtained by seizure or laying of the writ in the hands of garnishee creates merely inchoate lien, which cannot be enforced in equity before judgment of condemnation); *Cooke v. Cooke*, (1876) 43 Md. 522 (inchoate lien obtained by garnishment permits setting aside fraudulent conveyances, following *Curtis v. Moore*, (1863) 20 Md. 93); *Morton v. Grafflin*, (1888) 68 Md. 545, 13 Atl. 341. See also *May v. Buckhannon River Lumber Co.*, (1889) 70 Md. 448, 17 Atl. 274.

<sup>108</sup>*Main v. Lynch*, (1880) 54 Md. 658; *Thomas v. Brown*, (1887) 67 Md. 512, 10 Atl. 713; *Buschmann v. Hanna*, (1889) 72 Md. 1, 18 Atl. 962.

erty in the hands of a third person can be seized, the sheriff must take it into custody;<sup>109</sup> if the property cannot be taken, either because it is not found or of intangible nature, the writ (except in the case of real property) is merely "laid in the hands of the garnishee."<sup>110</sup> In either alternative, however, an inchoate lien is acquired on the property and credits in the hands of the garnishee at the time of the service as well as coming later into his hands,<sup>111</sup> provided it is within the territorial limits.<sup>112</sup>

The inchoate lien ordinarily must be "perfected" or "consummated" by judgment. If the real or personal property is identified either by the sheriff's return or by disclosure and is kept by the garnishee at the time of the judgment, the judgment rendered is a condemnation *in rem* of the property, to be enforced by *feri facias*.<sup>113</sup> But a personal judgment against the garnishee will be rendered, if the property has been lost by the garnishee<sup>114</sup> or if the assets attached was a money claim<sup>115</sup> or the garnishee had failed to appear.<sup>116</sup> This judgment, in case of an attachment of credits, is said to subrogate the garnishing creditor to the original creditor.<sup>117</sup>

Even though the Court of Appeals of Maryland has called the right acquired through attachment by garnishment an inchoate lien, it has made it perfectly clear that "one species of attachment is equally inchoate as the other" and that "an inchoate lien is still a lien."<sup>118</sup> While it enjoys no protection in equity either by

<sup>109</sup>May v. Buckhannon River Lumber Co., (1889) 70 Md. 448, 17 Atl. 274.

<sup>110</sup>De Bearn v. De Bearn, (1913) 119 Md. 418, 86 Atl. 1049; International Bedding Co. v. Terminal Warehouse Co., (1924) 146 Md. 479, 126 Atl. 902; Union Trust Co. v. Briggs, (1927) 153 Md. 50, 137 Atl. 509. See also Herzberg v. Warfield, (1892) 76 Md. 446, 25 Atl. 664.

<sup>111</sup>International Bedding Co. v. Terminal Warehouse Co., (1924) 146 Md. 479, 126 Atl. 902.

<sup>112</sup>United States Express Co. v. Hurlock, (1913) 120 Md. 107, 87 Atl. 834.

<sup>113</sup>Cockey v. Milne's lessee, (1860) 16 Md. 200, (judgment creates a specific lien relating back to attachment); Corner v. Mackintosh, (1878) 48 Md. 374; International Bedding Co. v. Terminal Warehouse Co., (1924) 146 Md. 479, 126 Atl. 902; Union Trust Co. v. Briggs, (1927) 153 Md. 50, 137 Atl. 509.

<sup>114</sup>International Bedding Co. v. Terminal Warehouse Co., (1924) 146 Md. 479, 126 Atl. 902.

<sup>115</sup>Buschmann v. Hanna, (1889) 72 Md. 1, 18 Atl. 962, but contra Brown v. Somerville, (1855) 8 Md. 444.

<sup>116</sup>Act of 1880, Maryland Laws of 1880, ch. 28; 1 Maryland Anno. Code, (1939) art. 9, sec. 13; Western Nat. Bank v. National Union Bank, (1900) 91 Md. 613, 46 Atl. 960.

<sup>117</sup>Farley v. Colver, (1910) 113 Md. 379, 77 Atl. 589.

<sup>118</sup>Thomas v. Brown, (1887) 67 Md. 512, 517, 10 Atl. 713.

injunction or creditors bill,<sup>119</sup> it is a lien for the purposes of priority,<sup>120</sup> insolvency,<sup>121</sup> or bankruptcy.<sup>122</sup>

The Maryland attachment procedure was the one involved in the famous Supreme Court decision of *Harris v. Balk*,<sup>123</sup> settling the conflicts problem of acquiring jurisdiction over an absent debtor by garnishing his debtor temporarily present in the state. The case came before the Supreme Court under the full faith and credit clause of the constitution, because of the refusal by the Supreme Court of North Carolina in a suit by a creditor against his debtor to give effect to an attachment of his debt in Maryland in favor of a creditor of the plaintiff and the payment by the defendant to the garnishing creditor pursuant to a Maryland judgment. The Federal Supreme Court reversed the judgment of the Supreme Court of North Carolina. It held that the Maryland had jurisdiction to attach the debt if a local statute to this effect existed. The court stated that according to the law of Maryland an inchoate lien attached to the fund when the attachment was laid in the hand of the garnishee and that the judgment had become a personal<sup>124</sup> judgment against him. The court pointed out that the law of Maryland considers such judgment against the garnishee "or" payment by him of such judgment as pleadable in bar<sup>125</sup> and held that the debtor having paid under a valid judgment should not be compelled to pay a second time. The Supreme Court, therefore, recognized, at least, that the garnishment process

<sup>119</sup>*Rhodes & Williams v. Amsinck*, (1873) 38 Md. 345, (no injunction); *Morton v. Grafflin*, (1888) 68 Md. 545, 13 Atl. 341, (no creditor's bill).

<sup>120</sup>*Wallace v. Forrest*, (1789) 2 Harr. & McH. 261; *Ohio Brass Co. v. Clark*, (1897) 86 Md. 344, 37 Atl. 899.

<sup>121</sup>*Buschmann v. Hanna*, (1889) 72 Md. 1, 18 Atl. 962; *Thomas v. Brown*, (1887) 67 Md. 512, 10 Atl. 713. See Hodge and McLane, *The Law of Attachment in Maryland* (1895).

<sup>122</sup>*Franklin v. Claffin*, (1878) 49 Md. 24, 46; *Kendrick & Roberts v. Warren Bros. Co.*, (1909) 110 Md. 47, 72 Atl. 461; *Crook Horner Co. v. Gilpin*, (1910) 112 Md. 1, 75 Atl. 1049; see also *Ressmeyer v. Norwood*, (1912) 117 Md. 320, 334, 83 Atl. 347.

<sup>123</sup>(1905) 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023.

<sup>124</sup>This point is somewhat doubtful. In accord with *Harris v. Balk*, apparently, *Buschmann v. Hanna*, (1889) 72 Md. 1, 18 Atl. 962; contra *Brown v. Somerville*, (1855) 8 Md. 444.

<sup>125</sup>The supreme court fell into a slight error here. According to the statute law of Maryland, judgment of condemnation against the garnishee and execution thereon, or payment shall be pleadable in bar. 1 Maryland Anno. Code, (1939) art. 9, sec. 35. It was so held also in *Cole v. Flitcraft*, (1877) 47 Md. 312. It is not clear from the obscure language of the supreme court in *Harris v. Balk* whether the federal constitution requires that the personal judgment against the garnishee as such must be a good defense.

might create an inchoate lien or a lien on the debt according to the state law.<sup>126</sup>

### 3. NEW HAMPSHIRE

The next state to be discussed is New Hampshire, because it is customarily cited as leading authority for the proposition that garnishment does not create a lien in favor of the creditor but merely effectuates a personal liability of the garnishee.

It is noteworthy that this view was taken in spite of the fact that the first trustee process statute<sup>127</sup> of the province of New Hampshire (which had been separated from its de facto or de jure union with Massachusetts Bay in 1679) was a verbatim copy of the above mentioned Massachusetts act of 1708.<sup>128</sup> Later acts passed in 1791,<sup>129</sup> 1829<sup>130</sup> had, however, gone their own way.<sup>131</sup> The law regarding the trustee process was incorporated into the Revised Statutes of 1842<sup>132</sup> and from then on has gone through the customary process of amendment and being rewritten in statute revisions.

The famous case which announced the rule that the creditor by resorting to the trustee process acquired no lien is *Walcott v. Keith*.<sup>133</sup> It involved an action in trover for the conversion of chattels. The facts are somewhat complicated. One Cook bought certain goods from the owner while they were in the possession of one Brown. The day before the purchase Brown had been "trusteed" by a creditor of Cook. Cook later pledged with a power of immediate sale the goods to plaintiff who placed the goods

<sup>126</sup>The supreme court cited *Cahoon v. Morgan & Stearns*, (1865) 38 Vt. 234, and *National Fire Insurance Co. v. Chambers*, (1895) 53 N. J. E. 468, for the proposition that garnishment creates a lien upon the debt. While this is true according to the local law of those states, Maryland has held that garnishment creates only an inchoate lien in *Buschmann v. Hanna*, (1889) 72 Md. 1, 18 Atl. 962, which was likewise cited by the supreme court.

<sup>127</sup>2 Laws of New Hampshire 1702-1745, (1913) 315.

<sup>128</sup>Cf. supra text to notes 45 and 89.

<sup>129</sup>Act of Feb. 12, 1791, 5 Laws of New Hampshire 1784-1792, (1916) 678.

<sup>130</sup>Act of July 3, 1829, 10 Laws of New Hampshire, (1922) 65.

<sup>131</sup>Curiously enough the New Hampshire Superior Court of Judicature stated in *Haven v. Wentworth*, (1819) 2 N. H. 93, 94, that "Our statute in relation to trustees is a substantial transcript of a statute in Massachusetts on the same subject." But the act of 1791 then in force in New Hampshire was no longer identical with the act of 1758 then in force in Massachusetts.

<sup>132</sup>New Hampshire Rev. Stats., (1843) ch. 208. Cf. New Hampshire Compiled Stats., (1853) ch. 221.

<sup>133</sup>*Walcott v. Keith*, (1850) 22 N. H. 196. The case is criticized by Rood, *Has the Garnishing Creditor a Specific Lien*, (1900) 51 Central Law Journal 25, 26. It is, however, submitted that the learned author's criticism shows that he has not read the opinion with all necessary care.



on a wagon. Meanwhile defendant, who was likewise a creditor of Cook, sued out an attachment and levied it on the goods while they were on the wagon. The argument was made by counsel for defendant that plaintiff had acquired no title since the goods were garnished before delivery to him by a creditor of his vendor. The court repudiated this argument by pointing out that at the time of the service of the trustee process Brown was not holding the property for Cook but for his vendor and therefore no rights were acquired under the trustee process, but it added the following dictum:

"But if Brown might have been rendered liable for the value of the property in that suit, still the service of the process gave the creditor no right or lien upon the specific property, but would only render the trustee liable for its value, in case of any misappropriation of the property by him. . . . It is true that, if the property had belonged to Cook, and had been holden by the trustee, as his agent, he might have been made liable for the same or its value; and for that reason, the law would doubtless give him the right to hold the possession against Cook, or any subsequent purchaser or pledgee of the same. But this could only be a power, or right, personal to the trustee himself, and vested in him alone, but giving to the creditor no right or interest whatever in the property itself."<sup>134</sup>

The same view was reiterated and reemphasized in the cases of *Bufford v. Sides*,<sup>135</sup> and *Corning v. Records*.<sup>136</sup> The latter case, holding that a creditor resorting to the trustee process could not attack a conveyance to the trustee as fraudulent, reviewed "the whole current of authority in this state establishing the principles of equitable procedure in trustee process."

"A plaintiff in trustee process does not acquire a lien upon the specific property in the hands of the trustee by service upon him. The substantial difference between attachment by direct seizure and by trustee process is that the validity of the attachment in the latter case does not depend upon the officer's taking or retaining possession of the property, and creates no specific lien upon the defendant's property in favor of the plaintiff. In place of such lien, the plaintiff acquires a right to hold the trustee personally responsible for the value of the goods . . . the remedy of the plaintiff, if the trustee neglects or refuses to deliver the goods for which he is adjudged chargeable, is not in following the goods but in a personal judgment against the trustee."

<sup>134</sup>Walcott v. Keith, (1850) 22 N. H. 196, 205.

<sup>135</sup>(1861) 42 N. H. 495, 504 (holding that property of a third person mortgaged to defendant cannot be attached by trustee process). The case cited the Massachusetts cases as contra.

<sup>136</sup>(1898) 69 N. H. 390, 46 Atl. 462, followed in Clough & Parker v. Glines & Stevens Co., (1914) 77 N. H. 408, 92 Atl. 803.

Yet, in spite of the strong and precise language in these cases, there is another line of authority in New Hampshire where a lien or attachment has been held to be created by the trustee process. Thus in the early case of *Burnham v. Folsom*, Chief Justice Richardson stated clearly that "the service of the process of foreign attachment upon the trustee creates a lien in favor of the plaintiff upon the debtor's property in the hands of the trustee."<sup>137</sup> It is particularly noteworthy that this dictum was cited with approval in the great case of *Kittredge v. Warren*<sup>138</sup> in which it was held that an attachment in mesne process creates a lien within the saving clause of the second section of the bankruptcy act of 1841. The court reviewed the whole development of the attachment process in the New England states and the application of the concept of lien thereto. In *Young v. Ross*<sup>139</sup> it was held that goods in order to be attached by trustee process must be within the boundaries of the state the same as for purposes of ordinary attachment. Other cases have similar language.<sup>140</sup> The court in *Corning v. Records* was obviously embarrassed by these cases and sought to distinguish them on the feeble ground that a lien created by ordinary attachment gave the creditor a "special property," while the lien referred to by Judge Richardson was not of such nature as it "would attach as well to a debt as to chattels."<sup>141</sup> Certainly this distinction is no more than meaningless verbiage.

It is very interesting that the supreme court of New Hampshire in a very recent case clearly reverted to the lien doctrine, by discussing the nature of the liability of joint trustees.<sup>142</sup> The court said:

"The effect of the . . . disregard of the trustee process in paying money to the principal defendant was to impair the lien created by the process. They violated a statutory obligation and their wrong is more consistently classified as a tort than a breach of contract."

Certainly in the light of this analysis of New Hampshire law the language of *Walcott v. Keith* loses much of its force.

<sup>137</sup>(1832) 5 N. H. 566 (holding that trustee cannot be charged if the principal defendant had commenced suit prior to the service of the writ).

<sup>138</sup>(1844) 14 N. H. 509.

<sup>139</sup>(1855) 31 N. H. 201; to the same effect *King v. Holmes*, (1853) 27 N. H. 266.

<sup>140</sup>See, for instance, *Nelson v. Sanborn*, (1886) 64 N. H. 310, 9 Atl. 721, and *Broadhurst v. Morgan*, (1891) 66 N. H. 480, 29 Atl. 553 (declaring that the trustee process gave a statutory lien).

<sup>141</sup>*Corning v. Records*, (1898) 69 N. H. 390, 399, 46 Atl. 462.

<sup>142</sup>*Protective Check Writer Co., Inc. v. Collins*, (N.H. 1942) 23 Atl. (2d) 770.

## 4. MAINE

Maine was after 1691 part of the Colony of Massachusetts Bay and gained statehood and membership in the Union in 1820. On February 28, 1821, a copy of the Massachusetts Act of 1794 concerning foreign attachment was adopted as the Law of Maine.<sup>143</sup> It may be interesting to note that the Board of Jurisprudence which was authorized to direct the printing of the revised laws and to add "marginal abstracts and references" inserted a marginal note to the effect that a lien on the principal's goods was created by process.<sup>144</sup>

Maine has followed the Massachusetts doctrine and held that the service of foreign attachment creates a lien. The leading case is probably *Franklin Bank v. Bachelder*.<sup>145</sup> It decided that a discharge of the principal in bankruptcy under the federal Bankruptcy Act of 1841 was not a good defense for the trustee in a *scire facias* proceeding to compel delivery of the chattels garnished after judgment against principal and trustee. The court made the following statement:

"The statutes of this state provide two modes by which means may be secured on mesne process, to satisfy a judgment sought to be obtained in the action. One is by direct attachment of the lands or goods of the defendant, and the other by foreign attachment. The former secures the property returned on the writ, so that the creditor may cause it to be seized and sold upon his execution . . . ; the latter protects the goods, effects and credits in the hands of the trustee at the time of the service of the original writ upon him, so that they or their value, are . . . to be applied for the same purpose. . . . A failure in the plaintiff to obtain a judgment will in both modes dissolve the attachment, because there is no debt, to which the avails of the property can be applied. But if judgment is obtained, whatever is the subject of the attachment in either form, is pledged for its satisfaction."

The court then posed the question whether either of these forms of attachment creates a lien within the meaning of the bankruptcy act and decided that "if our views are not erroneous, that a foreign attachment affords equal security with that in the ordinary form . . . it follows that it falls equally within the protecting provision of the bankruptcy act." However, it may be pointed out that, following a federal decision by Judge Story, the court required the recovery of a judgment both in domestic and foreign attachment before the saving clause of the Bankruptcy Act could apply.

<sup>143</sup>Maine Laws, (1821) ch. 61, 286. The present statute is Maine Rev. Stats., (1930) ch. 100.

<sup>144</sup>Marginal note to ch. 61, sec. 1.

<sup>145</sup>(1843) 23 Me. 60.

An analogous question involving the Bankruptcy Act of 1867<sup>146</sup> came before the court in *Storer v. Haynes*.<sup>147</sup> The court held that an attachment by trustee process served on March 19th, 1876, was not dissolved by bankruptcy proceedings begun on July 17th, 1876, where judgment was recovered against trustee and a writ of execution issued. The court stated that without judgment the plaintiff's lien on the goods, effects and credits, existing by virtue of the attachment would have been dissolved, because it was obtained within four months before bankruptcy, but the judgment and unsatisfied execution fixing the trustee's personal liability protected it. "The personal liability results from his refusal to deliver the goods, effects and credits in his hands, to which the creditor's lien had become absolute by virtue of the execution."

There are a number of other Maine cases which all are based on the theory that the trustee process is a mode of attachment and creates an attachment lien upon the goods, funds and credits in the hands of the trustee.<sup>148</sup>

#### B. MIDWESTERN STATES

The garnishment law to be examined in this division is that of Illinois, Michigan, Iowa, Wisconsin, North Dakota and South Dakota, in other words of states which either have obtained all or part of their area from the old Territory of the United States Northwest of the River Ohio, organized by the famous Ordinance of 1787, or whose area originally belonged to the Michigan Territory which in its turn was a "granddaughter" of the Northwest Territory. To avoid confusion a brief survey of the formation of territories and states in this area may be given.

The Northwest Territory was divided in 1800 into the Terri-

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<sup>146</sup>This act declared attachment liens made on mesne process within four months next preceding to bankruptcy proceedings to be dissolved. U. S. Rev. Stats. (1878) sec. 5044.

<sup>147</sup>(1877) 67 Me. 420.

