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GARNISHMENT OF PUBLIC CORPORATIONS

JEFF B. FORDHAM*

The notion that garnishment of public corporations is against public policy early took root in the minds of American judges. The history of the subject is an interesting commentary on the growth of our law. The policy objection, based principally on the avoidance of inconvenience to public administration, has been accorded wide judicial acceptance with only occasional reconsideration on the merits. *Stare decisis* and that characteristic, but for the most part commendable, conservatism of bench and bar have done their part to entrench the doctrine. Judicial revolt against it, which has occurred largely in cases involving municipalities, has made only modest and scattered inroads. The situation has plainly called for legislative action. And legislation of varying comprehensiveness is just what it has received in over half the states of the Union.¹

The judicial conception of public policy proved too static. The rapid expansion of governmental activity has made the assumption of business and civil relations by public corporations a commonplace. The natural adjustment in the law is in the direction of attaching the usual incidents of responsibility to such activities and relations. In state after state legislation rendering the process of garnishment available against public corporations, often against the state itself, has cast the policy notion upon the juristic junk heap.²

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¹ See n. 73, *infra*.

² In the following instances statutes were enacted which at least modify the judicial rule of immunity. *Sanders v. Steele*, 124 Ala. 415, 26 So. 882 (1889), ALA. CODE (Michie, 1928) § 8060, 8088-8091; *Stermer v. Board of Commissioners*, 5 Colo. App. 379, 38 Pac. 839 (1894), Colo. LAWS 1911, c. 143; *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. 620 (1888); KAN. REV. STAT. ANN. (1923) § 60-962 (salaries of public officers and employes subject to garnishment), § 60-940 (municipalities exempt); *School District No. 4 of the Township of Marathon v. Gage*, 39 Mich. 484 (1878), MICH. COMP. LAWS (1915) § 13167; *McDougal v. Board of Sup'rs. of Hennepin County*, 4 Minn. 130 (1860), MINN. GEN. STAT. (1923) § 9364; *State v. Everly*, 12 Neb. 616, 12 N. W. 96 (1882), Neb. LAWS 1925, c. 58; *Owen v. Terrell*, 22 N. M. 373, 162 Pac. 171 (1916), N. M. STAT. ANN. (1929) § 59-127; *Clark v. Board of Com'rs.*, 62 Okla. 7, 161 Pac. 791 (1916), OKLA. COMP. STAT. ANN. (Supp. Thornton, 1926) § 353-1; *City of Memphis v. Laski*, 56 Tenn. 511 (1872), TENN. ANN. CODE (Shannon, Supp. 1926) § 3795a4; *Van Cott v. Pratt*, 11 Utah 209, 39 Pac. 827 (1895), UTAH COMP. LAWS (1917) § 6754; *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 45 Pac. 31 (1896); WASH. COMP. STAT. (Remington, 1922) §§ 680-1, 680-2; *Buffham v. City of Racine*, 26 Wis. 449 (1870), WIS. STAT. (1929) § 304.21.

The subject is of more than historical interest in West Virginia, where the judicial rule of immunity still obtains. That circumstance has evoked the present study. Possibly a broad investigation of the subject on the merits will prove useful for West Virginia purposes.

The immediate inquiry is limited to the situation where the public corporation is named as garnishee. Where the corporation is principal debtor the problem is similar on principle and in fact to that of execution against public corporations. There relief is usually denied in order to prevent interference with property devoted to public use. The considerations operative where the corporation is garnishee are quite different as will shortly appear.³ In the matter of enforcing satisfaction of public obligations, moreover, the law has supplied an adequate substitute for execution in the form of mandamus.⁴ Since garnishment ordinarily results in a personal judgment only, the plaintiff may still be forced to resort to mandamus to obtain satisfaction.

Time and again the fact that "garnishment is purely a creature of statute"⁵ has been given judicial utterance. That circumstance would appear to reduce the problem of the liability of public corporations to the process to a matter of statutory construction. Yet the history of the subject reveals that the judicial rule of immunity has often been rested solely on grounds of public policy.⁶ The writer would not question judicial resort to considerations of policy in many common law matters as to which the courts have a law-making responsibility but where the field has been occupied solely by legislation the notion that matters of policy are for the legislature⁷ certainly deserves notice.

If the statute subjects "persons" or "corporations" to the

³ The Montana court has distinguished the effect of execution and garnishment as follows: "By garnishment the waterworks, fire-engines, public buildings, and revenues of the corporation are not seized. The corporation is simply required to hold, and finally pay over, a sum of money or property, in which it has no interest, to one person rather than another. Its business is not interrupted; its property is not touched; its functions are not deranged." *Waterbury v. Board of Commissioners of Deer Lodge County*, 10 Mont. 515, 522, 26 Pac. 1002, 1004 (1891).

⁴ See generally Fordham, *Methods of Enforcing Satisfaction of Obligations of Public Corporations* (1933) 33 COL. L. REV. 28.

⁵ *Brannon, J., in Ringold v. Suiter*, 35 W. Va. 186, 188, 13 S. E. 46, 47 (1891).

⁶ So it was in the much-cited case of *Merwin v. Chicago*, 45 Ill. 133 (1867). See also *State v. Eberly*, *supra* n. 2.

⁷ The New Mexico court has affirmed this proposition in upholding a statute authorizing garnishment of the state as well as public corporations. *Stockard v. Hamilton*, 25 N. M. 240, 130 Pac. 294 (1919).

process does it apply to public corporations? The usual answer is a rather emphatic "no". Since, as is true in West Virginia by statute,⁸ "person" will be construed to include "corporation" the quest is one for the meaning of "corporation" in this connection. The West Virginia Supreme Court of Appeals, relying solely on "the weight of authority", decided in *Welch Lumber Co. v. Carter Bros.*⁹ that the term did not include public corporations.