<sup>148</sup>See, e. g., *Pettingill v. Androscoggin Ry. Co.*, (1863) 51 Me. 370: ". . . the service of the writ operates as an attachment of the *specific articles* in his possession. It is only in case he neglects to keep them and deliver them to the officer . . . that he becomes *personally* liable." *Webster v. Adams*, (1870) 58 Me. 317; *Cunningham v. Hall*, (1879) 69 Me. 353, trustee process lien remains valid, if bankruptcy proceedings begun within four months are terminated by composition; *Cousens v. Lovejoy*, (1889) 81 Me. 467, 17 Atl. 495; *Davis v. U. S. Bobbin & Shuttle Co.*, (1919) 118 Me. 285, 107 Atl. 865. *Smith v. Davis & French, Trustee*, (1932) 131 Me. 9, 158 Atl. 359, creditor may enforce his lien obtained by trustee process by special judgment despite bankruptcy, where trustee in bankruptcy has made no claim.

tory of Indiana and the Northwest Territory. In 1803 the state of Ohio was formed and the rest of the Northwest Territory attached to Indiana. In 1805 the Territory of Michigan was separated from Indiana Territory and in 1809 the Territory of Illinois was likewise separated from Indiana Territory. In 1816 the greater portion of Indiana Territory became the state of Indiana and in 1818 a portion of Illinois Territory became the state of Illinois. The remaining areas of both territories were attached to the Michigan Territory. In 1834 a portion of the old Louisiana Territory (later becoming Iowa, part of Minnesota, and the two Dakotas) was likewise attached to Michigan. In 1836 the state of Michigan was formed and the rest of Michigan Territory was organized as Territory of Wisconsin. In 1838 a part was separated and organized as Iowa Territory. Part of that territory became a state in 1846 and part of the Wisconsin territory did so in 1848. The remaining part of both territories became the Territory of Minnesota, and after formation of that state in 1858 the rest was established as Dakota Territory.

The ordinance of 1787 contained a clause empowering the governor and the judges to adopt the best suited laws from the original states.<sup>149</sup> Pursuant to this authorization, in 1795 two acts allowing and regulating "domestic" attachments in county courts<sup>150</sup> and by justices of the peace<sup>151</sup> were adopted from the law of Pennsylvania and a third act regulating "foreign" attachments was borrowed from New Jersey.<sup>152</sup> Curiously enough the law givers did not even notice that at least the first Pennsylvania act<sup>153</sup> related to foreign attachments rather than domestic ones and covered thus substantially the same ground as the New Jersey Act.

In 1802 (after the Indiana territory was carved out) a new statute regulating writs of attachment was passed for the remaining Northwest Territory giving detailed provisions for attachments by seizure and by garnishment.<sup>154</sup> *It is this act which has*

<sup>149</sup>Laws of the Territory of the United States Northwest of the Ohio, (1796) III at V.

<sup>150</sup>Laws of the Territory of the United States Northwest of the Ohio, (1796) 22.

<sup>151</sup>Laws of the Territory of the United States Northwest of the Ohio, (1796) 25.

<sup>152</sup>Laws of the Territory of the United States Northwest of the Ohio, (1796) 197.

<sup>153</sup>This act was enacted by Pennsylvania in 1705 and is listed in Purdon's Abridgement of the Laws of Pennsylvania, (1811) 25, as "Attachment (foreign)."

<sup>154</sup>Laws of the Territory of the United States Northwest of the Ohio, (1796) 5.

been the direct ancestor of the attachment and garnishment law of the states of Ohio, Michigan, Wisconsin, Minnesota, North and South Dakota. This act was quite obviously an improved and simplified version of the Act for the relief of creditors against absconding and absent debtors passed in New Jersey on 8th of March, 1798<sup>155</sup> which in its turn derived from acts of 1748, 1760 and 1792. The territorial act was almost verbatim re-enacted by the state of Ohio in 1805.<sup>156</sup> It was amended in 1810<sup>157</sup> and the part pertaining to attachments by justices of the peace was amended and made a separate act in 1812,<sup>158</sup> it was amended in 1813 and redrawn in 1816.<sup>159</sup> In 1824 two new statutes were passed, one regulating writs of attachment in general and the other attachments before justices of the peace.<sup>160</sup> The latter statutes were still, even in the wording, substantially similar to the law of 1802, but became in their turn the model for the acts in other midwestern states.

In 1807 the Territory of Indiana adopted likewise two new statutes, one regulating foreign attachment, and the other attachments against absconding debtors.<sup>161</sup> They were, however, much less carefully drawn than the statute of 1802 for the Northwest Territory.

### 1. ILLINOIS

Illinois became a state and member of the Union in 1818. The Territory of Illinois, existing from 1809 to this period, seems to have applied the acts of the Territory of Indiana passed in 1807,<sup>162</sup> but in the first year of statehood two statutes were passed, one allowing foreign attachments,<sup>163</sup> the other regulating proceedings against absconding debtors.<sup>164</sup> Both acts permitted attachment against the lands and tenements, goods and chattels and rights and credits of the debtor. The statute pertaining to the absconding debtors set forth detailed provisions for the procedure which were applicable to foreign attachments by virtue of a reference contained in the foreign attachment act.<sup>165</sup> The statute provided for

<sup>155</sup>New Jersey Laws, (1821) 355.

<sup>156</sup>3 Laws of Ohio (1805) 81.

<sup>157</sup>8 Laws of Ohio (1810) 123.

<sup>158</sup>10 Laws of Ohio (1811) 75-84.

<sup>159</sup>11 Laws of Ohio (1812) 96; 14 Laws of Ohio (1816) 41.

<sup>160</sup>22 Ohio Rev. Stats. (1824) 145 and 151.

<sup>161</sup>Laws of Indiana Territory 1801-1809, 21 Illinois Historical Collections (1930) 266 and 556.

<sup>162</sup>See 1 Pope's Digest 1815, 28 Illinois Historical Collections 54.

<sup>163</sup>1 Ill. Laws (1819) 33, stat. of Feb. 22.

<sup>164</sup>1 Ill. Laws (1819) 66, stat. of Feb. 24.

<sup>165</sup>1 Ill. Laws (1819) 33, stat. of Feb. 22, sec. 1.

attachment by garnishment of the goods and chattels, lands and tenements in the hands of third persons. Judgment and execution against the garnishee was provided for "all money due from him and of property of the defendant in his possession or custody."<sup>166</sup> The last section provided expressly "that from and after the service of an attachment upon a garnishee he shall be enjoined from delivering over to the defendant any property or effects or the payment of the debt owed to him and that any suit by the debtor against the garnishee should be stayed."<sup>167</sup> In 1827 a new act was passed regulating the whole field of attachment by seizure and garnishment;<sup>168</sup> it was amended somewhat in the Revision of 1833.<sup>169</sup> While it is of little value to trace this act through all later amendments and revisions, it may be mentioned that the present law of Illinois pertaining to garnishment consists of three different portions. The first regulates attachment including attachment by garnishment in courts of record,<sup>170</sup> the second provides for garnishment as auxiliary execution process,<sup>171</sup> and the third concerns attachment and garnishment before Justices of the Peace.<sup>172</sup>

The attachment statute provides expressly, pursuant to an amendment of 1935, that attachment by garnishment creates a lien.<sup>173</sup>

"Persons summoned as garnishees shall thereafter hold any property, effects, choses in action or credits in their possession or power belonging to the defendant . . . and such property, effects, choses in action, credits and debts shall be considered to have been attached and the plaintiff's claim to have become a lien thereon pending such suit."

The sections concerning garnishment on judgment contain, however, no such provision.

While, of course, such statute settles the lien question in an affirmative sense, previously there was much uncertainty on this point and the Illinois Supreme Court had made several pronouncements against the creation of a lien. The leading case in this respect is *Bigelow v. Andress*.<sup>174</sup> In this case creditors prayed for an injunction against the garnishee to prevent him from dis-

<sup>166</sup>Ill. Laws (1819) 66, stat. of Feb. 24, sec. 2.

<sup>167</sup>Ill. Laws (1819) 66, stat. of Feb. 24, sec. 9.

<sup>168</sup>Ill. Rev. Laws (1827) 66.

<sup>169</sup>Ill. Rev. Laws (1833) 82.

<sup>170</sup>Ill. Rev. Stats. (1941) ch. 11, sec. 21.

<sup>171</sup>Ill. Rev. Stats. (1941) ch. 62 (garnishment on judgment).

<sup>172</sup>Ill. Rev. Stats. (1941) ch. 79, art. VII and IX.

<sup>173</sup>Ill. Rev. Stats. (1941) ch. 11, sec. 21.

<sup>174</sup>(1863) 31 Ill. 322.

posing of the goods of the principal defendant in his possession. The court refused the relief and stated:

"But this question of whether the service of the garnishee summons creates an actual or a qualified lien upon the effects in the hands of the garnishee, has not been determined, in terms, by this court . . . we are at a loss to perceive how the mere service of a summons on a third person to appear and answer whether he is indebted to, or has effects of the defendant in his possession, can create a lien of any character. . . . By the service of the garnishee process, there can be no pretense that the property is, in any sense, transferred to the officer, or that he thereby acquires any right to control it. The garnishee still has the right to retain it, and by the service, only becomes liable to account for it or its proceeds, if judgment shall be rendered against him on trial. The statute does not prohibit him from disposing of it, but only renders him liable on failing to produce it, to satisfy the judgment. . . . This would seem to place it beyond doubt, that it was not the design of the legislature to create any lien on such property."

It will be noted that the statute of 1845<sup>175</sup> under which the case was decided no longer contained an explicit injunction against return of the garnished assets to the owner as the original act of 1819 had provided.<sup>176</sup> Yet the court might have reached a different result had it noticed that Illinois originally had such prohibition. On the other hand the court could have reached its decision without denying the existence of the lien merely on the ground that the statute provided for an adequate remedy at law and that therefore no equitable protection was necessary.<sup>177</sup>

The doctrine of *Bigelow v. Andress* has been followed in a number of cases.<sup>178</sup> However, the court has never carried it to all its logical consequences. Thus in *Nesbitt v. Dickover*<sup>179</sup> the court gave the garnishing creditor priority over a laborer's and me-

<sup>175</sup>Ill. Rev. Stats. (1845) 67. The statute was an amended version of the statute of 1833.

<sup>176</sup>See supra, note 167.

<sup>177</sup>While it is believed that the reason suggested in the text is preferable to the reason given by the court, the result is not necessarily objectionable. To be sure, Rood in his article, *Has the Garnishing Creditor a Specific Lien*, (1900) 51 Central Law Journal 25, 28, declares, categorically, "The decision is indefensible from any point of view and stands entirely alone." However, other states also have refused to give special equitable protection to the garnishment lien. Cf. e. g. Maryland supra note 119.

<sup>178</sup>*Gregg v. Savage*, (1893) 51 Ill. App. 281, aff'd in *Savage v. Gregg*, (1894) 150 Ill. 161, 37 N. E. 312; *Detroit Copper and Brass Rolling Mills v. Ledwidge*, (1896) 162 Ill. 305, 311, 44 N. E. 751, equity will not aid garnishing creditor; *McElwee v. Wilce*, (1898) 80 Ill. App. 338, dictum only; *London Guarantee and Accident Co. v. Mossness*, (1903) 108 Ill. App. 440, holding that garnishment created no lien without the meaning of the bankruptcy act and therefore a judgment against the garnishee would not be set aside, although the facts show that the garnishment proceedings had been instituted within the four months' period.

<sup>179</sup>(1886) 22 Ill. App. 140.



chanics' lien attaching subsequently to the same indebtedness. *Bigelow v. Andress* was distinguished as applying only to chattels. In regard to debts (which in Illinois cannot be directly attached or levied upon<sup>180</sup>) garnishment process was called by the court to be "virtually an attaching process." In the case of *Bowen v. Pope*<sup>181</sup> the Appellate Court refused garnishment of a promissory note<sup>182</sup> which was kept outside the state. The court declared:

"A garnishee proceeding is in the nature of a proceeding in rem, and to the effectual creation of a lien it is not enough that the garnishee be within the jurisdiction of the court. The *res* itself must also be within the jurisdiction of such court."

The case was affirmed by the Supreme Court.<sup>183</sup> Finally in *Becker v. I. C. R. R. Co.*,<sup>184</sup> the supreme court of Illinois declared that by the service of the garnishment summons in Missouri (!) the creditor had acquired a contingent or inchoate lien upon the debt which prevented the debtor from making voluntary payments although a judgment recovered in Illinois previous to a judgment in Missouri would bar a perfection of the Missouri garnishment.

Then came the famous decision of the federal Supreme Court in the case of *Sanders v. Armour Fertilizer Works*<sup>185</sup> which involved the Illinois garnishment law. The precise question which came before the court under the federal Interpleader Act was whether a creditor who had garnished insurance claims of his debtor in Illinois and had recovered a default judgment against him had a better right to the money than the debtor, if the insurance money was exempt from the reach of the creditors by the law of the debtors' domicile. The decision went in favor of the creditor, Justice Cardozo dissenting. The controversy turned exclusively on the effect of garnishment in Illinois. Justice McReynolds, writing for the majority, declared: "The Illinois rule is that garnishment imposes an inchoate lien subject to defeat by certain subsequent events, none of which are present here." After citing Illinois cases he added: "This view is in harmony with the settled law of Illinois that an attachment when levied

<sup>180</sup>Commerce Vault Co. v. Barrett, (1906) 222 Ill. 169, 176, 78 N. E. 47.

<sup>181</sup>Bowen v. Pope, (1887) 26 Ill. App. 233.

<sup>182</sup>It may be noted that in Illinois promissory notes can be reached only by garnishment and not by ordinary attachment. Prout v. Grout, (1874) 72 Ill. 456; Nihell v. Nihell, (1911) 161 Ill. App. 587.

<sup>183</sup>Bowen v. Pope, (1888) 125 Ill. 28, 17 N. E. 64. This rule is not applicable to ordinary debts. Lancashire Insurance Co. v. Corbetts, (1897) 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640.

<sup>184</sup>(1911) 250 Ill. 40, 95 N. E. 42.

<sup>185</sup>(1933) 292 U. S. 190, 54 Sup. Ct. 677, 78 L. Ed. 1206. Cf. Holt, The Federal Interpleader Act and Conflict of Laws in Garnishment, (1937) 4 Univ. of Chicago L. Rev. 403.

on the debtor fixes a lien upon the claim." Justice Cardozo wrote equally emphatically: "Garnishment in Illinois does not create a lien upon the debt or chose in action subject to the writ." He pointed out that other jurisdictions have a different rule and that for them different results would follow. "In the conflict of laws the difference may be important between realities and metaphors, between the organism and the germ."

As a result the above mentioned amendment of 1935 was enacted making the garnishment explicitly a lien, on the debtor's assets.<sup>186</sup> It may be mentioned that quite recently the Illinois Court of Appeals for the fourth district assumed without questioning that garnishment created a lien within the meaning of the Bankruptcy Act and held that the garnishee could not plead the bankruptcy, but that such right was exclusively reserved to the trustee.<sup>187</sup> The court was not even aware that another Illinois court had previously taken the opposite view.<sup>188</sup>

## 2. MICHIGAN

The Territory of Michigan was established in 1805. In 1806 a short act concerning attachments and absent defendants was passed which was supplemented by another act of 1816.<sup>189</sup> In 1821 Governor Cass adopted<sup>190</sup> the 1798 act of New Jersey which had been the model of the Northwest Territory statute of 1802 and the Ohio statute of 1805.<sup>191</sup> In 1824 Michigan entered upon the second grade of government. In 1827<sup>192</sup> Michigan adopted verbatim Ohio's general attachment statute of 1824 mentioned above,<sup>193</sup> but it did not adopt Ohio's act of the same year relating to attachments before justices of the peace, but enacted insofar much simpler rules.<sup>194</sup> In 1836 Michigan gained statehood and provided for immediate revision of the territorial laws. The Revised Statutes of 1838 improved the wording,<sup>195</sup> but garnishment

<sup>186</sup>In a litigation begun before the passage of the act but terminated thereafter the Court of Appeals for the 1st district refused to commit itself for or against the lien doctrine. *Kryl v. Pierce*, (1937) 289 Ill. App. 10, 6 N. E. (2d) 521.

<sup>187</sup>*Morgan v. Int. Shoe Company*, (1941) 310 Ill. App. 597, 35 N. E. (2d) 90.

<sup>188</sup>*London Guarantee and Accident Co. v. Mossness*, (1903) 108 Ill. App. 440, cf. *supra* note 178.

<sup>189</sup>Mich. Territorial Laws 1805-1821 (1871) 135, 137.

<sup>190</sup>Mich. Territorial Laws 1805-1821 (1871) 822.

<sup>191</sup>Cf. *supra*, text to notes 154, 155, 156.

<sup>192</sup>Laws of Mich. (1827) 228.

<sup>193</sup>Cf. *supra*, text to note 160.

<sup>194</sup>Mich. Territory Laws (1827) 101, 114 (Justice's Code of 1827); Mich. Territory Laws (1833) 193, 205 (Justice's Code of 1833).

remained a method and form of attachment. The same remained true in regard to attachment in Justice courts.<sup>196</sup> The Revision of 1846 omitted all references to garnishment in its sections regulating attachment in circuit courts<sup>197</sup> and maintained them only in its provisions regulating attachment in Justice Courts.<sup>198</sup> In 1849 a detailed statute was passed regulating in detail garnishment in courts of Justices of the Peace.<sup>199</sup> In 1861 a statute was passed authorizing garnishment in other courts.<sup>200</sup> This resulted, of course, in a separation of garnishment from attachment which is maintained under present law. Proceedings by attachment and by garnishment in courts of record are two separate chapters in the Judicature Act of 1915 as incorporated in the Compiled Laws.<sup>201</sup>

The Supreme Court of Michigan has had similar difficulties in defining the effect of garnishment as other courts. Garnishment in that state has been said to be "a species of attachment" or "in the nature of an attachment" or "in the nature of an equitable attachment."<sup>202</sup> While garnishment has not been treated as an attachment for all purposes,<sup>203</sup> yet in many instances the word attachment in statutes has been held to apply to garnishment and garnishment has been held to be governed by identical rules with attachment.<sup>204</sup> The Supreme Court of Michigan has made the following comparison:<sup>205</sup>

"While there are in our state well-defined distinctions between

<sup>195</sup>Mich. Rev. Stats. (1838) Part III, tit. IV, ch. 1.

<sup>196</sup>Mich. Rev. Stats. (1838) Part III, tit. 1, ch. 5, sec. 46 ff.

<sup>197</sup>Mich. Rev. Stats. (1846) tit. 24, ch. 114.

<sup>198</sup>Mich. Rev. Stats. (1846) tit. 21, ch. 93, sec. 36.

<sup>199</sup>Mich. Acts (1849) 153.

<sup>200</sup>Mich. Acts (1861) 559.

<sup>201</sup>Mich. Compiled Laws (1929) secs. 14763 ff., and secs. 14857 ff.

<sup>202</sup>*Bethel v. Judge of Superior Court*, (1885) 57 Mich. 379, 381, 24 N. W. 112; *Posselius v. First Natl. Bank of Detroit*, (1933) 264 Mich. 687, 251 N. W. 429, cert. den. (1934) 292 U. S. 697, 54 Sup. Ct. 631, 78 L. Ed. 1481; *Missouri Tie and Lumber Co. v. Sullivan*, (1936) 275 Mich. 26, 265 N. W. 779; *Burr v. Heffner*, (1939) 289 Mich. 91, 286 N. W. 169, aff'd (1939) 309 U. S. 242, 60 Sup. Ct. 488, 84 L. Ed. 726.

<sup>203</sup>*Foreman Brothers Banking Co. v. Handy*, (1925) 229 Mich. 635, 201 N. W. 951 (garnishment in contrast to attachment is discharged by death of main debtor before judgment) followed in *Hoban v. Equitable and Central Trust Co.*, (1932) 259 Mich. 586, 244 N. W. 169.

<sup>204</sup>*Bethel v. Judge of Superior Court*, (1885) 57 Mich. 379, 24 N. W. 112 (infancy of one of debtors has some effect upon attachment and garnishment); *Posselius v. First Natl. Bank of Detroit*, (1933) 264 Mich. 687, 251 N. W. 429 (garnishment is attachment within the meaning of U. S. Rev. St. (1878) sec. 5242, U. S. C. (1940 ed.) tit. 12, sec. 91, U. S. C. A. tit. 12, sec. 91, 4 F. C. A., tit. 12, sec. 91).

<sup>205</sup>*Posselius v. First Natl. Bank of Detroit*, (1933) 264 Mich. 687, 690, 251 N. W. 429.

garnishment and attachment, still each impounds assets of the defendant, which assets in general are held subject to the further order and judgment of the court after final adjudication of the principal case."

The court has said that garnishment is "a proceeding substantially *in rem*" impounding defendant's indebtedness, that upon service of the writ a specific lien is created upon the debt and that garnished assets are *in custodia legis*.<sup>206</sup> The court has decided that a garnishment served within four months before the filing of a petition in bankruptcy was discharged upon a composition,<sup>207</sup> and that a garnishment can be prosecuted to a judgment *in rem*, where the main debtor went into liquidation in another state after service of the garnishment summons.<sup>208</sup> Similarly, it has been held that a Wisconsin garnishment created a lien which was entitled to recognition in a Michigan receivership proceeding,<sup>209</sup> and that in a suit in Michigan, garnishment proceedings, instituted against defendant in Minnesota by a creditor of plaintiff's assignor, were a good reason for a stay in order.<sup>210</sup>

Two decisions involving bankruptcy are particularly worth noting. In the first it was decided that upon a petition by a trustee in bankruptcy to set aside a garnishment the creditor (although he had not yet recovered a judgment in the main action) had a right to a jury trial on the issue of whether the principal defendant was insolvent at the time of the service of the garnishment summons.<sup>211</sup> In the second case the Supreme Court permitted a judgment against garnishees and principal defendant with a perpetual stay of execution against the principal defendant who was discharged in bankruptcy.<sup>212</sup> In addition it may be mentioned that the court had held under the Bankruptcy Act of 1867 that the

<sup>206</sup>Katt v. Swartz, (1917) 199 Mich. 51, 58, 165 N. W. 717; Sinclair Co. v. Becker Coal Co., (1933) 263 Mich. 617, 620, 249 N. W. 13; Kyte v. MacIvor, (1934) 266 Mich. 258, 263 N. W. 289; Fidelity Corp. of Mich. v. Post, (1935) 273 Mich. 697, 702, 263 N. W. 775.

<sup>207</sup>Sinclair Co. v. Becker Coal Co., (1933) 263 Mich. 617, 249 N. W. 13.

<sup>208</sup>Smith v. Builders and Manufacturers Casualty Co., (1939) 288 Mich. 146, 284 N. W. 678, noted (1939) 37 Mich. L. Rev. 1323; see also National City Bank v. Torrent, (1902) 130 Mich. 259, 89 N. W. 938.

<sup>209</sup>Rickman v. Rickman, (1914) 180 Mich. 224, 251, 146 N. W. 609, Ann. Cas. 1915C 1237. The court stated that a Michigan garnishment would have the same effect.

<sup>210</sup>Citizens Bank v. Chippewa Circuit Judge, (1915) 186 Mich. 494, 152 N. E. 1077.

<sup>211</sup>Borderland Coal Sales Co. v. Wayne Circuit Judge, (1924) 228 Mich. 198, 199 N. W. 641.

<sup>212</sup>New Kensington Sanitary Pottery v. Detroit Pipe & Supply Co., (1932) 258 Mich. 34, 241 N. W. 901; see also the dictum in Sinclair Co. v. Becker Coal Co., (1933) 263 Mich. 617, 249 N. W. 13.

"garnishee lien" was not dissolved by bankruptcy proceedings after judgment against the garnishee defendant had been recovered.<sup>213</sup>

### 3. IOWA

The Territory of Iowa was separated from the Territory of Wisconsin by congressional act of 1838.<sup>214</sup> The Territory of Wisconsin itself had only been organized in 1836, its area forming before that date a part of the Territory of Michigan. Thus the (Ohio-) Michigan statute of 1827 was in force until it was repealed by an Iowa act of 1829 "allowing and regulating writs of attachments."<sup>215</sup> This act contained provisions regulating the garnishment of property of defendant in the hands of third persons or of debts owed to him. In the same year an elaborate act regulating proceedings of the Justices of the Peace was adopted from Wisconsin which contained likewise detailed provisions for attachment.<sup>216</sup> Garnishment was part of the mode prescribed for attachment of debts and unaccessible assets of the defendant. The Revision of 1843 made only insignificant changes.<sup>217</sup> In 1846 Iowa became a state. In 1851 a Code of Iowa was adopted which in Chapter 109 contained a new regulation of attachment and garnishment.<sup>218</sup> The provisions appear to be influenced by the corresponding chapters in the Justice's Code of 1839 as well as of the proposed Code of Civil Procedure for New York published in 1850.<sup>219</sup> Garnishment was also provided for as a method of execution.<sup>220</sup> Garnishment of property was permitted only if it cannot be found or title thereto is doubtful.<sup>221</sup> A revision in 1860 made no substantial changes.<sup>222</sup> The Code of 1873 kept attachment and garnishment still in one chapter, but segregated the procedural provisions relating to garnishment from the rest of the attachment provisions.<sup>223</sup> The Code of 1897 abolished the necessity of the title being in doubt or failure to find chattels in the hand of third persons as a prerequisite for garnishment, but made

<sup>213</sup>Krupp v. Tabor, (1875) 31 Mich. 174.

<sup>214</sup>Laws of Iowa 1838-39 (1900) 32.

<sup>215</sup>Laws of Iowa 1838-39 (1900) 55.

<sup>216</sup>Laws of Iowa 1838-39 (1900) 300, 328.

<sup>217</sup>Rev. Stats. of the Territory of Iowa, 1843, (Reprint 1912) 56 ff., 218 ff., 239.

<sup>218</sup>Iowa Code (1851) ch. 109, sec. 1846 ff.

<sup>219</sup>New York Code of Civil Procedure (Reported complete by the Commissioners on Practice and Pleading (1850) secs. 723 ff.

<sup>220</sup>Iowa Code 1851, ch. 110, sec. 1892, "garnishment on execution."

<sup>221</sup>Iowa Code 1851, ch. 109, sec. 1860, sub. div. 4.

<sup>222</sup>Iowa, Rev. Laws 1860, ch. 124, sec. 3194 ff.; ch. 125, sec. 3270.

<sup>223</sup>Iowa Code, 1873, tit. XVIII, ch. 1, sec. 2949 ff.

otherwise no significant alterations.<sup>224</sup> The same is true in regard to the Code of 1924. Garnishment is still a mode of attachment or execution, permissive only when attachment or execution can be had for the purpose of reaching property of the defendant in the hands of third persons or debts owed to him.<sup>225</sup>

Early cases in Iowa have announced the rule that attachment by garnishment as distinguished from attachment by seizure does not create a lien on the property of the debtor. The creditor can rely only on the personal liability of the garnishee.<sup>226</sup> But later cases constitute a constant recession from this early position.

In the first place the Supreme Court of Iowa has made it clear that there is a distinction between garnishment of intangibles, particularly debts, and garnishment of chattels and that the "no lien rule" of *Mooar v. Walker* was not applicable to the former kind. When confronted with the relative rank between an attachment by garnishment of the surplus in the hands of a chattel mortgagee and a later attachment by levy on these chattels, the court had to admit that the garnishment created a lien on or right to the surplus superior to the attachment.<sup>227</sup> An even stronger stand was taken in the recent case of *Kinart v. Churchill*.<sup>228</sup> The court em-

<sup>224</sup>Iowa Code Anno. 1897, tit. XIX, ch. 1 and 2. Sec. 3897 provided: "Property of the defendant in the possession of another or debts due the defendant may be attached by garnishment, as hereinafter provided." On the change made by the law of 1897, see *Jordan v. Crickett*, (1904) 123 Iowa 576, 99 N. W. 163.

<sup>225</sup>Iowa Code, 1924, chs. 510, 513, particularly sec. 12101; Iowa Code, 1939, chs. 510, 513, particularly sec. 12101; see also the identical section 11677 (relating to garnishment on execution).

<sup>226</sup>The leading case in this respect is *Mooar v. Walker*, (1877) 46 Iowa 164, transfer of corporate stock by debtor was valid against creditor where stock had not been attached in accord with Iowa statute, but had been garnished. Other cases announcing this theory are: *McConnell v. Denham*, (1887) 72 Iowa 494, 34 N. W. 298 (creditor garnishing a chattel mortgagee is not entitled to the appointment of receiver since no lien was acquired and creditor had adequate remedy at law). Cf., however, *Sweet Dempster & Co. v. Oliver*, (1881) 56 Iowa 744, 10 N. W. 275, where equitable relief against a garnished chattel mortgagee was denied without discussion of the lien question merely on the ground that garnishment afforded a full and complete remedy; *Citizens State Bank v. Council Bluffs Fuel Co.*, (1894) 89 Iowa 618, 57 N. W. 444 (court held, however, that garnishing creditor could attach a conveyance as fraudulent); *Toledo Savings Bank v. Johnston*, (1895) 94 Iowa 212, 62 N. W. 748 (attachment of property previously garnished by same creditor is no conversion but releases garnishment); *McDonald v. Creager*, (1896) 96 Iowa 659, 65 N. W. 1021 (the creditor acquires, however, such interest as entitles him to accounting); *Commercial State Bank v. Pierce*, (1916) 176 Iowa 722, 158 N. W. 481; *Rodgers v. Oliver*, (1925) 200 Iowa 869, 205 N. W. 513. Some of these cases are criticized by Rood, *Has the Garnishing Creditor a Specific Lien* (1900) 51 Cent. L. J. 25.

<sup>227</sup>*Buck-Reiner Co. v. Beatty*, (1891) 82 Iowa 353, 48 N. W. 96.

<sup>228</sup>(1930) 210 Iowa 72, 75, 230 N. W. 349.

phasized that the cases bearing on the effect of garnishment of chattels had no force for the question of the effect of the garnishment of debts. "The service of such garnishment is a constructive seizure of the judgment debtor's chose in action against the garnishee." The necessity of a judgment is no argument against this theory. "The force and effect of the garnishment are not postponed, however, to the later date of the judgment. On the contrary, the judgment relates back to the date of garnishment, and confirms the seizure as of such date."

But also in regard to the garnishment of chattels the court has clarified or modified its position. It has admitted, at least once, in a case involving garnishment of chattels, "that a proceeding by garnishment is in the nature of a proceeding *in rem* and that, for certain purposes at least, a lien upon the *res* is created by the service of notice of garnishment."<sup>229</sup> Similarly in the case of *Bowen v. Port Huron E. and T. C.*,<sup>230</sup> the court summed its position up as follows:

"Garnishment is a mode of attachment. As a general rule no lien is created on the property in the hands of the garnishee, although it partakes of the nature of a proceeding *in rem*. . . . We have never gone to the extent of holding that it creates a specific lien upon property or money in the hands of the garnishee, but have said, in effect, that it gives plaintiff a specific right, over and above that of a mere general creditor to the indebtedness or property. . . . The effect of garnishment . . . is to deprive defendant of his property or money."

Why this "specific right" was not, in reality, a lien the court did not point out. Certainly the incidents of this right as described by the court make it look like a lien. The Supreme Court has quoted this statement with approval in a recent case,<sup>231</sup> although it involved the effect of dissolution proceedings in a sister state upon a garnishment in Iowa of two bank accounts. This shows also that the court takes not very seriously its distinction between the effects of a garnishment of chattels and of choses in action. The court added the somewhat obscure comment:

"It has been definitely settled in this state that the rights of an

<sup>229</sup>*Gilmore v. Cohn*, (1897) 102 Iowa 254, 71 N. W. 244 (the *res* was property mortgaged to garnishee).

<sup>230</sup>(1899) 109 Iowa 255, 80 N. W. 345, 47 L. R. A. 131. The case held that a judgment against the garnishee is a *pro tanto* satisfaction of the creditors claim against defendant, which is not affected by bankruptcy of the garnishee. It is amazing that the court cited the case of *Gilmore v. Cohn*, (1897) 102 Iowa 254, 71 N. W. 244, as precedent for the proposition that garnishment creates no lien.

<sup>231</sup>*Watts v. Southern Surety Company*, (1933) 216 Iowa 150, 248 N. W. 347.

attaching creditor by garnishment, although not amounting to a lien upon any specific property, does amount to something equivalent thereto, by regarding the garnishment as an assignment of the debt due from garnishee."

It might also be mentioned that in Iowa the judgment against the *garnishee* has been called a judgment *in rem*.<sup>232</sup>

Thus this isolated pronouncement in one case that garnishment creates no lien in Iowa which was considered by Justice Cardozo<sup>233</sup> as an accurate statement of the law, must in reality be read in the light of all the inroads, qualifications and modifications that the court had made. The result seems to be that garnishment does effectuate a lien on intangibles and creates something, at least, "in the nature of a lien" on chattels. Most noteworthy is the fact that in a case involving the Bankruptcy Act of 1867 the court has squarely held that a garnishment "lien" was not dissolved if the service was made four months before filing of the petition.<sup>234</sup>

#### 4. WISCONSIN

The Territory of Wisconsin was organized in 1836. In 1838 an act regulating proceedings of justices of the peace was passed.<sup>235</sup> It was the act which we have mentioned before as borrowed by Iowa.<sup>236</sup> Garnishment was provided for in the article on attachment.<sup>237</sup> This act was included in the first Revised Statutes, adopted in the following year.<sup>238</sup> Likewise included was an act regulating attachment, applicable to courts of record.<sup>239</sup> This statute was a copy of the Michigan Act of 1827,<sup>240</sup> which in its turn had been adopted from Ohio. In 1848 Wisconsin became a state. In 1849 a new revision of the statutes was put into force. It retained the separation of attachment and garnishment in

<sup>232</sup>Strand v. Halverson, (1935) 220 Iowa 1276, 1279, 264 N. W. 266, 103 A. L. R. 835. See also Gutschenritter v. Whitmore, (1913) 158 Iowa 252, 263, 139 N. W. 567, 571. This seems to apply regardless of whether chattels or debts are garnished.

<sup>233</sup>Sanders v. Armour Fertilizer Works, (1934) 292 U. S. 190, 208, 54 Sup. Ct. 677, 78 L. Ed. 1206. Justice Cardozo quoted from Commercial State Bank v. Pierce, (1916) 176 Iowa 722, 158 N. W. 481, holding that a judgment against garnishee could not be set aside on petition of third person claiming title. Certainly, no lien could be created on property not belonging to defendant, regardless of whether garnishment operates as a lien in case defendant is the owner.

<sup>234</sup>Hatch v. Seeley, (1873) 37 Iowa 494, 496.

<sup>235</sup>Wis. Territory Acts 1836-1838 (1867) 309.

<sup>236</sup>See supra text to note 216.

<sup>237</sup>Art. 11 of the Act.

<sup>238</sup>Wis. Territory Stat. (1839) 319, 336.

<sup>239</sup>Wis. Territory Stat. (1839) 165.

<sup>240</sup>See supra text to notes 192, 193. Two sections are omitted.



justice's courts<sup>241</sup> from attachment and garnishment in circuit and county courts.<sup>242</sup> But in both instances the provisions were greatly changed and simplified and more assimilated to each other. Yet some of the phrasing of the provisions pertaining to garnishment still showed the familiar language.

In 1856 Wisconsin adopted a Code of Procedure, which was modeled after the New York Code of Procedure. The chapter on attachment contained the identical provisions of Title VII, Chapter IV of the New York Code.<sup>243</sup> Attachment of debts or property in the hands of third parties was made by notice.<sup>244</sup> Garnishment was not specifically mentioned. However, one section contained the curious general provision that the sheriff should execute the writ "as prescribed by the law of attachments."<sup>245</sup> Whether in so far garnishment was still permitted might be questionable.<sup>246</sup> At any rate in the Revision of 1858 garnishment provisions were re-inserted into the chapter on attachments,<sup>247</sup> but the section on attachment of debts was retained.<sup>248</sup> Similar garnishment provisions were made in regard to justices of the peace.<sup>249</sup> The old condition for resort to garnishment that the officer cannot seize the property was deleted.<sup>250</sup> In 1862 a statute allowing garnishment in aid of execution was enacted.<sup>251</sup> The revision of 1871 made no substantial changes.<sup>252</sup> The Revisors of 1878, however, introduced an important change by making garnishment in circuit courts a proceeding distinct from attachment which could be resorted to under certain specified conditions.<sup>253</sup> Garnishment pro-

<sup>241</sup>Wis. Rev. Stat., 1849, ch. 88, secs. 11 ff.

<sup>242</sup>Wis. Rev. Stat., 1849, ch. 112, secs. 1 ff., 32 ff.

<sup>243</sup>Wis. Code of Procedure, 1856, tit. VII, ch. 4; New York, Code of Procedure (as amended), 1849, tit. VII, ch. IV.

<sup>244</sup>Wis. Code of Procedure, 1856, tit. 7, sec. 143.

<sup>245</sup>Wis. Code of Procedure, 1856, tit. 7, sec. 140.

<sup>246</sup>The corresponding New York section referred to the law against absent debtors (sec. 232). The Code Commissioners considered that as a reference to existing statutes. See Code of Civil Procedure (Reported Complete by the Commissioners 1850) note to sec. 729.

<sup>247</sup>Wis. Rev. Stat., 1858, ch. 130, secs. 34 ff.

<sup>248</sup>Wis. Rev. Stat., 1858, ch. 130, sec. 13.

<sup>249</sup>Wis. Rev. Stat., 1858, ch. 120, secs. 113 ff.

<sup>250</sup>For the judicial construction of this requirement, see *Kneeland v. Cowles*, (1851) 3 Pin. (Wis.) 316; *Malley v. Altman*, (1861) 14 Wis. 22.