The problem of construction has seldom been closely analyzed. Courts not content to stand on authority alone have usually dragged in the policy argument as an independent reason for finding the statute inapplicable to public corporations and stopped at that.¹⁰ The principle contention made in terms of statutory construction has been the theory that public corporations are arms of the sovereign and as such are subject to suit only to the extent expressly made so by statute.¹¹ This generalization, if true,¹² is too broad to be useful here. Statutes commonly provide that municipalities, counties or other public corporations may sue and be sued without specifying the character of litigation contemplated.¹³ Garnishment is generally regarded as a "suit".¹⁴ The term "corporation" taken literally without qualification certainly covers the public variety. Public corporations, moreover, where civilly liable in contract, quasi-contract or tort may be sued in like manner as any private

⁸ W. VA. REV. CODE (1931) c. 2, art. 2, § 10(i).

⁹ 78 W. Va. 11, 88 S. E. 1034 (1916).

¹⁰ See, for example, *Duval County v. Charleston Lumber and Mfg. Co.*, 45 Fla. 256, 33 So. 531 (1903); *Switzer v. City of Wellington*, *supra* n. 2.

¹¹ See the leading case of *Mayor and City Council of Baltimore v. Root*, 8 Md. 95, 63 Am. Dec. 692 (1855).

¹² The theory is that the delegation to and exercise of governmental powers by local agencies constitutes them arms of the state government. The extent to which they are such in practical effect varies greatly. The majority of local officers owe no responsibility to the state government for their ordinary conduct in office. Adding the fact of independent financial responsibility it is apparent that a city or county, for example, might rationally be treated separately from the state government for garnishment purposes. The writer believes, however, that even the state should be subject to garnishment or some proceeding serving the purpose. That is now the case in some jurisdictions by statute. *E. g.*, ALA. CODE (Michie, 1928) § 8088; CAL. CODES AND GEN. LAWS (Deering, Supp. 1929) p. 2246; NEB. LAWS 1925, c. 58; N. M. STATS. ANN. (1929) §§ 59-127; OKLA. COMP. LAWS ANN. (Supp. Thornton, 1926) § 353-1; ORE. LAWS (Olson, 1920) § 258; S. D. COMP. LAWS (1929) § 2453 (Garnishment against the state given the force of an assignment of the claim and not a binding judgment against the state); UTAH COMP. LAWS (1917) § 6754; WIS. STAT. (1929) § 304.21; WYO. COMP. STAT. ANN. (1920) §§ 6067, 6068.

¹³ See W. VA. REV. CODE (1931) c. 7, art. 1, § 1 (as to counties).

¹⁴ WAPLES ON ATTACHMENT AND GARNISHMENT (2d ed. 1895) § 470 *et seq.* This point was relied upon in the dissenting opinion of Judge Carter in *Duval County v. Charleston Lumber and Mfg. Co.*, *supra* n. 10.

party.¹⁵ The objective effect of these considerations seems to amount to this: a corporation which may "sue and be sued" may be sued in any appropriate proceeding not otherwise expressly barred and in this instance garnishment is entirely appropriate. The familiar rule that remedial statutes are to be liberally construed lends support to this conclusion.

Legislative intention, should always be a guiding influence in statutory interpretation.¹⁶ In the garnishment statute applicable to "corporations" there may well be no specific intention as to public corporations. The question of interpretation, however, cannot be escaped. If related statutes or the legislative history of the subject do not suggest the answer the court may be forced to determine, in effect, what the legislative intention would have been had it been specifically formulated. It will already have been observed that the writer considers that a statute conferring capacity "to sue and be sued" unaccompanied by limiting language may supply the key to the difficulty.¹⁷ Only after such possibilities are exhausted is the court warranted in determining the issue of policy and then only in the secondary sense of guessing at what the policy of the legislature would have been.¹⁸ The judicial practise, however, has been to exercise a primary judgment in the matter.

The product of this primary judgment has more frequently than otherwise been immunity.¹⁹ The cases to the contrary are for the most part better thought out because the rule of immunity got an early foothold and could not be summarily rejected in jurisdictions where the question subsequently arose.²⁰ It remains to consider the problem on the merits from the standpoint of policy. It

¹⁵ DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 1610 *et seq.*

¹⁶ See Horack, *In the Name of Legislative Intention* (1932) 38 W. VA. L. Q. 119.

¹⁷ In *Packard Phoenix Motor Co. v. American-La France Corp.*, 288 Pac. 1024, 1027 (Ariz. 1930), it was said: "The charter of the city of Phoenix provides that 'it may sue and be sued, . . . in all actions and proceedings whatsoever' . . . A garnishment proceeding certainly falls within the terms of this charter provision." The city charter was broader in terms than the usual statutory provision but under the view stated in the text that does not warrant a difference in result.

¹⁸ The judgment is a secondary one parallel to that which it is believed is the province of the court in judicial review to determine constitutionality. See the dissenting opinion of Mr. Justice Brandeis in *Burns Baking Co. v. Bryan*, 264 U. S. 504, 517, 44 S. Ct. 412, 415 (1924).

¹⁹ The writer has not "counted noses" but this is his reaction from an extensive examination of cases, citation of which would not be fruitful. See collection of cases (1880) 18 Am. Dec. 200; (1896) 51 Am. St. Rep. 114; (1928) 56 A. L. R. 601, 602; (1929) 60 A. L. R. 823.

²⁰ See, for example, the analysis of the problem in *Waterbury v. Board of Com'rs.*, *supra* n. 3; *City of Laredo v. Nalle*, 65 Tex. 359 (1886).

will be useful to look first to the situation of municipalities since all the arguments urged against their liability to garnishment and sometimes others are used where other public corporations are involved.