<sup>251</sup>On the nature of the proceedings under this statute, see *Storm v. Cotzhausen*, (1875) 38 Wis. 139.

<sup>252</sup>Wis. Rev. Stat., 1871, ch. 120, secs. 120 ff.; ch. 130, sec. 37 ff.

<sup>253</sup>Wis. Rev. Stat., 1878, ch. 125. The revisors made the following comments: "The statute in this state originally provided garnishment as a remedy in aid of attachment only. It is a sort of attachment itself. Then it was extended to aid execution, and subsequently it was provided as an auxiliary to an action independently of an attachment, thus making it a mere provisional remedy. It has been thought best to treat garnishment

ceedings in justices' courts were likewise permitted in all actions on contracts in addition to actions commenced by attachments.<sup>254</sup> The provision permitting levy on debts was apparently deleted. The revision of 1898 left the law in this respect substantially untouched.<sup>255</sup> It remained likewise in so far unchanged by the revision of the garnishment law of 1935<sup>256</sup> which is presently in force.<sup>257</sup>

In spite of the many alterations of the controlling statutes, the Supreme Court of Wisconsin has consistently adhered to its basic notions on garnishment. It considers the service of the garnishment summons as constituting an "equitable levy," or an "attachment" of the property or indebtedness in the hands of the garnishee.<sup>258</sup> The court has declared that many times garnishment creates an equitable lien or just lien,<sup>259</sup> and has quoted with approval Rood's statement that garnishment fastens "an effectual lien upon garnished property."<sup>260</sup>

An interesting discussion of the effect of this equitable lien was given by the supreme court in *Maxwell v. Bank of New Richmond*.<sup>261</sup> The case involved the garnishment of an assignee for the benefit of the creditors of the assignor. Judgment was rendered for garnishee, but it was reversed on appeal. The appeal pending, the garnishee sold the property and distributed the proceeds. The final judgment against garnishee proved to be incollectible. The question was whether the plaintiff could collect from the recipients of the distributed assets. The court held that no such

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before execution issued as a provisional remedy distinct from attachment." Revisors note to ch. 125.

<sup>254</sup>Wis. Rev. Stats., 1878, ch. 158, sec. 3716 ff.

<sup>255</sup>1 Wis. Rev. Stats., 1898, ch. 125 (garnishment in circuit courts); ch. 158 (attachment and garnishment in Justice's Courts).

<sup>256</sup>Wis. Laws, 1935, ch. 541, sec. 93 ff.

<sup>257</sup>Wis. Stats., 1941, ch. 267 (garnishment), and ch. 304 (attachment and garnishment in a justice's court).

<sup>258</sup>*Keep v. Sanderson*, (1860) 12 Wis. 352, 363; *Winner v. Hoyt*, (1887) 68 Wis. 278, 32 N. W. 128; *Commercial Inv. Trust v. Frankfurth Hardware Co.*, (1922) 179 Wis. 21, 190 N. W. 1004. While the latter case permitted a third party claimant to recover for wrongful garnishment, the principal defendant can recover only on the theory of malicious prosecution. *Veitch v. Cebell*, (1900) 105 Wis. 260, 81 N. W. 411, in distinction from an attachment defendant.

<sup>259</sup>*Bragg v. Gaynor*, (1893) 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; *Globe Milling Co. v. Boynton*, (1894) 87 Wis. 619, 59 N. W. 132; *Maxwell v. Bank of New Richmond*, (1898) 101 Wis. 286, 77 N. W. 149; *Stannard v. Youmans*, (1901) 110 Wis. 375, 85 N. W. 967.

<sup>260</sup>*Morawetz v. Sun Insurance Office*, (1897) 96 Wis. 175, 71 N. W. 109. The case held that property outside the state cannot be reached by garnishment, following *Bates v. Chicago, Milwaukee and St. Paul Railway Co.*, (1884) 60 Wis. 296, 19 N. W. 72, and *Renier v. Hurlbut*, (1891) 81 Wis. 24, 50 N. W. 783, 14 L. R. A. 562.

<sup>261</sup>(1898) 101 Wis. 286, 77 N. W. 149.

right existed. While the garnishment created an equitable lien upon the property, a *bona fide* purchaser could take it free and clear from such encumbrance. If the garnishee was insolvent, the creditor might restrain him from disposing of the property, but if he failed to do so he might possibly treat the property as in the custody of the court and all persons coming in possession thereof with notice as liable to account for it or, on the other hand, he might get a personal judgment against the garnishee. But if he elects the latter alternative, his rights are fixed and any rights to follow the property, if there were any, are precluded.<sup>262</sup>

The most important decision for our problem is undoubtedly the case of *Bank of Commerce v. Elliott*.<sup>263</sup> It dealt with the effect of bankruptcy proceedings on two garnishments, one of which was served more than four months from the filing of the petition while the other was served within the four months period. The court held that the first garnishment could be perfected while the other was discharged. The court made the following statement relating to the effect of garnishment.

"It is clear that under our statutes a garnishment does not create a lien, strictly so-called on the property of the principal debtor in the hands of the garnishee. The interest obtained is of an inchoate character. It does not reach the property so as to constitute an actual interest therein, though it is true that such interest has been commonly called an equitable lien. The plaintiff cannot follow the property on the strength of any legal or even equitable interest therein, from the mere fact of the service of the garnishee process, but can control the property by seasonably acting to that end and thereby put the court in possession of the *res*."<sup>264</sup>

The court then construed the meaning of the word lien in the Bankruptcy Act and reached the conclusion that the incidents attached to the interest acquired by the service of the garnishment summons elevated the same to the status of a lien within the purview of this statute. This, according to the court, was done even in the case of a mere indebtedness, where, according to the court, the authorities were "quite uniform that nothing in the nature of a specific lien is obtained."<sup>265</sup>

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<sup>262</sup>As precedents for the power to restrain an insolvent garnishee from disposing of the property, the court cited *Almy v. Platt*, (1862) 16 Wis. 169; *Malley v. Altman*, (1861) 14 Wis. 22. To the same effect *Johann v. Rufener*, (1873) 32 Wis. 195.

<sup>263</sup>(1901) 109 Wis. 648, 85 N. W. 417.

<sup>264</sup>*Bank of Commerce v. Elliott*, (1901) 109 Wis. 648, 658, 85 N. W. 417.

<sup>265</sup>*Bank of Commerce v. Elliott*, (1901) 109 Wis. 648, 661, 85 N. W. 417.

It may also be pointed out that the supreme court has held that the statutory proceedings supplementary to executions, which took the place of and incorporated the old creditors' bills in aid of execution<sup>266</sup> created a lien which if more than four months old was protected by the Bankruptcy Act.<sup>267</sup> This is significant in the light of a decision<sup>268</sup> in which the court made an elaborate comparison between supplementary proceedings and garnishment. While the court admitted that supplementary proceedings were more comprehensive and far reaching than a proceeding by garnishment, the court pointed out that both proceedings had the effect of the old creditors' bill:

"Garnishee process under our statute is only the equivalent of an equitable attachment and creates a lien in like manner as by filing a bill, and is in every essential element, so far as it extends, a creditors' bill; and a creditors' bill is an equitable levy."<sup>269</sup>

The court has also recognized that the "quasi-garnishment" of salaries of public officers creates a lien and may, under appropriate circumstances, be recognized in bankruptcy.<sup>270</sup>

## 5. NORTH DAKOTA

The Territory of Dakota was established in 1861, on an area which had originally been acquired by the Louisiana Purchase. In the first legislative session a Code of Civil Procedure was passed which remained in force until 1868. It was a copy of the Ohio code of civil procedure, enacted in 1853, and it provided like that code for garnishment in attachment proceedings, where the property "cannot be come at" by the officer.<sup>271</sup> A justice's code adopted in the same session contained similar provisions in its chapter on attachment<sup>272</sup> which were copied from the attachment provisions of the Ohio Justice's Code, likewise passed in 1853.<sup>273</sup> In 1863

<sup>266</sup>Originally supplementary proceedings were narrower in scope than creditors bills and the court held that supplementary proceedings superseded that later remedy. *Graham v. LaCrosse & M. Ry. Co.*, (1860) 10 Wis. 459. But the legislature immediately passed a statute expanding the scope of supplementary proceedings so as to be co-extensive in scope. *Wis. Stats.*, 1860, ch. 303, p. 291; cf. *Gates v. Boomer*, (1863) 17 Wis. 455.

<sup>267</sup>*Alexander v. Wald*, (1939) 231 Wis. 550, 286 N. W. 6.

<sup>268</sup>*Bragg v. Gaynor*, (1893) 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

<sup>269</sup>*Bragg v. Gaynor*, (1893) 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

<sup>270</sup>*Jefferson Transfer Co. v. Hull*, (1918) 166 Wis. 438, 166 N. E. 1; *Chadel v. Forest County*, (1931) 206 Wis. 85, 238 N. W. 850.

<sup>271</sup>*Dakota Territory Laws* (1862) ch. 8, secs. 197 ff., 211 ff.

<sup>272</sup>Compare with these provisions 51 *Ohio Acts* (1852) 57, 86. 1 *Dakota Territory Laws* (1862) ch. 49, sec. 23 ff.

<sup>273</sup>51 *Ohio Acts* (1852) 179, secs. 3 ff.

a new Justice's Code was passed. While it provided for garnishment on execution and referred to garnishees in the article on attachment, no provisions were made how garnishment was to be executed.<sup>274</sup> The reason is that the chapters were a copy from the Minnesota justice's code and that Minnesota possessed a separate statute on garnishment, applicable to justices' courts, which was not adopted by Dakota. But in 1866<sup>275</sup> this omission was remedied and garnishment provisions were inserted. The provisions were taken from the old Dakota justice's code of 1862. In 1868 a new Code of Civil Procedure was adopted which was a copy of the New York (amended) Code of 1849. As the New York Code, the Dakota copy did not mention garnishment, but contained the incorporating reference to the law of attachment against absent debtors.<sup>276</sup> Choses in action could be attached by notice to the debtor.<sup>277</sup> The Revision of 1877 made no great changes in this respect, but it deleted the reference to attachment against absent debtors.<sup>278</sup> The Revision also repealed all garnishment sections in the Justice's Code,<sup>279</sup> so that from then on Dakota did not possess garnishment proceedings until 1895.<sup>280</sup>

North Dakota gained statehood in 1889. The codes were revised, but the revision was not finished until 1895. In that year a garnishment statute was passed and incorporated into the code;<sup>281</sup> it was obviously a copy of the Wisconsin law of 1878.<sup>282</sup> In the attachment proceedings the methods provided by the territorial law for the attachment of property in the hands of third persons and of "demands" were retained.<sup>283</sup> Garnishment in justice's courts was re-established in 1897.<sup>284</sup> The revisions of 1899 and 1905 have made no change in the law in this respect.<sup>285</sup>

<sup>274</sup>Dakota Territory Laws (1862-1863) ch. 34, sec. 92, 116.

<sup>275</sup>Dakota Territory Laws (1865-1866) 377, 416, secs. 177 ff.

<sup>276</sup>Dakota Territory Laws (1867-1868), Code of Civil Procedure, ch. 1, sec. 28 ff., p. 677 ff. Cf. supra text to notes 78, 245, 246.

<sup>277</sup>Dakota Territory, Code of Civil Procedure (1868) 188.

<sup>278</sup>Dakota Territory Rev. Codes 1877 (2d ed. 1880) Code of Civil Procedure, ch. 11, secs. 197 ff., particularly sec. 202, p. 510 ff.

<sup>279</sup>Dakota Territory Rev. Codes 1877 (2d ed. 1880) Justices Code, ch. 1, sec. 28 ff., p. 677 ff.

<sup>280</sup>The North Dakota Supreme Court has said that Dakota did not at all possess garnishment proceedings before 1895; this is obviously erroneous. *Park Grant & Morris v. Nordale*, (1918) 41 N. D. 351, 170 N. W. 555; *Jangula v. Bobb*, (1927) 55 N. D. 279, 213 N. W. 27.

<sup>281</sup>North Dakota Rev. Codes (1895) secs. 5382 ff.

<sup>282</sup>The court has been hesitant to admit this in *Park Grant & Morris v. Nordale*, (1918) 41 N. D. 351, 170 N. W. 555.

<sup>283</sup>North Dakota Rev. Codes (1895) sec. 5362 (4).

<sup>284</sup>North Dakota, Laws, 1897 ch. 82, p. 125.

<sup>285</sup>See North Dakota Rev. Codes (1899) sec. 5382 ff., sec. 5362; North

While no decision on the effect of garnishment, during the territorial days, is reported, the Supreme Court of North Dakota has had several occasions to pronounce its views on the nature and effect of garnishment. It has in one instance announced that garnishment creates no specific lien. The first decision to this effect seems to be the case of *Sargent County v. State of North Dakota*.<sup>286</sup> A county had deposited funds with the state operated Bank of North Dakota. This bank held accounts in other banks. The county sued the Bank of North Dakota and garnished its deposits with the other banks. The court permitted the garnishment for the reason that it was entirely different from attachment and did not create a specific lien. Therefore, according to the court, no state funds were "impaired." On rehearing, a statutory exemption of banking associations from attachment was likewise held to be inapplicable, as garnishment was not an attachment suit against the banks within the terms of the statute. Undoubtedly the reasoning of the majority is very poor in many points,<sup>287</sup> but it is not our purpose to deal with these points.

However, in other cases the Supreme Court has used quite different language which tends to the result that garnishment creates at least an equitable or inchoate lien. In *Mahon and Robinson v. Fansett*<sup>288</sup> the court stated plainly: "A lien is created on the debtor's property in the hands of the garnishee when the summons is served upon the garnishee, upon all property in the garnishee's hands at that time, providing it is subject to such lien at all." Therefore such "acquired lien" could not be divested by later acts of the debtor. In *Burcell v. Goldstein*<sup>289</sup> the effect of bankruptcy proceedings on garnishment of exempt funds came before the court. It was held that failure to claim exemption in the garnishment proceeding left the lien intact and that it was not affected by bankruptcy as there the property had been set aside properly. The court emphasized that garnishment was in the nature of an equitable attachment creating a lien for the creditor and affirmed the judgment rendered for the purpose of enforcing

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Dakota Codes (1905) sec. 6968 ff., sec. 6948 (4); 2 North Dakota Compiled Laws (1913) secs. 7547 (4), 7567 ff., 9063.

<sup>286</sup>(1921) 47 N. D. 561, 182 N. W. 270, reh'g den. (1921) 47 N. D. 270, 182 N. W. 287.

<sup>287</sup>For instance it is not clear whether or not the true ground for the result reached was that the funds of the Bank as such were not state funds in so far as they derived from private deposits and that garnishment of the Bank's deposits with other institutions was permitted, because it was not an attachment of the latter's assets.

<sup>288</sup>(1908) 17 N. D. 104, 115 N. W. 79.

<sup>289</sup>(1912) 23 N. D. 257, 136 N. W. 243.

the "undoubted lien upon the moneys garnished." Also in later cases the Supreme Court of North Dakota has made it clear that it considered the effect of a garnishment summons as the creation of a lien on the assets of the debtor.<sup>290</sup>

In the most recent case on the point<sup>291</sup> the court evidently tried to take an intermediate stand between its two positions. The question was whether a garnishment was released by the death of the defendant before judgment. The court answered in the affirmative. It pointed out that the North Dakota law had made attachment and garnishment two separate and distinct remedies and that their effect was different. "Whatever interest in the property is created by the initiation of garnishment proceedings, it is clear that in this state they are not identical with attachment. . . . While garnishment proceedings are in the nature of an equitable attachment, they are not in fact attachment proceedings. Under our statute there is a complete lien—not merely an equitable lien—upon attached property immediately upon levy." As death prevented the completion of a lien, the equitable lien could not "ripen into a lien."

Thus the present position of the court seems to be that the service of the garnishment summons creates an equitable lien. The judgment is not a step in the enforcement but in the perfection of the lien.

## 6. SOUTH DAKOTA

South Dakota gained statehood in 1889. At that time the Dakota law had no provisions for garnishment either in courts of record or justice's courts. In 1893 South Dakota provided for garnishment in Justice Courts.<sup>292</sup> The Revised Codes did not alter the situation and the Code of Civil Procedure provided merely for the attachment of debts by notice on the debtor of such debt.<sup>293</sup> Only in 1909 a statute was passed that provided for garnishment in any court in South Dakota, following quite clearly the Wisconsin-North Dakota Act.<sup>294</sup> The statute with certain amendments and change in language constitutes the present law.<sup>295</sup>

<sup>290</sup>Atwood v. Roan, (1914) 26 N. D. 622, 145 N. W. 587, 51 L. R. A. (N.S.) 597; Hatcher v. Plumley, (1917) 38 N. D. 147, 164 N. W. 698; Retterath v. Smith, (1930) 60 N. D. 83, 91, 232 N. W. 606, 609.

<sup>291</sup>First National Bank v. Rohlik, (1935) 66 N. D. 72, 262 N. W. 458.

<sup>292</sup>South Dakota Laws 1893, ch. 96, 162.

<sup>293</sup>South Dakota Rev. Codes (1903), Code of Civil Procedure, sec. 216, Justices' Code sec. 31 ff.

<sup>294</sup>South Dakota, Laws 1909, ch. 156, p. 230.

<sup>295</sup>1 South Dakota Revised Code (1919), sections 2453 ff., 2 South Dakota, Code (1939) ch. 37.28.

The Supreme Court of South Dakota recognized very early that the purpose of garnishment is the attachment of the debtor's assets in the hands of a third person.<sup>296</sup> It has said that garnishment proceedings are analogous to those in attachment and quoted with approval and at great length from the Wisconsin case of *Bragg v. Gaynor* (mentioned before) that garnishment creates a lien.<sup>297</sup> In *Frederick v. Nuzum*<sup>298</sup> the court held that a creditor who had commenced garnishment proceedings in aid of execution was entitled to attack the assignment of a note and mortgage as fraudulent. The court pointed out that a levy upon a debt was a levy upon property not capable of manual delivery and the effect of the levy was generally the same whether the procedure be by attachment, garnishment or under an execution. The lien acquired by this kind of notice to the third party, while not being a clear and full lien, was such a lien as gives the right to hold garnishee personally liable for the assets in his possession.<sup>299</sup> In *Anderson v. Billingsly*<sup>300</sup> it was held that a garnishment lien was dissolved, if a petition in bankruptcy was filed, even if the money was exempt. The court, however, conceded only for the purposes of that case that a lien was obtained; yet in later cases the court has spoken without qualification of the "lien of the garnishment"<sup>301</sup> and also taken the view that the property is placed in custodia legis from the date of the service of the writ.<sup>302</sup> Thus there seems to be little doubt that the service of the garnishment summons in South Dakota creates a lien, although in some respects it may not amount to a "full and clear" lien.