Municipalities

1. The principal judicial objection to garnishment of municipalities has been public inconvenience. It is conceived that city officers would be compelled to answer unlimited suits in which the city had no interest thus throwing expense on its taxpayers and damaging the public service by diverting the time and energies of public officials from their duties.²¹

Is the city interested in the litigation? Its interest is patent where the claim sought to be enforced is a controversial one in fact as between it and the principal debtor. It is as well that the matter be settled in garnishment as in another litigation. If we suppose a case where the principal debtor would not urge the claim attributed to him there is still an element of interest since there is some likelihood, so long as it is outstanding, that the claim might be pressed directly.

Interest is lacking where the corporation admits the indebtedness but so also is the element of inconvenience. If it is a case of garnishment serving as an attachment in aid of the principal litigation and the city has money available to pay, it might avoid inconvenience by paying the fund into court and leaving the litigants to settle their claims to it. The want of funds for payment would simply mean that the city would be subjected to judgment. Enforcement of the judgment might or might not cause embarrassment but it would hardly be for the city to rely on its failure to provide means for paying its debts.²² Garnishment, or suggestion as it is called in West Virginia, in aid of execution on a judgment

²¹ “. . . in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation.”
Merwin v. City of Chicago, 45 Ill. 133, 135 (1867).

²² Once a claim is established against a city the federal courts, in particular, have little mercy on its public objects when it comes to protecting creditors. *City of Little Rock v. U. S. ex rel. Howard*, 103 Fed. 418 (C. C. A. 8th, 1900); *Rountree v. State ex rel. Georgia Bond and Mtg. Co.*, 135 So. 888 (Fla., 1931).

against the principal debtor is even less objectionable because it involves no independent litigation into which to drag the city.

The prospect of liability to garnishment burdening a city with expense is slight indeed. In West Virginia the garnishee is liable for costs only where upon trial of an issue as to whether he has made full disclosure of indebtedness the verdict goes against him.²³ If the proceeding is uncontested the city incurs no expense other than administrative costs incident to the routine process of disbursement.

How serious, measured in West Virginia terms, would one expect the inconvenience to be in a contested case? It cannot be said that cities have suffered greatly in this behalf in ordinary litigation. The burden of the case falls on the city attorney. The pressure of garnishments is not likely to cause him to neglect other things. He might require the attention of other officials in preparing the case and in appearing on the stand but seldom would the distraction be for long. A great accretion of cases would prove onerous but there is small prospect of such a situation and that for practical reasons. The funded debt of a city is in negotiable form and thus not effectually garnishable.²⁴ That substantially eliminates what is usually the largest item of indebtedness. Salaries of officials would not be reached often because no public officer worth his salt would be found in the sorry plight of having his salary garnished if he could possibly avoid it. Minor officers and employes whose tenure is not fixed by law would for their own security, if for no other reason, minimize attacks on their salaries by garnishors. A number of cases have involved efforts to garnish claims under construction contracts with public corporations. So far as laborers and materialmen are concerned it seems that the policy of the law, which protects them by liens upon the finished product in the ordinary case but which cannot be expressed in that way against public property,²⁵ is at least strong enough to neutralize the inconvenience. With respect to general creditors of the contractor there unquestionably are quite a number of cases on record

²³ W. VA. REV. CODE (1931) c. 38, art. 5, § 18; art. 7, § 28. See also c. 50, art. 9, § 19, as to justice of the peace practise.

²⁴ Garnishment will not be allowed if at any time after service on the garnishment the instrument is negotiated to a holder in due course. See W. VA. REV. CODE (1931) c. 38, art. 5, §§ 14, 15; art. 7, §§ 19, 25, 26.

²⁵ See *Moss Iron Works v. County Court*, 89 W. Va. 367, 109 S. E. 343 (1921). W. VA. REV. CODE (1931) c. 38, art. 3, § 39, expressly exempts public buildings from such liens and requires a bond of the contractor to afford laborers, etc., protection.

of at least attempted garnishment²³ but viewed in terms of a single city the anticipated volume of litigation would be modest. Ordinarily, moreover, the city will have provided funds to meet the purpose and could avoid inconvenience entirely simply by paying the fund into court. Finally in the matter of supplies and equipment the cases would not be numerous in which the city's creditor would be of a character requiring resort to garnishment. If he is a non-resident there is substantial authority, at least in equity, that the policy of protecting home creditors prevails in any event.²⁷ These observations draw additional support from the fact that none of the many state legislatures which have joined the chorus against the judicial rule of immunity have changed their tune.²⁸

Contentions other than inconvenience which have been used to prop the rule of immunity are largely makeweights and do not require extended notice.

2. A rather common suggestion is the idea that garnishment would divert public funds from the objects to which they have been appropriated. This is entirely specious in the ordinary case because the city has gotten that for which it is paying and payment to the garnishor discharges its obligation to the principal debtor. The point has merit, however, where the city is in effect paying in installments for that which is fully useful only as a whole, as in the case of construction contracts. There the usual purpose of paying as the work progresses is to provide the contractor with funds to pay for what must go into the project. If payments are intercepted by third parties the public interest may suffer due to the inability of the contractor to pay his way. The effect is a diversion of public funds from their proper object. The Wisconsin statute subjecting public corporations to a proceeding which serves the purpose of garnishment in aid of execution is expressly inapplicable to "moneys due a contractor engaged upon public work

²³ This is no index, of course, to the number of unreported cases or to the amount of litigation in states where the bars have been taken down.