### C. THE LAW OF MINNESOTA

The Territory of Minnesota was organized in 1849. It comprised those areas of the Territories of Iowa and Wisconsin which

<sup>296</sup>*Black Hills T. and T. Co. v. Mitchell*, (1899) 11 S. D. 615, 79 N. W. 999.

<sup>297</sup>*State v. Circuit Ct. of Gregory County*, (1913) 32 S. D. 573, 143 N. W. 892.

<sup>298</sup>(1916) 38 S. D. 72, 160 N. W. 65.

<sup>299</sup>The court did not make it clear whether garnishment of a chose of action by a judgment creditor and a levy upon the same under an execution are identical proceedings. About a straight execution levy on a chose in action, cf. *Black Hills Brewing Co. v. Middle West Fire Ins. Co.*, (1915) 35 S. D. 130, 151 N. W. 44.

<sup>300</sup>(1922) 46 S. D. 17, 189 N. W. 986. Liens obtained by supplementary proceedings within four months from the bankruptcy are likewise avoided. *Gardiner v. Ross*, (1905) 19 S. D. 497, 104 N. W. 220.

<sup>301</sup>*McConnell v. Babcock*, (1926) 49 S. D. 616, 618, 208 N. W. 160, aff'd on reh'g (1928) 53 S. D. 46, 219 N. W. 953; *Bank of Centerville v. Gelhaus*, (1932) 60 S. D. 31, 242 N. W. 642, 83 A. L. R. 1380.

<sup>302</sup>*Bowman v. Larsen*, (1928) 53 S. D. 246, 220 N. W. 489; *Farm Elevator v. Kapaun*, (1941) 67 S. D. 631, 638, 297 N. W. 678.



had not been included in the two states when they were admitted to the Union in 1846 and 1848.<sup>303</sup> According to the organic act, the law of the Territory of Wisconsin governed.<sup>304</sup> But Judge David Cooper, one of the three members of the new territorial Supreme Court called it, in his first official act, a charge to the grand jury, "a mess of incongruous imperfection."<sup>305</sup> Thus the law-making machine started operating at once and the first legislative session of 1849 passed a number of laws superseding those of the Territory of Wisconsin.<sup>306</sup>

With respect to attachment and garnishment in courts of record, Wisconsin's "act concerning the writ of attachment" of 1839 as amended in 1842 remained in force.<sup>307</sup> We have pointed out that this act was a copy of a Michigan act of 1827<sup>308</sup> which in turn had been taken verbatim from an Ohio statute of 1824. We also have mentioned that this Ohio act was an improvement of a series of Ohio acts which go back to an act of 1802 for the Northwest Territory and that the latter act was an improvement of the New Jersey Act of 1798.<sup>309</sup> In addition new attachment and garnishment provisions were made in the Justice's Code<sup>310</sup> which was enacted in the first legislative session. This Code contained attachment provisions in article 11 and garnishment provisions in article 12. It was a curious mixture of borrowed statutes. Article 12 regulating proceedings against garnishees was a verbatim copy of the Michigan act passed in the same year.<sup>311</sup> The attachment chapter starts with a combination of the New York and the Wisconsin-Iowa chapters regulating attachments before justices of the peace.<sup>312</sup> Added was a verbatim copy of the garnishment provisions of the Ohio Act of 1824 regulating writs of attachment before justices of the peace as amended in 1839.<sup>313</sup> Who was respon-

<sup>303</sup>Cf. *supra*, pp. 36 and 39.

<sup>304</sup>Act to establish the Territorial Government of Minnesota, section 12.

<sup>305</sup>1 Stevens, *History of the Bench and Bar of Minnesota* (1904), Judge Cooper's Celebrated Charge to the Grand Jury, 29.

<sup>306</sup>1 Minn. Territory, Laws 1849, 152, 155.

<sup>307</sup>On the first legislative session, see 1 Folwell, *A History of Minnesota*. (1921) 253, 256.

<sup>308</sup>Cf. *supra* text to notes 192, 240.

<sup>309</sup>Cf. *supra* text to notes 155, 156.

<sup>310</sup>1 Minn. Territory, Laws 1849, 10 ff.

<sup>311</sup>Cf. 1 Minn. Territory, Laws 1849, ch. 6, art. 12 with Michigan Acts, 1849, 153.

<sup>312</sup>Cf. 1 Minn. Territory, Laws 1849, ch. 6, art. 11, secs. 1-12 with Wis. Territory, Stat. 1838, and Act concerning justices of the peace, art. 11, secs. 8-12, p. 344 and New York Rev. Stat. (3rd ed. 1842), Part III, ch. 2, art. 2, secs. 31, 32, 33.

<sup>313</sup>Cf. 1 Minn. Territory, Laws 1849, ch. 6, art. 11, secs. 13-18 with Ohio, Stats. 1840-1841, ch. 9 secs. 12-26.

sible for the draftsmanship could not be learned from a study of the original bills in the Minnesota Historical Society. In 1851 the first Revised Statutes were passed.<sup>314</sup> The legislature adopted the (amended) New York Code of Civil Procedure of 1849 with some amendments. However, the chapter on attachment was not incorporated as passed by the New York legislature, but the Minnesota lawgivers rather inserted the provisions in an amended form as they had been proposed by the New York Commissioners in 1850.<sup>315</sup> The New York Code of 1849 contained a reference to the existing law of foreign attachment and thereby to garnishment, as we have mentioned before.<sup>316</sup> The New York Commissioners made a recommendation to delete it<sup>317</sup> and the Minnesota legislature followed it.<sup>318</sup> In addition to the chapter on civil actions, a new Justice's Code was passed. It was a copy of the Wisconsin Justice's Code of 1849.<sup>319</sup> However, in the section on attachment the garnishment provisions contained in the Wisconsin code were likewise omitted. Instead a general statute regulating proceedings against garnishees in all courts was inserted,<sup>320</sup> which was a slightly amended copy of the Michigan statute of 1849 which had been incorporated in the Minnesota Justice's Code of 1849.<sup>321</sup>

In 1858 Minnesota gained statehood. In 1860 following a scorching comment on the old act by Justice Flandrau<sup>322</sup> a new garnishment statute was passed.<sup>323</sup> This statute was practically a new act. The former statute served as a model only in a very remote fashion. Apparently also none of the garnishment laws of the sister states was directly copied. At least search has not disclosed such statute. Of course, some of the new provisions can be found with similar wording in other garnishment statutes, especially in those of Massachusetts. This is true also in regard to the important section which declares that the service of the summons attaches and binds the property in the hands of the

<sup>314</sup>Minn. Territory, Rev. Stat. (1851), ch. 70.

<sup>315</sup>Cf. Minn. Territory, Rev. Stat. (1851), ch. 70, sec. 134 ff., with New York, Code of Civil Procedure, (Reported Complete by the Commissioners on Practice and Pleading 1850) secs. 723 ff.

<sup>316</sup>Cf. *supra* text to note 78; see also text to notes 245, 246, 276.

<sup>317</sup>New York, report of Commissioners, of the Code of Civil Procedure, note to sec. 729.

<sup>318</sup>Minn. Territory, Rev. Stat. (1851) ch. 70, sec. 140, p. 346.

<sup>319</sup>Cf. Minn. Territory, Rev. Stat. (1851) ch. 69, art. IV with Wis., Rev. Stat. (1849) ch. 88, p. 442.

<sup>320</sup>Minn. Territory, Rev. Stat., (1851) ch. 91, p. 451.

<sup>321</sup>See *supra* text to note 311.

<sup>322</sup>*Chase v. North and Carl*, (1860) 4 Minn. (Gil. 288) 381.

<sup>323</sup>Minn. Stat., 1860, ch. 70, p. 244.

garnishee to respond to final judgment.<sup>324</sup> But generally speaking, it seems to be an original act. From whose pen it came could not be ascertained. The original bill in long hand, kept in the archives of the Minnesota Historical Society, gave no answer. General Sanborn<sup>325</sup> was then the chairman of the judiciary committee of the house. But nothing indicates that he actually drew the act.

The statute of 1860 became, with slight amendments, part of the Revised Statutes of 1866.<sup>326</sup> From there it went into the compilations of 1878 and 1894<sup>327</sup> and finally into the Revised Statutes of 1905.<sup>328</sup> In the new Revision of 1941, the statute is incorporated with the later amendments as chapter 571.<sup>329</sup>

The statutory language in Minnesota can be considered as indicative of the view of the framers that the service of the garnishment summons constitutes an attachment. Section 571.04 declares expressly that the service of the summons upon the garnishee shall attach and bind all the property and money in his hands and all indebtedness owing by him to the defendant.<sup>330</sup> We have just called attention to the fact that this language is substantially copied from the law of Massachusetts; in the latter jurisdiction, however, there is no doubt that the service of the trustee process creates a lien.<sup>331</sup> We may also call attention to the wording of section 531.54 which provides that in the case of a summons by publication the execution shall be enforced only "against property seized or *attached* by virtue of attachment or garnishee process issued in the action,"<sup>332</sup> and to section 571.06 which lists the assets which "may be *attached* by garnishment."

The Minnesota Supreme Court has had several occasions to consider the effect of the service of the garnishment summons.

<sup>324</sup>Minn., Stats., 1860, ch. 70, sec. 4, now Minn. Stat. 1941, sec. 571.04; Mason's 1927 Minn. Stat. sec. 9359. A similarly phrased provision was contained in the Massachusetts statute of 1795, ch. 64, sec. 1. 2 Perpetual Laws of the Commonwealth (1799) 287 and came from there into the Massachusetts, Rev. Stats., (1836) ch. 109, sec. 4; Maine Rev. Stats. (1857) ch. 86, sec. 4, and Vermont, Compiled Stats. (1851) ch. 32, sec. 2.

<sup>325</sup>About General Sanborn, see 1 Stevens, History of the Bench and Bar of Minnesota (1904) 203.

<sup>326</sup>Minn. General Stats. (1866) ch. 66, title 10, sec. 147 ff.

<sup>327</sup>Minn. General Stats. (1878) ch. 66, title 10, sec. 164 ff., 2 Minn., Gen. Stats. (1894) ch. 66, title 10, sec. 5306 ff.

<sup>328</sup>Minn., Rev. Laws (1905) ch. 77, sec. 4229 ff.

<sup>329</sup>2 Minn. Stat. 1941, ch. 571; Mason's 1927 Minn. Stat., secs. 9356-9384.

<sup>330</sup>2 Minn. Stat. 1941, sec. 571.04; Mason's 1927 Minn. Stat., sec. 9359.

<sup>331</sup>See supra p. 17 ff.

<sup>332</sup>2 Minn. Stat. 1941, sec. 531.54; Mason's 1927 Minn. Stat., sec. 9056.

In the early case of *Banning v. Sibley*,<sup>333</sup> in which the court held that a fraudulent conveyance could be attacked by garnishment as well as by attachment, Judge Atwater quoted with approval the statement by Drake: "Garnishment is an effectual attachment of the effects of the defendant in the garnishee's hands, differing in no essential respect from attachment by levy, except as it said, that 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." He added that garnishment was "in effect but another form of attachment, and intended to reach a class of cases in which the ordinary writ is of no avail." The same judge emphasized also in a later case<sup>334</sup> that garnishment was "differing but little in its effect from a writ of attachment."

Then came the important and frequently misunderstood case of *Langdon v. Thompson*.<sup>335</sup> It involved an action in trespass against a sheriff for wrongful taking of goods. The property originally belonged to one Gaines and was in the possession of one Banker. Gaines was sued by a creditor of his and Banker was garnished. Despite the garnishment, Banker turned the property back to Gaines who conveyed it to the present plaintiff. A judgment against the principal defendant was thereafter recovered, but no order against the garnishee entered. A writ of execution was sued out and the sheriff levied on the property transferred to plaintiff. The court held for plaintiff. As no order against the garnishee had been entered, the status of the property "which was attached by the service of the garnishment summons" was not fixed; until such entry no right to seize the property existed "by virtue of any prior lien, inchoate or otherwise, created thereon under the garnishee proceedings." Certainly this case did not hold that garnishment creates no lien. It decided simply that before entry of an order against the garnishee no levy could be made under the garnishment.

In *Idc v. Harwood*<sup>336</sup> the Supreme Court pointed out that attachment on mesne process, execution levy and garnishment of debts were carried into effect by proceedings precisely in accordance with one another and that the "garnishee lien" was an attachment of the debt.

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<sup>333</sup>(1859) 3 Minn. (Gil. 282) 389, 403.

<sup>334</sup>*Prince v. Heenan*, (1861) 5 Minn. (Gil. 279) 347, 350.

<sup>335</sup>(1879) 25 Minn. 509.

<sup>336</sup>(1883) 30 Minn. 191, 196, 14 N. W. 884.

The two cases of *North Star Boot and Shoe Co. v. Ladd*<sup>337</sup> and *Coykendall v. Ladd*<sup>338</sup> followed. In the first case the court held that a creditor who had garnished an insurance company owing insurance money to the debtor for goods destroyed by fire could attack as fraudulent a chattel mortgage executed on perished goods when the chattel mortgage claimed the same money in the garnishment proceedings. The court reasoned that the garnishment of the insurance claim, although not technically conferring a specific lien, created such specific right as to be substantially analogous to that effectuated by an attachment. In the second decision the court receded somewhat from its bold position and held that the garnishing creditor could base his attack only on actual fraud and not on merely constructive fraud due to lack of filing. For the latter attack actual seizure of the property was required. While the Wisconsin Supreme Court<sup>339</sup> once commented on these two decisions that "it remains to be seen, how the cases are distinguished or reconciled," the Minnesota court never had occasion to do so. In *Security State Bank v. Brecht*<sup>340</sup> the court cited both cases as precedent for the proposition that garnishment of a debt created an inchoate lien on the debt authorizing the garnishing creditor to question the validity of a previous transfer of a note for the same debt to another party.

In *Irvin v. McKechnie*<sup>341</sup>, permitting garnishment of a federal receiver, the court emphasized that garnishment of a debt did not create a specific lien on any property of the garnishee, but it was not denied that an interest could be acquired by garnishment on assets of the debtor.

The case of *Cavanaugh v. Fenly*<sup>342</sup> confronted the court for the first time with the problem of garnishment and bankruptcy. Plaintiff started suit against a non-resident defendant by garnishment and publication. Within four months from the beginning of the suit, defendant filed a petition in bankruptcy in Iowa and claimed the garnished property as exempt. No trustee was appointed. Plaintiff obtained a default judgment before defendant's discharge. After the discharge, the defendant moved to discharge the garnishment and to stay permanently the execution under the

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<sup>337</sup>(1884) 32 Minn. 381, 20 N. W. 334.

<sup>338</sup>(1884) 32 Minn. 529, 21 N. W. 733.

<sup>339</sup>*Manson v. Phoenix Ins. Co.*, (1885) 64 Wis. 26, 29, 24 N. W. 407

<sup>340</sup>(1921) 150 Minn. 502, 185 N. W. 1021.

<sup>341</sup>(1894) 58 Minn. 145, 59 N. W. 987. Nevertheless the decision is somewhat questionable, because the general rule is that a receiver, especially a federal one, cannot be hampered by garnishments.

<sup>342</sup>(1905) 94 Minn. 505, 103 N. W. 711.

judgment. The court held that the adjudication had rendered the garnishment proceedings void under section 67f of the Bankruptcy Act, and that the default judgment was therefore likewise without force. No discussion was made of whether garnishment created a lien within the meaning of the Bankruptcy Act.

In *Pitzl v. Winter*<sup>343</sup> the court stated for the first time squarely that garnishment created no more than an inchoate lien, citing—not quite correctly—*Langdon v. Thompson*. No consequence was drawn from this pronouncement. The decision was cited in the case of *Marsh v. Wilson Bros.*,<sup>344</sup> in which a trustee in bankruptcy of one Grossman sued for the recovery of a preference on the following facts: The defendant had sued the bankrupt more than four months from the filing of the bankruptcy petition and garnished one Galbraith who held property of Grossman under a deed which was invalid as against his creditors. Thereafter Galbraith had disclosed an indebtedness of \$3,000. Judgment had been recovered against the bankrupt and an execution levied under the same on the disclosed indebtedness. Thereupon the bankruptcy petition was filed. The court held that the trustee in bankruptcy prevailed. It pointed out that the inchoate garnishment lien was never perfected by entering an order against the garnishee. Hence by suing out an execution and levying on the debt the rights under the garnishment were abandoned and the lien under the execution could not be tacked onto the inchoate garnishment lien. Consequently, the money obtained under the execution was a preference acquired within four months and could be recovered by the trustee.

Any fairly attentive reading of the decision shows that the court was far from holding that a garnishment commenced more than four months before the filing of the petition in bankruptcy could not be completed or did not create a lien within the meaning of section 67 of the Bankruptcy Act. All it held was that a failure to complete the garnishment proceedings and to complete the lien had the effect that the inchoate lien was of no avail for the purpose of taking a satisfaction, obtained under a regular execution within four months from the filing of the petition, out of the avoidance of preferences during this period. This analysis is fully borne out by the case of *National Surety Co. v. Hurley*.<sup>345</sup> There a trustee in bankruptcy intervened in a garnishment proceeding which had been begun more than one year before the

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<sup>343</sup>(1905) 96 Minn. 499, 105 N. W. 673.

<sup>344</sup>(1914) 124 Minn. 254, 144 N. W. 959.

<sup>345</sup>(1915) 130 Minn. 392, 153 N. W. 740, L. R. A. 1918 F 440.

filing of the petition in bankruptcy. The court affirmed a judgment in favor of plaintiff for the reason that "plaintiff's lien attached when the garnishee summons was served." Certainly, if the "inchoate lien" could never be perfected because of the discharge in bankruptcy or for any other reason flowing from the Bankruptcy Act, the court could not have reached this result.

The most recent pronouncement by the Minnesota Supreme Court on the nature of garnishment is apparently contained in the case of *Watson v. Goldstein*.<sup>346</sup> The case involved the question whether a creditor who had garnished a note, secured by a mortgage, that was held by a bank as collateral was protected by the recording act against a previous transfer of the note. In holding that the recording act did not furnish such protection, as no attachment levied on real estate was involved, the court stated that garnishment was not an attachment within this statute and added: "True, it is in the nature of an attachment, but in garnishment proceedings the plaintiff never gets more than an inchoate lien, which may be protected by proceeding to judgment. It may get a definite right. It is not a levy in the usual sense. It differs from an attachment in that usually there is no actual seizure of the property and no specific lien is acquired thereon. It is the judicial warning to the garnishee not to pay or restore property to defendant, and if he does he may subject himself to judgment." For an evaluation of the significance of this pronouncement attention may be called to the fact that the court expressly pointed out that "in this case an attachment would have accomplished no more than the garnishment." Thus the differentiation between garnishment and attachment made by the court was unnecessary and the whole statement is consequently in the first place no more than a dictum. Furthermore the difference made between a specific and an inchoate lien is rather dubious. The term inchoate lien would seem to imply that at least at some step in the proceedings the lien will be perfected and specific. The true meaning of the dictum is therefore somewhat obscure.