²⁷ See *Boyd, Higgins and Goforth v. Malone*, 142 Va. 690, 128 S. E. 259 (1925); *Southwestern Surety Ins. Co. v. Wells*, 217 Fed. 294 (E. D. Pa. 1914) (dictum). See also *Pendleton v. Perkins*, 49 Mo. 565 (1872) (in equity).

²⁸ In several instances statutes establishing immunity have given way under enactments authorizing garnishment. *E. g.*, OKLA. COMP. STAT. ANN. (Bunn, 1921) § 353, (Supp. Thornton, 1926) § 353-1; ORE. LAWS (Olson, 1929) (abrogating statute of 1862 which exempted public officers from garnishment). The Iowa experience has been unique. In *Wales v. City of Muscatine*, 4 Ia. 302 (1855), the city was held subject to garnishment. In 1860 the Iowa Legislature expressly forbade garnishment of "municipal or public corporations" and that is still the law of the state. IOWA CODE (1927) §12159.

until all claims and expenses of performing such contract have been paid.”²⁹ This distinction has been applied in some of the cases.³⁰

3. It has been urged that to allow garnishment would often mean that a city would be subjected to a judgment where it was not indebted due to failure of its officers to contest the proceeding.³¹ The short answer is that city officers are responsible for their conduct in office and a court has no warrant to assume in advance that they will not protect the city’s interest. Such an argument would operate to ban all litigation against the corporation. An occasional dereliction of this sort would cost the city accordingly but the amount might be recouped by proceedings on the officer’s bond.³²

Where the policy of immunity is followed the court makes no distinction based on the character of function in performing which a debt was incurred. Thus debts incurred in maintaining utility services have been shielded from garnishment.³³ In one instance the protection was accorded a debt owed by a city as trustee of a charitable trust.³⁴ Surely the case for immunity was never weaker than at this point. The inconvenience notion is not persuasive as to utility functions since the city is dealing in a business way with the public and should be subject to the usual incidents of responsibility.

Counties

Counties have been granted immunity almost universally in the absence of specific legislation.³⁵ The Colorado Court of Appeals went so far as to declare a statute subjecting “municipal corporations” to garnishment to be inapplicable to counties on the ground

²⁹ WIS. STAT. (1929) § 304.21. See also CAL. CODE CIV. PROC. § 710a, CAL. CODES AND GEN. LAWS (Deering, Supp. 1929) p. 2247.

³⁰ Under the Arkansas cases establishing “equitable garnishment” relief is refused under these circumstances. *City of Texarcana v. Offenhauser*, 182 Ark. 201, 31 S. W. (2d) 140 (1930). See n. 61, *infra*. Cf. *Leake v. Lacey*, 95 Ga. 747, 22 S. E. 655 (1895) (denying garnishment though the construction project had been completed).

³¹ *Born v. Williams*, 81 Ga. 796, 7 S. E. 868 (1888).

³² Municipal officers who “handle public funds or property” and all others “of whom it shall be required” must give bond in West Virginia. W. VA. REV. CODE (1931) c. 6, art. 2, § 11. This requirement is flexible enough to permit adjustment to the situation if it turned out that municipal officers were derelict in defending garnishment proceedings.

³³ *Irlarry v. San Diego*, 186 Cal. 535, 199 Pac. 1041 (1921) (water system); *Laughlin v. Neveling*, 1 Pa. County Ct. Rep. 370 (1885) (gas plant).

³⁴ *Fairbanks Co. v. Kirk*, 12 Pa. Sup’r. Ct. 210 (1889).

³⁵ See collection of cases (1929) 60 A. L. R. 823. Massachusetts is a notable exception. *Adams v. Tyler*, 121 Mass. 380 (1876).

that they were quasi-corporations!³⁰ The more specific arguments have been little more than a spelling out of the Colorado position. It is insisted that a county is more clearly an arm of the state for purposes of local administration than are cities; that a county's powers and functions are much narrower; and that it is in general less autonomous, lacking legislative power, for example. The last two points are sound but it is not perceived that they are significant here. That counties are subject to suit is definitely established by statute. That they engage in more restricted functions than cities should not render them the less responsive for debts incurred in functions they do perform. Where the immunity notion has been rejected as to cities it has been rejected broadly both as to its functions similar to those of a county and as to its utility and other services. The first point is not acceptable. In a state like West Virginia where municipal corporations are completely the creatures of the legislature, they are as much instrumentalities of the state government for purposes of local administrations as counties, in fact they are more so since they serve the purpose more fully. The difference is simply that the two are useful in different phases of public administration. Municipalities have more autonomy because experience approves it for urban problems. Counties, then, as well as cities, should be subject to garnishment.

Other Public Corporations

The rule of immunity has usually been extended to school districts³⁷ and the various types of local improvement districts,³⁸ all of which are created for highly specialized purposes. Nothing can be said for immunity here that could not be said in the case of a county. The objection of inconvenience is doubtless less significant at this point since the attention of the district officers is not so

³⁰ *Stermer v. Board of Com'rs.*, *supra* n. 2. *Accord*: *Hoyt v. Paysee*, 51 Nev. 174, 269 Pac. 607 (1928). This argument could be turned the other way in a state like Georgia with a garnishment statute applying to all corporations except "municipal corporations". GA. CODE (Michie, 1926) § 5302. If counties are not municipal corporations for this purpose in Georgia the statute makes them garnishable but the Supreme Court of Georgia says that counties are not garnishable. *Dotterer v. Bowe*, 84 Ga. 519, 11 S. E. 896 (1890).

³⁷ *Kein v. School Dist. of City of Carthage*, 42 Mo. App. 460 (1890); *Welch Lumber Co. v. Carter Bros.*, *supra* n. 9.

³⁸ *McBain v. Rogers*, 29 So. 91 (Miss., 1901) (levee district); *Board of Directors of St. Francis Levee Dist. v. Bodkin*, 108 Tenn. 700, 69 S. W. 270 (1902) (levee district).

constantly required by routine duties.³⁹ Of the two West Virginia cases on the general subject the first related to a school district and the second to a municipality.⁴⁰ Immunity was granted in both without comment upon the type of public corporation involved on the assumption, apparently, that the immunity extended to all public corporations.

The West Virginia court was first confronted with the general question in *Welch Lumber Co. v. Carter Bros.*,⁴¹ where a board of education of a school district was named garnishee in a proceeding in aid of execution. The nature of the claim did not appear. The board answered admitting indebtedness. The trial judge, on motion of the principal debtor, quashed the suggestion on the ground that the board was not garnishable. The Supreme Court of Appeals in affirming stated: “. . . . we are disposed to adopt the rule which best accords with the weight of authority” and let the matter rest without independent analysis. Judge Miller said:

“If uninfluenced by them (his brethren), this being a case of first instance in this State, I would be inclined to follow the opinion of the great text writers on the subject, as being founded on the better reason. I see little merit in the argument based on consideration of public inconvenience, etc. The rules now adopted, I fear, are liable to be made the instruments of fraud and imposition by unconscionable contractors of public buildings and other public works.”

The *Welch Lumber Company* decision was followed in *Leiter v. The American La France Fire Engine Company*⁴² without discussion of the merits. The court made no reference to the fact that the garnishee, a city, was brought into the case by an order of attachment before final judgment was rendered against the principal debtor or to the fact that the principal debtor was a foreign corporation.⁴³ The first circumstance tends to make the case a stronger one for immunity but the second more than offsets it by

³⁹ After an improvement such as a drainage system had been completed there would remain the task of maintenance, which, however, would require only intermittent application by the district officers.

⁴⁰ *Welch Lumber Co. v. Carter Bros.*, *supra* n. 9 (school district); *Leiter v. American-La France Fire Engine Co.*, 86 W. Va. 599, 104 S. E. 56 (1920) (municipality).

⁴¹ *Supra* n. 9.

⁴² *Supra* n. 40.

⁴³ Service on the corporation was found to be defective so the primary liability was not adjudicated. But that was no justification for ignoring the policy of protecting home creditors and relying on the usual policy argument against garnishment.

reason of the strong policy favoring local creditors against local assets of foreign debtors.

These cases represent the present state of West Virginia law on the subject.

Salaries of Public Officers and Employees

“The author’s view, where the question is left entirely open by statute, is, that, on principle, a municipal corporation is exempt from liability of this character (garnishment) with respect to its revenues, the salaries of its officers, and perhaps also the wages of its employees, or payments to be made under pending contracts for public works and the like, but that where it owes an ordinary debt to a third person not in its service, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives to creditors of natural persons and of private corporations.”⁴⁴

Judge Dillon’s distinction in favor of salaries of public officers and employes finds some support in the cases.⁴⁵ The rational basis for this position has been the supposed presence of an additional policy argument against garnishment of official salaries. It has been urged that an officer’s salary is calculated to give him economic independence and thus freedom from private care to the end that he may devote his time and energy unreservedly to the public service;—garnishment of his salary might destroy that independence to the detriment of the interests of the public.⁴⁶

Reserving the merits for the moment, the argument must be labelled inapplicable to employes who have no fixed tenure but are hired to perform ministerial functions at the direction of those higher up. Thus a particular policeman would hardly be considered an essential cog in the machinery. There may be instances where the services of administrative officers or employes have become quite unique but they are most exceptional in the lower ranks. But to have to determine in every case whether the officer or employe could easily be dispensed with, would be entirely impracticable. Would it not be more desirable, then, to subject all in the class to garnishment and give creditors adequate remedies

⁴⁴ DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 249.

⁴⁵ See, for example, Packard-Phoenix Motor Co. v. American-La France Corp., *supra* n. 17; City of Laredo v. Nalle, *supra* n. 20.

⁴⁶ This thesis is elaborated in Sanger v. City of Waco, 15 Tex. Civ. App. 424, 40 S. W. 549 (1897); writ of error denied by Texas Supreme Court. See also Heilbronner v. Posey, 103 Ky. 462, 45 S. W. 505 (1898); Bank of Winnfield v. Brumfield, 124 So. 628 (La. App. 1929).

than to save for the public a few "unique" servants by giving every petty employee the role of a spendthrift?"

Were it assumed for the moment that the elective and higher ranking appointive officers of public corporations were never dispensable without injury to the public interest the argument for immunity of salaries from garnishment would yet want persuasiveness. Few men worthy of important responsibilities would permit themselves to be subjected to such a proceeding. That many would avoid it by bending their energies to the exploitation of other resources and thus to the neglect of public affairs is not demonstrable. Is it not just as safe to assume that officials who were given no special protection from creditors would have a keener sense of responsibility in public affairs than otherwise? Who can say with assurance that the asserted policy of official independence outweighs the policy, based on common honesty, which would subject one's resources to the satisfaction of his debts? In the language of the Ohio Court of Appeals, "One would think that it was in accordance with public policy to see that public officers did pay their debts" ⁴⁸ One might risk the further suggestion that immunity would be undemocratic.

From the standpoint of West Virginia law the rule of liability can fairly be tested only by experience. It is not for the courts to make an exception in favor of public officers though the purpose be to protect the public and not the officers themselves. Were the rule of liability to have evil consequences legislative reconsideration is always possible.

Immunity has been denied the earned salary of an officer whose term had expired.⁴⁹ The policy notion did not apply. There is some authority that the earned salary of one yet in office is garnishable.⁵⁰ That is the more common situation where one would expect a policy rationalization to be offered. The case of unearned salary

⁴⁷ The writer has strong sympathy for the views of John Chipman Gray against spendthrift trusts. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895) § 258 *et seq.* Their social implications apply very strongly here because public officers are before the public eye.