It is certainly not easy to reconcile all the statements made by the Supreme Court. Yet, while the garnishment lien might be in some respects different from an attachment lien, above all because it is non-possessory, it seems to be safe to say that in the light of the cases in Minnesota the service of the garnishment creates such an interest in the debtor's property or the indebted-

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<sup>346</sup>(1928) 176 Minn. 18, 222 N. W. 509, quoted in *National Automatic Tool Co. v. Goldie*, (D.C. Minn. 1939) 27 F. Sup. 399.

ness as can be properly designated with the term lien,<sup>346a</sup>—though, if one likes it, “softened” by the terms incomplete, imperfect or inchoate. Incidentally, it may be mentioned that according to Minnesota law the institution of supplementary proceedings also creates a lien.<sup>347</sup>

#### IV. THE EFFECT OF BANKRUPTCY ON GARNISHMENT PROCEEDINGS

The foregoing chapters have shown how garnishment originally developed as a mode of attachment, how in some states it gradually separated from the latter remedy and what legal effects the courts in four eastern and seven midwestern states have attributed to the service of the garnishment summons.

Generally speaking, bankruptcy proceedings may impinge on garnishment proceedings for either or both of two reasons. On the one hand the Bankruptcy Act may contain a provision which is directly applicable to garnishment. On the other hand bankruptcy may have legal consequences which indirectly exercise an effect upon garnishment proceedings.

1. The provision which may be directly applicable to garnishment is the above quoted section 67f which provides that liens obtained by attachment or other legal or equitable proceedings within four months before the filing of the petition are void, if the bankrupt was insolvent at that time.<sup>348</sup>

2. The provisions which may indirectly affect garnishment are the discharge provisions.<sup>349</sup> For, if they should make it impossible to obtain a judgment against the bankrupt, no order against the garnishee can be obtained in states where such judgment must precede the order. As a consequence the garnishment proceedings could never be prosecuted to a successful end and would therefore lapse.

It is these two problems we have to deal with in the remaining part of this study.

<sup>346a</sup>For the court's definition of a “lien,” see *Marquette National Bank v. Mullin*, (1939) 205 Minn. 562, 571, 287 N. W. 233.

<sup>347</sup>*Northern National Bank v. McLaughlin*, (1938) 203 Minn. 253, 280 N. W. 852: “The judgment creditor acquires a lien on the debtor's property by availing himself of the statutory supplementary proceeding.”

<sup>348</sup>Cf. *supra* text to note 10.

<sup>349</sup>Bankruptcy Act, 1898 (as amended 1938) 52 Stat. at L., ch. 575, secs. 14, 15, 16, 17, 63 pp. 850, 873; U. S. C. (1940) tit. 11, secs. 32, 33, 34, 35, 103; 11 U. S. C. A. secs. 32, 33, 34, 35, 103; 3 F. C. A. tit. 11, secs. 32, 33, 34, 35, 103.



A. THE APPLICATION OF SECTION 67 OF THE  
BANKRUPTCY ACT

The applicability of section 67 of the Bankruptcy Act upon garnishment proceedings depends upon two issues. In the first place, it must be ascertained what legal effects garnishment possesses in the particular jurisdiction. In the second place, it must be determined whether these effects amount to a lien within the meaning of the Bankruptcy Act<sup>350</sup> and what consequences will flow from section 67 according to the answer found to this question. While the first of the issues depends exclusively on local law, the second is one of interpretation of a federal statute.<sup>351</sup> Thus state court decisions are of greater authority in regard to the first issue, whereas federal decisions possess greater authority to determine the second issue, although both kinds of courts usually have to decide both issues when the question of the effect of bankruptcy on garnishment comes before them.

The preceding chapters have discussed the effects which state decisions and statutes have attributed to garnishment in various jurisdictions. It is our task now to examine the significance of section 67 of the Bankruptcy Act and particularly the scope and meaning of the term "lien" used in that section, in view of its applicability to garnishment. Again some historical considerations may be helpful.

a. LEGISLATIVE ANTECEDENTS OF SECTION 67

*The Bankruptcy Act of 1800.*<sup>352</sup> This statute contained a provision to the effect that "every creditor having security for his debt by judgment . . . or having an attachment under any of the laws of the individual states, or of the United States, on the estate of such bankrupt . . . shall not be relieved upon any such judgment . . . or attachment, for more than a rateable part of his debt."<sup>353</sup> In pursuance of this clause, the federal Supreme Court held that attachments were removed by bankruptcy.<sup>354</sup> It was, however,

<sup>350</sup>Cf. supra text to notes 11 to 14.

<sup>351</sup>This distinction is clearly brought out by the excellent opinion of the supreme court of Wisconsin in *Bank of Commerce v. Elliot*, discussed supra text to note 263.

<sup>352</sup>Act of April 4, 1800, 2 Stat. at L. ch. 19, p. 19. The act was repealed on December 19, 1803.

<sup>353</sup>Act of April 4, 1800, 2 Stat. at L. ch. 19, sec. 31, p. 30.

<sup>354</sup>*Harrison v. Sterry*, (1809) 5 Cranch (U.S.) 289, 3 L. Ed. 104; cf. also *Payson v. Payson*, (1805) 1 Mass. 283; *Flagg v. Tyler*, (1806) 6 Mass. 33, 36

provided that the act should not impair any lien existing at the date thereof,<sup>355</sup> and, in so far, it was held that attachments, levied before the date when the act went into force, could be prosecuted.<sup>356</sup>

*The Bankruptcy Act of 1841.*<sup>357</sup> This act caused a great judicial controversy which was finally settled, at least in part, by the Supreme Court. The law provided "that nothing in this act contained shall be construed to annul, destroy or impair . . . any lien . . . which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act."<sup>358</sup> The controversy concerned the problem how far this so-called "saving clause" was applicable to attachments, trustee process, garnishment and creditors' bills.

The question came first before Justice Story when he sat on circuit. Of course his authority as Associate Justice of the Supreme Court and as draftsman of the Act<sup>359</sup> made his opinion particularly momentous. The case was *Ex parte Foster*.<sup>360</sup> It involved a petition for an injunction by a debtor who had filed a petition in bankruptcy but had not yet obtained a discharge to enjoin his creditors from prosecuting certain attachments made partly by levy and partly by trustee process. Justice Story dealt only with the attachments by levy. He granted an injunction against proceeding with the attachment. He pointed out that the term lien as used by the Bankruptcy Act had to be understood as meaning only a present, fixed and vested interest in the creditor, and that such interest was created neither by ordinary attachment nor by the trustee process. However, the justice emphasized<sup>361</sup> that he

<sup>355</sup>Act of April 4, 1800, 2 Stat. at L. ch. 19, sec. 63, p. 36.

<sup>356</sup>*Ingraham v. Phillips*, (1803) 1 Day (Conn.) 117; the same rule applied to judgments, *Livingston v. Livingston*, (1805) 2 Caines (N.Y.) 300.

<sup>357</sup>Act of August 19, 1841, 5 Stat. at L. ch. 9, 1440. The act was repealed on March 3, 1843.

<sup>358</sup>Act of August 19, 1841, 5 Stat. at L. ch. 9, sec. 2, p. 442.

<sup>359</sup>About Story's interest in the passage and draftsmanship of the Bankruptcy Act of 1841, see 1 *Life and Letters of Joseph Story* (ed. by Wm. Story 1851) 436; 2 *ibid* 407, and *Justice Douglas in American Surety Co. v. Bethlehem Bank*, (1941) 314 U. S. 314, 62 Sup. Ct. 226, 229 note 2, 86 L. Ed. 231.

<sup>360</sup>(C.C. Mass. 1842) Fed. Cas. No. 4960, 2 Story 131.

<sup>361</sup>2 Story 131, 157, "I do not propose to rest my present judgment upon any construction of the words, limiting them so as to exclude inchoate, conditional liens, arising not under contract, but under remedial mesne process. Assuming such liens to be within the protection of the proviso (which is an admission, which I make merely for the sake of argument, and I am by no means satisfied, that it is a correct exposition of the words or intent thereof), still there remains behind a much more grave and pressing difficulty. . . ."

did not rest the granting of the injunction upon this ground. His *ratio decidendi* was that even though an attachment might create a lien within the meaning of the Bankruptcy Act, that it must lapse nevertheless, as the discharge would prevent its completion. Therefore no steps should be taken to race to a judgment of condemnation under the attachment in the period between the petition and discharge. In the case of *In re Cook*<sup>362</sup> the matter came again before the Justice. In this case the attachment creditors had obtained a judgment before the petition was filed. Justice Story held that the judgment was not discharged by bankruptcy and that therefore the attachment had ripened into a perfected lien which could be enforced under the judgment.

Other federal judges took an opposite view. This was particularly true in Vermont. Here, Justice Thompson, sitting on circuit, and District Judge Prentiss held that an attachment constituted a lien which was protected under the savings clause even when no judgment was recovered before bankruptcy and that it could be prosecuted to a qualified judgment against the bankrupt despite a discharge. Justice Thompson denied an injunction on virtually the same facts on which his brother Story had granted the same.<sup>363</sup> Apparently he was not aware of Justice Story's opinion which had been rendered just shortly before. While Judge Prentiss in his first case on the point<sup>364</sup> was not compelled to reach a result different from Justice Story's, since a judgment had been rendered previously to the filing of the petition, he took the occasion to intimate that the recovery of the judgment was immaterial for the result. In the following two cases,<sup>365</sup> however, he decided squarely that a judgment recovered upon an attachment before the filing with consent of the bankrupt was no reason to bar his discharge because of a preference. The reason was that the preference was in reality created by the attachment which resulted in a lien within the saving clause of the Bankruptcy Act and which could be prosecuted to judgment even after a discharge.

In state courts the application of the saving clause to attachments, garnishments and creditors' bills was likewise litigated. In

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<sup>362</sup>(C.C. Mass. 1842) Fed. Cas. No. 3152, 2 Story 376.

<sup>363</sup>*Haughton v. Eustia*, (C.C. Vt. 1842) Fed. Cas. No. 6224.

<sup>364</sup>*Downer v. Brackett*, (D.C. Vt. 1842) 21 Vt. 599, Fed. Cas. No. 4043.

<sup>365</sup>In the matter of *Rowell*, (D.C. Vt. 1843) 21 Vt. 620, Fed. Cas. No. 12095; In the Matter of *Reed* (D.C. Vt. 1844) 21 Vt. 635, Fed. Cas. No. 11640.

Maine a case came before the highest state tribunal which involved an attachment by the trustee process.<sup>366</sup> But as judgment had been recovered against the defendant and the trustee before the filing of the petition, the court followed *In re Cook* and was not embarrassed by *Ex parte Foster*. It was held that a lien acquired by trustee process and prosecuted to judgment before bankruptcy could be enforced by *scire facias* in spite of the discharge. In New Hampshire, however, Chief Justice Parker wrote an elaborate opinion, politely disagreeing with Justice Story and deciding that a plea of discharge was not good in an action begun by attachment before the filing of the petition.<sup>367</sup> He held that an attachment, whether by levy or trustee process, created a lien within the savings clause and could be enforced by qualified judgment.

This case compelled Justice Story to reconsider the problem<sup>368</sup> but he firmly clung to his old views that an attachment was not a lien within the meaning of section 2 of the act and that even if it were it could not be perfected by qualified judgment. Chief Justice Parker in his turn reconsidered,<sup>369</sup> but likewise retained his former position. At this state Chief Justice Shaw of Massachusetts had to pass on the issue in several cases. In the first of them<sup>370</sup> he found a convenient distinction, as the attached property had been conveyed by the bankrupt before filing of the petition. He held that, at least, in such case the attachment was not affected by bankruptcy and could be perfected by a qualified judgment despite the discharge. While this result is hardly reconcilable with Justice Story's dictum, Chief Justice Shaw went a step further in a subsequent case<sup>371</sup> and sided clearly with his brother from New Hampshire. There he held that an attachment lien obtained before bankruptcy could be prosecuted to qualified judgment thereafter and that consequently a confession of judgment after an attachment was not preferential.

The controversy sprang over from attachments to creditors' suits. Since creditors' bills are based on judgment, the cases of *Ex parte Foster* and *In the Matter of Cook* were strictly speaking of no value as precedents. Nevertheless one federal judge held

<sup>366</sup>*Franklin Bank v. Bacheider*, (1843) 23 Me. 60, 39 Am. Dec. 601; cf. *supra* text to note 145.

<sup>367</sup>*Kittredge v. Warren*, (1844) 14 N. H. 508; cf. *supra* text to note 138.

<sup>368</sup>*In the Matter of Bellows and Peck*, (C.C. N.H. 1844) Fed. Cas. No. 1278, 3 Story 428.

<sup>369</sup>*Kittredge v. Emerson*, (1844) 15 N. H. 227.

<sup>370</sup>*Davenport v. Tilton*, (1845) 10 Metc. (Mass.) 320.

<sup>371</sup>*Ives v. Sturges*, (1847) 12 Metc. (Mass.) 462.

that "liens" obtained by creditors' suits were not liens within the meaning of the savings clause<sup>372</sup> while two other federal courts took the opposite view.<sup>373</sup> The latter position was also taken in an elaborate opinion by New York's Vice-Chancellor Sandford.<sup>374</sup>

Finally, the federal Supreme Court settled the matter in regard to attachments. In *Peck v. Jenness*<sup>375</sup> the court through Mr. Justice Grier took the position of the New Hampshire Supreme Court on all points. It was held that an attachment on mesne process might, if the state so determined, create a lien within the meaning of the saving clause and that the discharge provisions did not prevent a qualified judgment for the purpose of its enforcement.<sup>376</sup> The court gave a broad sweep to the term lien as used by the act. "It is clear, therefore, that whatever is a valid lien or security upon property, real or personal, by the laws of any State, is exempted by the express language of the act. . . . It will be unnecessary to notice arguments which have been urged against them on the ground of their peculiarities or distinctive features. The mere accidents of the subject cannot alter its essence. . . ."

*The Bankruptcy Act of 1867.*<sup>377</sup> This statute preserved, by explicit provision liens on the property of the bankrupt "for securing the payment of a debt"<sup>378</sup> but also contained another clause whereby attachment on mesne process of real and personal property was dissolved by the assignment in bankruptcy if made within four months next preceding the commencement of the bankruptcy proceedings.<sup>379</sup>

The federal Supreme Court settled it very early under this statute that ordinary attachments levied more than four months

<sup>372</sup>Ex parte Waddell, In the Matter of Coster, (D.C. N.Y. 1842) Fed. Cas. No. 17027.

<sup>373</sup>Ex parte General Assignee. In the Matter of Allen (D.C. N.Y. 1842) Fed. Cas. No. 5305; Clarke v. Rist, (C.C. Ohio 1844) Fed. Cas. No. 2861, 3 McLean 494.

<sup>374</sup>Storm v. Waddell, (1845) 2 Sandf. Ch. (N.Y.) 494.

<sup>375</sup>(1849) 7 How. (U.S.) 612, 12 L. Ed. 841.

<sup>376</sup>However, if the attachment creditor knew of an act of bankruptcy, the lien was void as preferential, *Shawhan v. Wherritt*, (1849) 7 How. (U.S.) 627, 12 L. Ed. 847; In the Matter of Howes, (D.C. Vt. 1843) Fed. Cas. No. 6788, 21 Vt. 619.

<sup>377</sup>Act of March 2, 1867, 14 Stat. at L., ch. 176, p. 517, U. S. Rev. Stat. 1878, sec. 5075.

<sup>378</sup>Act of March 2, 1867, 14 Stat. at L., ch. 176, sec. 20, p. 526. Judgment creditors were held to acquire a lien under this section by serving the summons in a creditors' bill. *Stewart v. Isidor*, (N.Y. Comm. Pleas 1868) 5 Abb. Prac. (N.S.) 68, 1 Nat. Bankr. Regis. 485 (holding that proof in bankruptcy constitutes a waiver); *Johnson v. Rogers*, (D.C. N.Y. 1876) Fed. Cas. No. 7408, 15 Nat. Bankr. Regis. 1. Execution levies were likewise protected under this section. *Wilson v. City Bank*, (1873) 17 Wall. (U.S.) 473, 21 L. Ed. 723.

<sup>379</sup>Act of March 2, 1867, 14 Stat. at L., ch. 176, sec. 14, p. 522.

before the filing of the petition could be prosecuted to a qualified judgment for the purpose of enforcing the lien or to charge sureties on a bond, if the lien was dissolved upon giving such bond.<sup>380</sup> The lower federal and the state courts seem to have entertained no doubt that garnishment and trustee process were to be treated like other attachments under this section, and that they were dissolved if the summons was served within the four months' period, while they could be prosecuted to a qualified judgment against the bankrupt and a charging order against the garnishee, if they were served prior thereto.<sup>381</sup> The greatest difficulty seems to have been created by the related but quite different question of whether a garnishment was dissolved, if both the summons was served and the judgment recovered within the four months' period,<sup>382</sup> but the same uncertainty existed in regard to attachments proper.<sup>383</sup> The reason was a disagreement on the point whether the recovery of the judgment transformed the attachment or garnishment lien from one "on mesne process" into one "on final process" which was within the protection of section 14 of the act. In this regard, of course, the nature and mechanical details of the order against the garnishee and its enforcement, as regulated by local law, played a decisive part. Garnishments on final process were held to be unimpaired even when the summons was served within the four months.<sup>384</sup>

<sup>380</sup>*Doe v. Childress*, (1874) 21 Wall. (U.S.) 642, 22 L. Ed. 549; *Wolf v. Stix*, (1878) 99 U. S. 1, 25 L. Ed. 309; *Hill v. Harding*, (1889) 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083.

<sup>381</sup>*Howe v. Union Insurance Co.*, (1872) 42 Cal. 528, Fed. Cas. No. 6776; *Hatch v. Seeley*, (1873) 37 Iowa 493; *Storer v. Haynes*, (1877) 67 Me. 420; *Franklin v. Claffin*, (1878) 49 Md. 24; *Krupp v. Tabor*, (1875) 31 Mich. 174; *Janes v. Beach*, (1869) 1 Mich. N. P. 94; *Stoddard v. Locke*, (1871) 43 Vt. 574, 5 Am. Rep. 308; *In re Peck*, (D.C. Vt. 1877) Fed. Cas. No. 10886, 9 Ben. (U.S.) 169.

<sup>382</sup>*Howe v. Union Ins. Co.*, (1872) 42 Cal. 528, Fed. Cas. No. 6776, held that a judgment against the garnishee and issuance of an execution thereon did not create a lien on final process; conversely *Krupp v. Tabor*, (1875) 31 Mich. 174, held that a judgment against main debtor and garnishee prevented dissolution; *Storer v. Haynes*, (1877) 67 Me. 420, held that judgment against the trustee, execution and demand without levy preserved the lien.