⁴⁸ Cooper v. Schooley, 159 N. E. 727 (Ohio App. 1927). In Massachusetts garnishment has been denied where compensation was statutory on the ground that the process applied only to contract liability, express or implied. Walker v. Cook, 129 Mass. 577 (1880). Salaries determined by local authorities are garnishable. Hooker v. McLennan, 236 Mass. 177, 127 N. E. 626 (1920).

⁴⁹ Southwestern Savings Loan and Bldg. Ass'n. v. Awalt, 22 N. M. 607, 166 Pac. 1181, L. E. A. 1917E, 1117 (1917).

⁵⁰ Cooper v. Schooley, *supra* n. 48. *Contra*: Sanger v. City of Waco, *supra* n. 46.

presents differences of degree but not such as to require different treatment. It is not a proper case in which to invoke the policy against assignment of official salaries.⁵¹ The basis of that policy is protection of the public service against direct and unnecessary embarrassment incident to voluntary assignment of unearned salary. Deliberate bartering in such claims is unwholesome from the officer's standpoint as well. The factor of creditor protection is not present. Of the statutes allowing garnishment not a few apply to unearned salaries.⁵²

Judicial Limitations on the Rule of Immunity

1. Assuming that immunity will be granted where relied upon by the garnishee corporation, may it be waived? Is it a matter of defense or is it jurisdictional? Both suggestions have received approbation.⁵³ Since the protection is created for the public and not the principal debtor the courts are naturally reluctant to permit him to hide behind it when the corporation does not elect to do so. The Michigan court, on the other hand, has made the unsound ruling that a school district could not waive the immunity as to a teacher's salary without his consent.⁵⁴ The West Virginia position has been that the immunity cannot be waived.⁵⁵

Once the rule of immunity is embraced the conclusion against waiver seems inescapable. Garnishment being a statutory process the expanse of a court's jurisdiction in the matter depends upon

⁵¹ A statute subjecting earned salary of public officers to garnishment has been construed not to abrogate the rule that the unearned salary of a public officer may not be assigned. *Tribune Reporter Printing Co. v. Homer*, 51 Utah 153, 169 Pac. 170 (1917). The West Virginia statute does not apply to debts arising after the time answer was filed. *Ringold v. Suiter*, *supra* n. 5.

⁵² *E. g.*, N. Y. CIV. PRAC. ACT §§ 684, 685; WIS. STAT (1929) § 304.21.

⁵³ Waiver allowed: *Tone v. Shankland*, 110 Ia. 525, 81 N. W. 789 (1910); *Clapp v. Walker and Davis*, 25 Ia. 315 (1868) (so held though immunity established by statute); *Dollar v. Allen West Com'n. Co.*, 78 Miss. 274, 28 So. 876 (1900); *Dollman v. Moore*, 70 Miss. 262, 12 So. 23 (1892); *Baird v. Rogers*, 95 Tenn. 492, 32 S. W. 630 (1895) (garnishment of officer's salary claim after term of service; dictum that defense could not be waived while he was in office).

No waiver: *Porter and Blair Hdw. Co. v. Perdue*, 105 Ala. 293, 16 So. 713 (1894); *Vaughn v. Condon*, 52 Cal. App. 713, 195 Pac. 545 (1921); *Born v. Williams*, 81 Ga. 796, 7 S. E. 868 (1888); *First National Bk. v. City of Ottawa*, 43 Kan. 294, 23 Pac. 485 (1890); *School Dist. v. Gage*, 39 Mich. 484 (1878); *Morgan v. City of Beaumont*, 157 S. W. 207 (Tex. Civ. App. 1913) (dictum, immunity established by city charter); *Van Cott v. Pratt*, 11 Utah 209, 39 Pac. 827 (1895); *Welch Lumber Co. v. Carter Bros.*, 78 W. Va. 11, 88 S. E. 1034 (1916).

⁵⁴ *School Dist. v. Gage*, *supra* n. 53.

⁵⁵ *Welch Lumber Co. v. Carter Bros.*, *supra* n. 53; *Leiter v. Fire Engine Co.*, *supra* n. 40 (dictum).

statute. The rule of immunity embodies the assumption that the statute does not apply to public corporations. It logically follows that the parties cannot by their consent confer jurisdiction. On the merits, moreover, were the policy rationale of the immunity sound it would not be wise to permit public officers to raise or lower the shield at their caprice. They would be tempted to discriminate between creditors. To leave the application of the policy to administrative discretion is an admission of its weakness,⁵⁵ or at least that it is not inflexible.

2. Equitable garnishment.

The advantages of garnishment have been in part saved to creditors in Arkansas, where the legal rule of immunity is followed, by the resourcefulness of equity. Arkansas has contributed "equitable garnishment" to our jurisprudence. Missouri has embraced the device in the teeth of a statute forbidding garnishment of public corporations⁵⁷ but at least four states and the District of Columbia have definitely rejected it.⁵⁸ "Equitable garnishment" is a proceeding in the form of a creditor's bill in which the plaintiff must plead and establish the insolvency of the principal debtor and the inadequacy⁵⁹ of legal processes. A public corporation indebted to the principal debtor is simply joined as a defendant and subjected to a personal decree requiring payment to the plaintiff.⁶⁰ If the claim is one under a contract for construction of public works the plaintiff must further estab-

⁵⁵ This is particularly true where the courts allow waiver of a statutory immunity. See *Tone v. Shankland and Clapp v. Walker*, both *supra* n. 53. Cf. *Vaughn v. Condon*, *supra* n. 53.

⁵⁷ *De Field v. Harding Dredge Co.*, 180 Mo. App. 563, 167 S. W. 593 (1914); *Pendleton v. Perkins*, 49 Mo. 565 (1872).

⁵⁸ *McConnell v. Floyd Co.*, 164 Ga. 177, 137 S. E. 919 (1927); *Dow v. Irwin*, 21 N. M. 576, 157 Pac. 490 (1915); *Clark v. Bd. of Com'rs.*, 62 Okla. 7, 161 Pac. 791 (1916); *Parsons v. McGavock*, 2 Tenn. Ch. 581 (1875); *Columbia Brick Co. v. D. C.*, 1 App. D. C. 351 (1893). The West Virginia court has intimated that it would not allow equitable garnishment. *Rothwell v. Brice*, 94 W. Va. 466, 471, 119 S. E. 293 (1923). In New Mexico, Oklahoma and Tennessee statutes now expressly permit garnishment. See n. 2, *supra*.

⁵⁹ In Missouri legal processes need not first be exhausted if complainant can show that that course would be futile. *Pendleton v. Perkins*, *supra* n. 57.

⁶⁰ *Wharf Improvement District v. U. S. Gypsum Co.*, 181 Ark. 288, 25 S. W. (2d) 425 (1930); *Plummer v. School Dist.*, 90 Ark. 236, 118 S. W. 1011 (1909). See also SLOAN, *THE LAW OF IMPROVEMENT DISTRICTS IN ARKANSAS* (1928) §§ 28 - 31.

Cf. *First National Bk. v. Mays*, 175 Ark. 542, 299 S. W. 1002 (1927) (equitable garnishment of compensation county owed sheriff for feeding prisoners denied because compensation subject to settlement of sheriff's accounts and garnishment might embarrass that settlement).

lish that the work has been completed.⁶¹ The device is particularly effective where the principal debtor is a non-resident.

The explanation of this equitable creation is probably that it is in part a recognition of the unsoundness of the immunity rule and certainly in larger part an appreciation of other policies which at least neutralize the policy against inconvenience to the public service. Equity relies on the general policy underlying creditors' bills, that a creditor shall not go empty-handed if equity can avoid it,⁶² and in an appropriate case on the policy favoring domestic creditors against foreign debtors.⁶³

Means of Circumventing Immunity

Statutory proceedings in aid of execution go far in West Virginia toward reaching intangible assets.⁶⁴ Choses in action which are disclosed are required to be assigned to the levying officer under pain of an attachment of the body of the debtor.⁶⁵ The court to which the writ is returnable is required to order such steps to enforce payment as it deems best. Thus the execution creditor may without even resorting to garnishment sometimes enforce claims of the principal debtor which could not be sold under execution. Since the officer by assignment of the claim becomes the legal owner, for purposes of collection, he would be in as favorable a position as the assignor to enforce a claim against a public corporation. Thus the policy argument would not apply.

This possible method of circumventing the immunity rule in West Virginia is no reason for not overthrowing it. Garnishment is useful both before and after judgment. It is more efficient,—never depending upon an assignment by the principal debtor or upon the ingenuity of the court in devising a method of enforcing the assigned claim. It is desirable, moreover, to have a choice of remedies.

One further alternative deserves notice. In a case otherwise satisfying the requirements of a creditor's bill claims against public corporations may be reached and sold in equity. The policy notion

⁶¹ *City of Texarcana v. Offenhauser*, *supra* n. 30; *Sloan, loc. cit., supra* n. 60.

⁶² The Oklahoma Supreme Court, however, has insisted that the proceeding in equity is just as opposed to the policy against inconvenience as legal garnishment. *Clark v. Bd. of Com'rs.*, *supra* n. 58.

⁶³ See citation of authorities, *supra* n. 27.

⁶⁴ W. VA. REV. CODE (1931) c. 38, art. 5.

⁶⁵ *Ibid.*, §§ 4, 5.

has no bearing since the corporation is not a party.⁶⁶ A decree appointing a receiver to take an assignment of a claim against a city and collect or adjust it has been upheld.⁶⁷ This device approaches the West Virginia statutory scheme just described. A sale in equity would not perform the function of garnishment since a forced sale is not likely to be as fruitful as direct payment.

Garnishment of Property or Funds of Debtors in the Hands of Officers of Public Corporations

Suppose funds have been paid over to a county officer for purposes of redeeming land from a tax sale. May a creditor of the holder of the tax certificate garnish the fund? A negative answer was given in an Illinois case.⁶⁸ The problem may be presented, of course, with respect to any public officer such as a clerk of court, sheriff or constable who is likely to have control of money or property of private parties, in his official capacity.⁶⁹ A fiscal officer with public funds in his custody is not, of course, in this category.⁷⁰ If the particular officer is a court officer and the money or property is still in *custodia legis* pending final order it is not garnishable because the court with established jurisdiction will not brook interference.⁷¹ In the absence of that objection the courts favoring immunity have been wont to rest on the inconvenience notion. It has no more virtue here, however, than at other points and a growing list of statutes expressly subjecting public officers to garnishment in this type of case have been enacted.⁷²

Legislation

A total of twenty-nine states now have express enactments rendering garnishment available against public corporations or

⁶⁶ *Riggin v. Hilliard*, 56 Ark. 476, 20 S. W. 402 (1892).

⁶⁷ *Knight v. Nash*, 22 Minn. 452 (1876).

⁶⁸ *Smith v. Finlen*, 23 Ill. App. 156 (1887).

⁶⁹ *Connolly v. Thurber-Whyland Co.*, 92 Ga. 651, 18 S. E. 1004 (1893); *Rohan and Son Boiler Works Co. v. Young*, 190 Mo. App. 649, 176 S. W. 295 (1915).