<sup>383</sup>*Cf. Henkelman v. Smith*, (1875) 42 Md. 164 (if chattels are attached and sold as perishable within four months prior to the petition, and judgment is thereafter obtained during this period, the creditor may retain the proceeds); *Hudson v. Adams*, (D.C. Ohio 1878) Fed. Cas. No. 6832, 18 Nat. Bankr. Regis. 102 (if land is attached within four months preceding the petition, and judgment and order of sale are obtained within this period, the lien has become one "on final process"); *Tottle v. Sheldon*, (1880) 14 Nebr. 44, 4 N. W. 358 (attachment of chattels within four months before bankruptcy is dissolved, though also a judgment is recovered within this period, because the lien does not merge in a judgment lien).

<sup>384</sup>*First Nat. Bank of Baltimore v. Jagers*, (1869) 31 Md. 38, 100 Am. Dec. 53

b. THE MEANING OF SECTION 67 OF THE PRESENT  
BANKRUPTCY ACT

The Bankruptcy Act of 1898<sup>385</sup> no longer retained the distinction between procedural liens on mesne process and procedural liens on final process, and provided that either kind of procedural lien shall be void if it was obtained within four months before the filing of the petition and the debtor was insolvent at such time.<sup>386</sup> Yet it can hardly be doubted that the scope of the term lien was not intended to be narrower than under the acts of 1841 and 1867.

Therefore, while our survey of the law on garnishment in four eastern and seven midwestern states has shown that in many jurisdictions the modern garnishment procedure has gradually become independent of attachment and that frequently the courts have been reluctant to use the word lien without a qualifying phrase, it seems to be without doubt that in all these states the service of the garnishment summons creates some powers and privileges in favor of the creditor in regard to certain assets of the debtor which may be described as "lien" within the meaning of the Bankruptcy Act, as the term should be construed in the light of its legislative antecedents. There is no reason to assume that other jurisdictions should differ<sup>387</sup> particularly as in that respect, according to the Supreme Court, the essentials and not the incidents are controlling.<sup>388</sup>

1. In the state courts, in so far as could be ascertained, it has been held or intimated in all but one case (the latter being decided by a lower court and *contra* to a later case in the same jurisdiction<sup>389</sup>) that section 67 is applicable to garnishment proceedings and that ordinarily the service of the summons is the controlling moment for the running of the four months' period. Thus where the service was more than four months before the filing of the petition,

<sup>385</sup>Act of July 1, 1898, 30 Stat. at L., ch. 541.

<sup>386</sup>Act of July 1, 1898, 30 Stat. at L., ch. 541, sec. 67f, p. 565.

<sup>387</sup>The law of other states has not been studied in detail. Yet it can be said that many other states have held that garnishment creates a lien. Cf. *Stoddard v. Locke*, (1871) 43 Vt. 574, 5 Am. Rep. 308; and *Northfield Knife Co. v. Shapleigh*, (1888) 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224, where the court commented on the no-lien-doctrine announced by *Bigelow v. Andress*, (1863) 31 Ill. 322, that under such rule "garnishment would be an expensive farce." In Alabama it was provided by statute that garnishment creates a lien and the courts have fully accepted this rule. *Henry v. McNamara*, (1896) 114 Ala. 107, 22 So. 428.

<sup>388</sup>*Peck v. Jenness*, quoted *supra* text following note 375.

<sup>389</sup>*London Guarantee & Accident Co. v. Mossness*, (1903) 108 Ill. App. 440, discussed *supra* text to note 178; but *contra* *Morgan v. Int. Shoe Co.*, (1941) 310 Ill. App. 597, 35 N. E. (2d) 90.

the garnishing creditor prevailed over the trustee, whereas otherwise the garnishment lien was voidable. The decisions of Massachusetts,<sup>390</sup> Maryland,<sup>391</sup> Illinois,<sup>392</sup> Michigan,<sup>393</sup> Wisconsin,<sup>394</sup> North Dakota,<sup>395</sup> South Dakota,<sup>396</sup> to this effect have already been discussed. It has also been shown that the Supreme Court of Minnesota has taken this view.<sup>397</sup>

Without attempting to complete the list, it may be added that the Supreme Courts of Alabama,<sup>398</sup> Kansas,<sup>399</sup> and Oklahoma<sup>400</sup> have held that garnishing creditors could pursue their remedies and prevail over the trustee in bankruptcy by virtue of section 67f of the Act, if the service of the summons antedated the filing of the petition by more than four months. In Florida the Justices of the Supreme Court disagreed in an earlier case<sup>401</sup> on the question of the effect of bankruptcy on a garnishment proceeding where service had been made more than four months prior to the petition, but judgment had been entered within this period; however, in a later case<sup>402</sup> they held that the garnishing creditor prevails in such case. In a case before the Supreme Court of Arkansas defective service of a garnishment summons had been made in Tennessee more than four months before the filing of the petition, the defect was cured by appearance within the four months' period. The

<sup>390</sup>*Snyder v. Smith*, (1904) 185 Mass. 58, 69 N. E. 1089; *Zani v. Phandor Co.*, (1932) 281 Mass. 139, 183 N. E. 500.

<sup>391</sup>*Kendrick and Roberts v. Warren Bros.*, (1909) 110 Md. 47, 72 Atl. 461.

<sup>392</sup>*Morgan v. Int. Shoe Co.*, (1941) 310 Ill. App. 597, 35 N. E. (2d) 90, but cf. *London Guarantee and Accident Co. v. Mossness*, (1903) 108 Ill. App. 440.

<sup>393</sup>*Borderland Coal Sales Co. v. Wayne Circuit Judge*, (1924) 228 Mich. 198, 199 N. W. 641; *New Kensington Sanitary Pottery v. Detroit Pipe & Supply Co.*, (1932) 258 Mich. 34, 241 N. W. 901; *J. T. Sinclair Co. v. Becker Coal Co.*, (1933) 263 Mich. 617, 249 N. W. 13; cf. *supra* text to notes 211, 212; see also *Wilson v. Van Buren County Farmers Mut. Ins. Co.*, (1915) 184 Mich. 530, 151 N. W. 752, 34 Am. Bankr. Rep. 678.

<sup>394</sup>*Bank of Commerce v. Elliott*, (1901) 109 Wis. 648, 85 N. W. 417, discussed *supra* text to note 263; *Jefferson Transfer Co. v. Hull*, (1918) 166 Wis. 438, 166 N. W. 1; *Chadek v. Forest County*, (1931) 206 Wis. 85, 238 N. W. 850.

<sup>395</sup>*Burcell v. Goldstein*, (1912) 23 N. D. 257, 136 N. W. 243.

<sup>396</sup>*Anderson v. Billingsley*, (1922) 46 S. D. 17, 189 N. W. 986; 25 A. L. R. 96; cf. *supra* text to note 300.

<sup>397</sup>*National Surety Co. v. Hurley*, (1915) 130 Minn. 392, 153 N. W. 740, L. R. A. 1918F 440; cf. *supra* text to note 345.

<sup>398</sup>*Bloch Bros. v. Moore*, (Ala. 1905) 39 So. 1025; cf. also *Standard Sanitary Manufacturing Co. v. Benson*, (1934) 228 Ala. 594, 154 So. 560.

<sup>399</sup>*Simmons v. Vawter*, (1925) 118 Kans. 637, 237 Pac. 71.

<sup>400</sup>*Weinstein v. Griggs*, (1935) 174 Okla. 481, 50 P. (2d) 638.

<sup>401</sup>*Aetna Ins. Co. v. Evans*, (1909) 57 Fla. 311, 49 So. 57.

<sup>402</sup>*Florida East Coast Ry. Co. v. Consol. Engineering Co.*, (1928) 95 Fla. 99, 116 So. 19, 11 Am. Bankr. Rep. (N.S.) 647.



court held that the lien was acquired at that latter moment and was therefore voidable under section 67.<sup>403</sup> In Georgia where garnishment of debts creates a lien by virtue of a statutory provision<sup>404</sup> the courts have carefully worked out a number of details. It has been held that when a garnishment was served within four months prior to the petition it will be dissolved on the petition of the trustee<sup>405</sup> regardless of whether such service was made after the recovery of a judgment against the main defendant<sup>406</sup> or before.<sup>407</sup> Conversely, if the garnishment was served more than four months before the filing of the petition<sup>408</sup> or within this period in regard to exempt property pursuant to a waiver,<sup>409</sup> the remedy can be pursued to special judgment regardless of whether the debt is dischargeable<sup>410</sup> or not.<sup>411</sup> Cases where garnishment has been set aside under section 67 of the Bankruptcy Act because the service was made within four months can be found in many states.<sup>412</sup>

2. In the federal courts at first some difficulties arose. The statute read originally, before its amendment in 1938, "that all levies, judgments, attachments or other liens, obtained . . . within four months prior to the filing of a petition . . . shall be deemed null and void."<sup>413</sup> It was therefore thought by some federal judges that this section prohibited the entry of any valid judgment during

<sup>403</sup>*Mechanics & Traders Ins. Co. v. McVay*, (1920) 142 Ark. 522, 219 S. W. 34, 45 Am. B. R. 230.

<sup>404</sup>Ga. Code (1933) sec. 46-203, p. 1323.

<sup>405</sup>*McKenney v. Cheney*, (1903) 118 Ga. 387, 45 S. E. 433; *Anderson v. Ashford*, (1932) 174 Ga. 660, 163 S. E. 741.

<sup>406</sup>*Armour Packing Co. v. Wynn*, (1904) 119 Ga. 683, 46 S. E. 865.

<sup>407</sup>*Barnes v. Snyder*, (1925) 33 Ga. App. 501, 126 S. E. 863; 5 Am. B. R. (N.S.) 980; *Saint John v. Johnson*, (1936) 54 Ga. App. 87, 187 S. E. 134; *Ryder v. Clare & Co.*, (1937) 56 Ga. App. 671, 193 S. E. 603, and cases cited.

<sup>408</sup>*Anderson v. Ashford*, (1932) 174 Ga. 660, 163 S. E. 741; *Light v. Hunt*, (1915) 17 Ga. App. 491, 87 S. E. 763; *Citizens Nat. Bank v. Dasher*, (1914) 16 Ga. App. 33, 84 S. E. 842; *Henley v. Colonial Stages*, (1937) 56 Ga. App. 722, 193 S. E. 905.

<sup>409</sup>*Anderson v. Ashford*, (1932) 174 Ga. 660, 163 S. E. 741; *Ryder v. Clare & Co.*, (1937) 56 Ga. App. 671, 193 S. E. 603.

<sup>410</sup>*National Surety Co. v. Medlock*, (1907) 2 Ga. App. 665, 58 S. E. 1131.

<sup>411</sup>*Anderson v. Ashford*, (1932) 174 Ga. 660, 163 S. E. 741; *Light v. Hunt*, (1915) 17 Ga. App. 491, 87 S. E. 763; *Henley v. Colonial Stages* (1937) 56 Ga. App. 722, 193 S. E. 905. About bankruptcy of the garnishee see *Shabaz v. Henn*, (1933) 48 Ga. App. 441, 173 S. E. 249.

<sup>412</sup>*Cf. Smith v. Gaskill*, (Mo. App. 1925) 272 S. W. 1087, 6 Am. B. R. (N.S.) 311; *Cairo Auto Supply Co. v. Stalion*, (Mo. App. 1941) 151 S. W. (2d) 541; *Southern Pac. Co. v. I. X. L. Furniture Installment House* (1914) 44 Utah 472, 140 Pac. 665; *Jackson v. Valley Tie Co.*, (1908) 108 Va. 714, 62 S. E. 964.

<sup>413</sup>30 Stat. at L., ch. 541, sec. 67f, p. 565, 11 U. S. C. A. sec. 107f.

the four months' period and excluded therefore the further prosecution of any proceedings like creditors' bills, attachments and garnishments, unless the judgment against the person holding the fund had been recovered before the proscribed period. This doctrine was first announced by Judge Brown in the case of *In re Lesser (I)*<sup>414</sup> involving a creditors' bill. In that case judgment creditors had served the summons of a creditors' bill more than four months, but had obtained a final judgment in their favor only during this period. Judge Brown held that the trustee had a right under 67f to claim the benefit of the adjudication for the estate. In the case of *In re Lesser (II)*<sup>415</sup> Judge Brown applied the same doctrine to a Connecticut garnishment proceeding against the same bankrupt. He pointed out that in attachment as well as in garnishment the judgment was necessary to make the lien "effectual" and that therefore with the avoidance of the judgment the garnishment must necessarily lapse. This doctrine was apparently followed by other federal judges in two garnishment cases<sup>416</sup> and certainly was applied in a case involving ordinary attachment.<sup>417</sup> However, in the case of *In re Blair*,<sup>418</sup> Judge Lowell refused to follow Judge Brown and permitted an attachment creditor to prosecute an attachment to a qualified judgment as the levy was made more than four months before bankruptcy.

In the case of *Metcalf v. Barker*<sup>419</sup> the Supreme Court had to pass upon the correctness of the first *Lesser Case*. It decided against Judge Brown's ruling and certified that by filing a creditors' bill more than four months before the petition the creditors had acquired a lien superior to the trustee. The court pointed out that not judgments but only liens created by judgments are invalidated by section 67f. Where the judgment is only "in enforcement" of an otherwise valid pre-existing lien, it is not affected by the provision. The court cited with approval the Blair case.

The exact bearing of this decision for the effect of bankruptcy

<sup>414</sup>(D.C. N.Y. 1900) 100 Fed. 433; the circuit court of appeals of the second circuit affirmed (5 Am. B. R. 320), but later withdrew its opinion and certified questions to the supreme court; cf. infra note 415.

<sup>415</sup>(D.C. N.Y. 1901) 108 Fed. 201.

<sup>416</sup>*In re McCartney*, (D.C. Wis. 1901) 109 Fed. 621. (The case involved the petition by a garnishee to pay the fund which was claimed as exempt into the court. It may be noted that the court did not state when the summons was served); *In re Beals*, (D.C. Ind. 1902) 116 Fed. 530 (injunction against garnishee to make payment to creditor who had recovered judgment against garnishee in Illinois within four months from the filing of the petition. The court likewise failed to state the date of the service of the garnishment summons).

<sup>417</sup>*In re Johnson*, (D.C. Vt. 1901) 108 Fed. 373.

<sup>418</sup>(D.C. Mass. 1901) 108 Fed. 529.

<sup>419</sup>(1902) 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122.

on garnishment is a difficult question. Certainly, contrary to a suggestion by a Georgia case,<sup>420</sup> the Supreme Court overruled directly only the first *Lesser Case*. On the other hand it impaired severely, without doubt, the authority of the second *Lesser Case*. In the first place the Judge who had decided both cases had explicitly stated that both were decided on the same theory. In the second place, the Supreme Court made it plain in the *Metcalf Case* that mere "contingency" of a lien created by judicial proceedings did not militate against its "existence."<sup>421</sup> Nevertheless, one could draw a neat distinction according to the specific role played by the judgment. The Supreme Court differentiated between judgments merely "enforcing" liens and judgments "creating" liens. Now, the judgments in garnishment proceedings are usually spoken of as judgments "perfecting" liens. In which of the two classes distinguished by the Supreme Court do they belong? Posing the problems in these terms shows that the line to be drawn would be tenuous and that it would depend to a large degree upon the technical details as laid down by the various local statutes and worked out by the courts in the different jurisdictions. It is very unlikely that the Supreme Court had such artificial distinctions in mind. One can probably agree with the position taken by the editor of the fourth edition of *Collier*:<sup>422</sup> "However while *Metcalf v. Barker* is not exactly in point, its conclusion seems to apply to all cases involving inchoate liens antedating the four months' period."

The lower federal courts seem to have taken the view that the rule of *Metcalf v. Barker* was applicable to garnishment cases. In the case of *In re Maher*,<sup>423</sup> which is the first federal decision we could find involving this issue squarely, the district court for the northern district of Georgia said: "Whatever may have been the view formerly held as to the existence of a lien by reason of the service of summons of garnishment, pending suit against the funds or property in the hands of the garnishees, it seems to be now pretty well settled, that the plaintiff has, if not a lien in the common acceptance of that term, at least peculiar rights against such

<sup>420</sup>*National Surety Co. v. Medlock*, (1907) 2 Ga. App. 665, 58 S. E. 1131.

<sup>421</sup>"Doubtless the lien created by a judgment creditors' bill is contingent in the sense that it might possibly be defeated by the event of the suit, but in itself, and so long as it exists, it is a charge, a specific lien, on the assets. . . ." *Metcalf v. Barker*, (1902) 187 U. S. 165, 172, 23 Sup. Ct. 67, 47 L. Ed. 122.

<sup>422</sup>*Collier, The Law and Practice in Bankruptcy* (4th ed. by Hotchkiss 1903) 492.

<sup>423</sup>(D.C. Ga. 1909) 169 Fed. 997.

funds or property." The court held that a creditor having served a garnishment summons prior to the four months' period could have the discharge stayed for the purpose of charging the sureties on a bond given to dissolve such garnishment. The case was followed by the district court for the southern district of Georgia.<sup>424</sup>

While thus the controlling date for the reckoning of the four months interval was placed on the time of the service of the summons instead of that of the recovery of the judgment, it now became doubtful whether the lien was terminated by the recovery of a judgment against the garnishee. The argument was made that the lien was gone and section 67f no longer applicable once the garnishee was charged, although such order was made within the four months or even after the filing of the petition. The federal courts which were confronted with the problem held, however, that the trustee in such case could either require a stay of the execution,<sup>425</sup> or the assignment of the judgment,<sup>426</sup> at least if the order against the garnishee did not operate a satisfaction.

In this state of the authorities, the case of *In re West Hotel*<sup>427</sup> was decided. Quite apparently Judge Sanborn misconstrued the two Minnesota cases which he cited,<sup>428</sup> and overlooked the controlling Minnesota case in point.<sup>429</sup> His conclusion was that the garnishment lien was "only inchoate," which means in other words *too* inchoate to be completed.

Of course, this decision baffled other federal judges. As a result Circuit Judge Altschuler dodged the issue in a case<sup>430</sup> involving a Wisconsin garnishment although he had an excellent case decided by the supreme court of that state squarely in point.<sup>431</sup> But a few months later, he was again confronted with the problem in an Illinois case.<sup>432</sup> Although at that time the creation of a lien by garnishment was more doubtful in Illinois than anywhere else because of the rule of *Bigelow v. Andres*,<sup>433</sup> the judge made a care-

<sup>424</sup>*In re J. L. Philips Co.*, (D.C. Ga. 1915) 224 Fed. 628.

<sup>425</sup>*In re Ramsford*, (C.C.A. 6th Cir. 1912) 194 Fed. 658 (while the date of the garnishment summons is not indicated, it seems to follow that it was within the four months' period); *In re Theodore Ebert Co.*, (C.C.A. 7th Cir. 1935) 77 F. (2d) 169.

<sup>426</sup>*In re Dukes*, (D.C. Del. 1921) 276 Fed. 724.

<sup>427</sup>*Cf. supra* ch. 1.

<sup>428</sup>*Cf. supra* text to notes 335 and 344.

<sup>429</sup>*National Surety Co. v. Hurley*, (1915) 130 Minn. 392, 153 N. W. 740, discussed *supra* text to note 345.

<sup>430</sup>*In re Lincks Wire Forming Co.*, (C.C.A. 7th Cir. 1932) 60 F. (2d) 770.

<sup>431</sup>*Bank of Commerce v. Elliott*, (1901) 109 Wis. 648, 85 N. W. 417.

<sup>432</sup>*In re Snitzer*, (C.C.A. 7th Cir. 1933) 62 F. (2d) 285.

<sup>433</sup>(1863) 31 Ill. 322, discussed *supra* text to note 174.

ful survey of the local law and came to the conclusion that the service of the summons created a lien within the meaning of section 67f. As the service of the garnishment summons antedated the four months' period, he held that the lien was unimpaired. The same rule was applied by Circuit Judge Phillips in a case dealing with a Georgia garnishment,<sup>434</sup> and in another recent opinion it seems at least to be intimated that a garnishment lien acquired by service more than four months prior to the petition cannot be avoided by the trustee.<sup>435</sup>

The only recent decision which might be cited in support of the rule of *In re West Hotel* is *In re Masters*.<sup>436</sup> In this case Circuit Judge Treanor had to decide whether the service of a garnishment summons destroyed the constructive possession of the debt upon which the bankruptcy jurisdiction rests. He held that in Missouri the service of the garnishment summons created no such lien as to have this effect. But from this decision it does not necessarily follow that no such lien is created as to be valid under section 67, if obtained prior to the four months' period.

As the result of this survey, it may be said that the word lien, within the meaning of the bankruptcy act, has a broad sweep. Merely inchoate liens are not excluded and there is nothing in this section which would invalidate judgments perfecting them if the inchoate lien is more than four months old when bankruptcy intervenes.

#### B. THE EFFECT OF THE DISCHARGE PROVISIONS ON GARNISHMENTS PROCEEDINGS

*Metcalf v. Barker* settled that section 67 of the Bankruptcy Act did not mean that liens which require a judgment for their enforcement must have been prosecuted to such judgment prior to the four months' period. While directly applicable only to liens obtained by judgment creditors' bills, this rule was universally extended by later cases to attachments, and, apart from the case of *In re West Hotel*, in all except one not very authoritative and later weakened instance<sup>437</sup> (as we have shown) to garnishments.

<sup>434</sup>*Morris Haft & Bros. v. Wells*, (C.C.A. 10th Cir. 1937) 93 F. (2d) 991.

<sup>435</sup>*McLeod v. Cooper*, (C.C.A. 5th Cir. 1937) 88 F. (2d) 194 (involving a Florida garnishment served more than four months prior to the petition, which was, however, ineffective for other reasons).

<sup>436</sup>(C.C.A. 7th Cir. 1938) 101 F. (2d) 365.

<sup>437</sup>*Cf. supra* text to note 389.

Our present problem, i.e., the effect exercised by a discharge in bankruptcy of the main cause of action on pending garnishment proceedings, is strictly speaking quite different from the point discussed so far. For while the latter involved a construction of section 67 of the act, the question now before us depends upon the significance of section 17. If, for instance, this section should exclude any kind of judgment against a bankrupt on a dischargeable debt, an attachment or garnishment could still be prosecuted against a bankrupt if it was levied or sued out for the purpose of securing a non-dischargeable debt.<sup>438</sup>

It must be realized that in regard to our present problem the authority of *Metcalf v. Barker* is further diminished, for the reason that in the case of a judgment creditors' bill the judgment against the bankrupt on the debt whose collection is sought is already obtained. The most that can be said—although it was not even argued in the case—is that *Metcalf v. Barker* implies that the discharge of a judgment by bankruptcy does not prevent the completion and enforcement of an inchoate lien obtained for the collection of it, if such lien is not impaired by section 67 of the act. Consequently, once it is admitted that it is the time of the service of the garnishment summons which controls the application of section 67, it is clear that a garnishment upon execution is not affected by the discharge of the judgment as long as the inchoate lien remains valid. The courts have so held and have seen no obstacle to the prosecution of a garnishment execution in the discharge of the judgment, where the garnishment was valid either because the garnishment summons was served before the beginning of the four months,<sup>439</sup> or because the property garnished was exempt and could be reached only pursuant to a waiver.<sup>440</sup> Of course, the same result should follow where the bankrupt was not insolvent at the time of the service of the execution garnishment. By the same token, the discharge of the judgment by bankruptcy likewise does not affect the prosecution of a garnishment which was served before the recovery of the judgment in the main action

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<sup>438</sup>Conversely sec. 17 thus construed would prevent the prosecution of an attachment even where the four months' rule does not apply as where the bankrupt is not insolvent at the time of the creation of the lien, at whatever time this may be, or where exempt property is attached pursuant to a waiver or where no trustee is appointed.

<sup>439</sup>Cf. *In re Snitzer*, (C.C.A. 7th Cir. 1933) 62 F. (2d) 285; *Armour Packing Co. v. Wynn*, (1904) 119 Ga. 683, 46 S. E. 865; *Bloch v. Moore*, (Ala. 1905) 39 So. 1025; see also *In re Sims*, (D.C. N.Y. 1910) 176 Fed. 645.

<sup>440</sup>*Ryder v. Clare*, (1937) 56 Ga. App. 671, 193 S. E. 603.

provided that the garnishment lien itself is not impaired by section 67.<sup>441</sup>

But from the fact that the discharge in bankruptcy of the judgment against the main defendant does not prevent the prosecution of a garnishment against the garnishee if the garnishment lien has not been invalidated under section 67, it does not necessarily follow that a judgment against the main defendant may be rendered in spite of a discharge in bankruptcy for the purpose of following up such lien. *Metcalf v. Barker* is really no authority at all for the latter proposition. Neither has any other decision of the Supreme Court expressly so held. However, under the Acts of 1841 and 1867 the Supreme Court held that the discharge provisions did not prevent the old state practice<sup>442</sup> of rendering a qualified judgment against the bankrupt for the purpose of completing an attachment, meaning by qualified a judgment whose execution is perpetually stayed except in regard to the attached assets.<sup>443</sup> There is no reason why the discharge provisions of the present bankruptcy act should not be construed the same way. State and lower federal courts have universally taken this view, and Justice Robert cited with approval a long list of federal cases holding so in a footnote to the case of *Stratton v. New*.<sup>444</sup> There is likewise no reason why in this respect a distinction should be made between attachments and garnishment proceedings, once it is conceded that garnishment liens enjoy the same protection under section 67 as attachments. No federal court has seen difficulties on that score<sup>445</sup> and even the opinion in the case of *In re West Hotel* did not rely on the discharge provisions.

Thus it can be considered as settled that the discharge provisions of the Bankruptcy Act do not prohibit the rendition of a qualified judgment for the purpose of prosecuting an attachment or garnishment in so far as it is not rendered voidable by section 67, provided, of course, that the state practice permits such judg-

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<sup>441</sup>*Florida E. C. Ry. Co. v. Consol. Engineering Co.*, (1928) 95 Fla. 99, 116 So. 19, 11 Am. B. R. (N.S.) 647; *Henley v. Colonial Stages*, (1937) 56 Ga. App. 722, 193 S. E. 905; see also *Anderson v. Ashford*, (1932) 174 Ga. 660, 163 S. E. 741.

<sup>442</sup>*Cf. Kittredge v. Warren*, (1844) 14 N. H. 508, 536; *Davenport v. Tilton*, (1845) 10 Metc. (Mass.) 320.

<sup>443</sup>*Peck v. Jenness*, (1849) 7 How. (U.S.) 612, 12 L. Ed. 841; *Doe v. Childress*, (1874) 21 Wall. (U.S.) 642, 22 L. Ed. 549; see also *Hill v. Harding*, (1889) 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083.

<sup>444</sup>*Stratton v. New*, (1930) 283 U. S. 318, 326, 51 Sup. Ct. 465, 75 L. Ed. 1060.

<sup>445</sup>See the federal cases discussed or cited in the previous sections of this article, i. e., IV, A, a and b.

ment.<sup>440</sup> But while neither the Bankruptcy Act nor the due process clause of the federal constitution does nor can compel the states to allow such qualified judgments, the state courts have in general seen no difficulties in allowing such practice. There are numerous cases where state courts have permitted qualified judgments against the bankrupt for the purpose of charging the garnishee, where the garnishment lien was unimpaired by the bankruptcy either because it was more than four months old at the filing of the petition<sup>447</sup> or because no trustee was appointed,<sup>448</sup> he alone being permitted to claim the voidability, except in respect to exempt property.<sup>449</sup> It is beyond doubt that the same practice will be followed in cases where the garnishment lien is unaffected because the bankrupt was not insolvent at the time the garnishee summons was served<sup>450</sup> or where the garnishment was made pursuant to a waiver.<sup>451</sup> The very fact that the courts have held that a trustee cannot successfully intervene in such cases shows that they must permit such judgments in these cases.

The only instances where difficulties have arisen are the cases where a qualified judgment against the bankrupt was asked for the purpose of charging the sureties on a bond given by the debtor for the purpose of dissolving a garnishment. The Supreme Court has recognized that a qualified judgment may be rendered for the purpose of charging sureties on a bond given for the purpose of dissolving an attachment levied more than four months before the petition,<sup>452</sup> and doubtless the Bankruptcy Act also does

<sup>440</sup>The distinction between the authorization of a qualified judgment by the bankruptcy act and by state law was clearly brought out by the supreme court of Alabama in *Standard Sanitary Mfg. Co. v. Benson*, (1934) 228 Ala. 594, 154 So. 560.

<sup>447</sup>*Stoddard v. Locke*, (1871) 43 Vt. 574, 5 Am. Rep. 308; *Hatch v. Seeley*, (1873) 37 Iowa 493; *New Kensington Sanitary Pottery v. Detroit Pipe & Supply Co.*, (1932) 258 Mich. 34, 241 N. W. 901; *J. T. Sinclair Co. v. Becker Coal Co.*, (1933) 263 Mich. 617, 249 N. W. 13; *Bank of Commerce v. Elliott*, (1901) 109 Wis. 648, 85 N. W. 417; *Kendrick and Roberts v. Warren Bros.*, (1909) 110 Md. 47, 72 Atl. 461; *Henley v. Colonial Stages*, (1937) 56 Ga. App. 722, 193 S. E. 905. Cf. also the cases discussed or cited in 81 A. L. R. 81.

<sup>448</sup>*Smith v. Davis & French*, (1932) 131 Me. 9, 158 Atl. 359, 81 A. L. R. 78.

<sup>449</sup>*Fischer v. Pauline Oil Co.*, (1939) 309 U. S. 294, 60 Sup. Ct. 535, 84 L. Ed. 764. See also *Swaney v. Hasara*, (1925) 164 Minn. 416, 205 N. W. 274.

<sup>450</sup>Cf. *Liberty Natl. Bank of Roanoke v. Bear*, (1924) 265 U. S. 365, 44 Sup. Ct. 499, 68 L. Ed. 1057; *Borderland Coal Sales Co. v. Wayne Circuit Judge*, (1924) 228 Mich. 198, 199 N. W. 641; *Jackson v. Valley Tie Co.*, (1908) 108 Va. 714, 62 S. E. 964.

<sup>451</sup>*Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; *Anderson v. Ashford*, (1932) 174 Ga. 660, 163 S. E. 741.

<sup>452</sup>*Hill v. Harding*, (1889) 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083.



not exclude such judgments in other cases where but for the dissolution the attachment would have been unaffected by bankruptcy.<sup>453</sup> Whether such judgment would be possible even where the attachment lien itself would have been invalidated by the bankruptcy is a more doubtful question. A number of courts have permitted it, provided that the liability of the surety was merely conditioned on the judgment.<sup>454</sup> There is likewise no reason why the same rule should not apply to sureties on bonds given for the dissolution of a garnishment, at least if otherwise the garnishment would have subsisted despite of garnishment.<sup>455</sup> Nevertheless, at least one jurisdiction refused qualified judgments in such cases. This holding, however, was not based on any provision of the Bankruptcy Act, but on the reason that the undertaking by the surety according to its terms requires more than the recovery of a merely qualified judgment against the bankrupt.<sup>456</sup> But even in such case, the federal court may stay discharge to give the creditor a chance to secure a full judgment.<sup>457</sup>

Consequently, it can be considered as settled that the discharge provision of section 17 does not prohibit the completion of a garnishment not invalidated by section 67 and permits the rendition of a qualified judgment for that purpose.

## V. CONCLUSION

Hence we arrive at the following results:

I. The federal courts have no power under sections 2(15) or 11 of the Bankruptcy Act to prohibit the completion of a garnishment in bankruptcy when the summons was served more than four months prior to the petition. The trustee cannot successfully inter-

<sup>453</sup>*Pue v. Wheeler*, (1927) 78 Mont. 516, 255 Pac. 1043, 10 Am. B. R. (N.S.) 5, writ of error dismissed (1927) 275 U. S. 483, 48 Sup. Ct. 19, 72 L. Ed. 385.

<sup>454</sup>See cases cited in 36 A. L. R. 449, 107 A. L. R. 1138, and 81 A. L. R. 81.

<sup>455</sup>It has been so held in *Kendrick and Roberts v. Warren Bros.*, (1909) 110 Md. 47, 72 Atl. 461; *Smith v. Davis*, (1932) 141 Me. 9, 158 Atl. 359, 81 A. L. R. 78; *In re Maher*, (D.C. Ga. 1909) 169 Fed. 997; *In re J. L. Phillips*, (D.C. Ga. 1915) 224 Fed. 628; *Light v. Hunt*, (1915) 17 Ga. App. 491, 87 S. E. 763; conversely, where the garnishment would have been invalidated a special judgment for the purpose of charging the sureties was denied in *Klipstein & Co. v. Allen-Miles*, (C.C.A. 5th Cir. 1905) 136 Fed. 385; *Saint John v. Johnson*, (1936) 54 Ga. App. 87, 187 S. E. 134; *Roberts v. Seanor*, (1934) 46 Ga. App. 5, 166 S. E. 375; *Crook Horner Co. v. Gilpin*, (1910) 112 Md. 1, 75 Atl. 1049.

<sup>456</sup>*Standard Sanitary Mfg. Co. v. Benson*, (1934) 228 Ala. 594, 154 So. 560.

<sup>457</sup>*In re J. L. Phillips*, (D.C. Ga. 1915) 224 Fed. 628.

vene. The creditor prevails and can prosecute the main suit to qualified judgment for the purpose of charging the garnishee. The case of *In re West Hotel* is no valid authority against such practice for the following reasons:

a. The facts of the case did not require any holding in regard to garnishments served more than four months before the petition, as the files show that the service was made within the four months period.<sup>458</sup>

b. The judge based his opinion on two Minnesota cases whose holding he apparently misconstrued.<sup>459</sup>

c. The judge overlooked the controlling Minnesota decision which is squarely contra to his statement of the law.<sup>460</sup>

d. A great number of decisions of other state courts have held the opposite.

e. The other federal cases since 1903 have held the opposite.

f. Historically there is no reason to treat garnishment differently from attachment, as garnishment was originally but a mode of attachment.

g. As in Minnesota in many instances the garnishing creditor could reach the assets by outright attachment of either chattels or the debt, there is not much point to distinguish between his rights according to what procedure he chose. Otherwise the number of attachments will be unnecessarily increased in order to protect the creditor.

II. A more detailed correct statement of the law seems to be this:

a. If garnishment summons has been served more than four months from the filing of the petition and has not been dissolved on bond, the garnishment is valid and can, if necessary, be prosecuted to a special judgment against the garnishee.

b. If the garnishment summons has been served within four months from the filing of the petition and the garnished assets are not exempt and no judgment has been recovered, the bankruptcy court can stay the prosecution of the garnishment,<sup>461</sup> regardless of whether the main debt is dischargeable or not, until a trustee is appointed. The trustee may then invalidate the lien, provided that the bankrupt was insolvent at the time of the service.

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<sup>458</sup>See supra p. 4.

<sup>459</sup>See supra text to notes 428, 335, 344.

<sup>460</sup>See supra text to notes 429, 345.

<sup>461</sup>This power follows from section 2(15) of the Bankruptcy Act, because its exercise is necessary to protect the assets.

c. If the garnishment summons has been served within the four months' period and no judgment has been recovered and the property garnished is exempt, the bankrupt himself can claim the invalidity,<sup>462</sup> provided that the garnishment was not made pursuant to a waiver. In the latter case a special judgment may be obtained if necessary.

d. If the garnishment summons has been served within the four months' period and in addition a judgment against the bankrupt and an order or judgment against the garnishee has been obtained in the same period, certain doubt arises. If according to the local law an order against the garnishee constitutes a satisfaction pro tanto of the main judgment, the lien can be considered as transformed into title<sup>463</sup> and the trustee cannot avoid the judgment or require its assignment. If according to the local law the judgment against the garnishee does not constitute a satisfaction, the rights of the trustee are still governed by section 67<sup>464</sup> as long as the money is not actually paid over to the creditor.<sup>465</sup>

e. If the garnishment has been dissolved on bond pursuant to section 571.30 but would otherwise not have been invalidated, a special judgment against the bankrupt is possible even after a discharge, for the purpose of recovering from the sureties, provided that the terms of their statutory undertaking does not require a full judgment.<sup>466</sup> Otherwise the bankruptcy court must stay the discharge.<sup>467</sup>

<sup>462</sup>Chicago, B. & O. R. Co. v. Hall, (1913) 229 U. S. 511, 33 Sup. Ct. 885; Fischer v. Pauline Oil Co., 84 L. Ed. 764, 60 Sup. Ct. 535, 309 U. S. 294, 301.

<sup>463</sup>This seems to be the law of Iowa. Watts v. Southern Surety Co., (1933) 216 Iowa 150, 248 N. W. 347.

<sup>464</sup>See cases cited in footnotes 425 and 426.

<sup>465</sup>In case of an attachment or execution lien section 67a is likewise applicable until and not after the money is actually paid over. Charles v. Larremore, (1902) 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; In re Resnek, (D.C. Tenn. 1909) 167 F. 574; In re Carr, (D.C. Tenn. 1930) 39 F. (2d) 916; In re Bailey, (D.C. Ore. 1906) 144 F. 214; Mulroney v. McIntyre, (1940) 207 Minn. 234, 290 N. W. 584.

<sup>466</sup>2 Minnesota Stat. 1941, sec. 571.30; Mason's 1927 Minn. Stat., sec. 9383; provides for the release of a garnishment or attachment upon a bond given by defendant which is ". . . conditioned to pay any judgment recovered against him in the action. . . ." Whether this condition is satisfied by a qualified judgment against a bankrupt has never been decided by the Supreme Court of Minnesota. The Minnesota Supreme Court has likewise never decided whether the sureties are liable even though the lien would otherwise have been invalidated by the bankruptcy; it has only held that initial validity of the garnishment is necessary. Wilcox v. Conley, (1926) 169 Minn. 179, 210 N. W. 887.

<sup>467</sup>In re Maher, (N.D. Ga. 1909) 169 Fed. 991; In re G. L. Philips Co., (S.D. Ga. 1915) 224 Fed. 628; see supra text to notes 423, 424.