⁷⁰ In this situation garnishment of the officer is in effect garnishment of the corporation. *Triebel v. Colburn*, 64 Ill. 376 (1872).

⁷¹ After decree directing payment of a fund in the hands of a commissioner garnishment will be permitted since the reason for denying it has ceased. *Boylan v. Hines*, 62 W. Va. 486, 59 S. E. 503 (1907).

⁷² ALA. CODE (Michie, 1928) § 8060; IDAHO COMP. STAT. (1919) § 6799; IND. STAT. ANN. (Burns, 1926) § 1004; MONT. REV. CODE (Choate, 1921) § 9294; OHIO GEN. CODE (Page, 1926) § 11829; N. M. STAT. ANN. (1929) § 59-127; UTAH COMP. LAWS (1917) § 6754; WYO. COMP. STAT. (1920) § 6127. The statutes of several other states on the general subject are broad enough to allow garnishment in this type of case. Massachusetts alone expressly grants immunity. MASS. GEN. LAW. (1921) c. 32, § 37.

their officers.⁷³ These statutes vary greatly, of course, both in form of expression and extent of application. The Wyoming statute at the one extreme is quite comprehensive while that of Maryland occupies the other by giving the remedy to the state alone. Eight states have by statute granted at least partial immunity.⁷⁴ None of the immunity statutes, however, were enacted recently.⁷⁵ Investigation has disclosed no instance of the repeal of a statute rendering the process available. The trend has developed into a movement in the opposite direction. In no less than twelve states legislation has served to abrogate a judicially established rule of immunity.⁷⁶

The "weight of legislative authority" is now definitely against the West Virginia position, a circumstance not to be overlooked when one recalls the basis upon which that position was assumed. Viewed solely upon the merits, however, West Virginia might well get in step. That her public corporations have fallen upon evil days during the current stringency is not an answer since garnishment would not increase the financial burden. Nearly two years intervene, moreover, before the next regular session of the Legislature.

The simplest phase of the subject from a legislative standpoint is garnishment of property or funds of debtors in the hands of public officers. Garnishment should be fully and directly extended to the case. West Virginia might draw upon the statutes of sister states for guidance in the matter.⁷⁷ Clarity would be served by

⁷³ In addition to the statutes cited in notes 2, 29 and 72 *supra*, see the following: ARIZ. STAT. 1929, c. 50; MASS. GEN. LAWS (1921) c. 223, § 28 (similar to Vermont provision); NEV. REV. LAWS (1912) § 5154; N. J. COMP. STAT. (First Supp. 1918) p. 587, N. J. Pub. Laws 1915, p. 471; N. Y. CIV. PRAC. ACT §§ 684, 685; N. D. COMP. LAWS (1913) § 7567; ORE. LAWS (Olson 1920) § 258; S. D. COMP. LAWS (1929) § 2453; VT. GEN. LAWS (1917) § 1952 (assumes that garnishment lies by providing a method for summoning public corporations); VA. CODE ANN. (Michie, 1930) §§ 6560, 6561. MD. CODE ANN. (Bagby, 1924) (authorizes garnishment of counties and the city of Baltimore at suit of the state with respect to property or money owed debtors of the state). The Maine statute after an amendment striking out a clause exempting public corporations has been held applicable to them. *Clark v. Clark*, 62 Me. 255 (1874).

⁷⁴ GA. CODE (Michie, 1926) § 5302; IDAHO COMP. STAT. (1919) § 6799; IOWA CODE (1927) § 12159; KAN. REV. STAT. ANN. (1923) § 60-940; LA. CIV. CODE art. 1992, LA. REV. CODE OF PRAC. (Marr, 1927) art. 647; MASS. GEN. LAWS (1921) c. 32, § 37. See n. 72, *supra*; MO. REV. STAT. (1919) § 1848; TEX. COMPLETE STAT. (Vernon, 1928) art. 1175-5 (authorizing home rule cities to immunize themselves).

⁷⁵ On the other hand some are quite old. *E. g.*, IOWA CODE (1927) § 12159, dating from 1860.

⁷⁶ See n. 2, *supra*.

⁷⁷ See references to statutes, *supra* n. 72. The simple Alabama statute, though inadequate, would afford a starting point:

"Money in hands of an attorney at law, sheriff, or other officer, may

expressly negating any application of the statute to public funds in the custody of financial officers.⁷⁸ Provision should be made also for payment into court to abide the result of litigation in which the fund is involved if the garnishee be a court officer.

Most of the statutes providing expressly for garnishment of salary or other claims against public corporations simply extend the ordinary process to the new field.⁷⁹ California and Wisconsin, however, substitute a special type of proceeding calculated to minimize inconvenience to the corporation. One who has obtained a judgment in a court of the state against a debtor to whom a public corporation is indebted is authorized to file a transcript of his judgment with the corporate auditor, or other officer performing auditing functions, whereupon the officer must issue his warrant for or pay so much of the amount owing the principal debtor as will satisfy the judgment.⁸⁰ The Wisconsin statute goes further. All sums coming due after filing of the transcript are required to be applied to the judgment till it is paid in full.⁸¹

Both the California and Wisconsin statutes make proper exception for incomplete public construction contracts.⁸² Three inadequacies of both should be noticed in contemplation of more complete enactment for West Virginia. First they serve only the function of garnishment in aid of execution and not the function of at-

be garnished; and in the case of officers of the court, the money must be paid into the court, to abide the result of the suit, unless the court otherwise direct.”

ALA. CODE (Michie, 1928) § 8060.

⁷⁸The provision is not essential. Thus the Ohio act has been declared inapplicable to financial officers. *Bazzoli v. Larson*, 178 N. E. 331 (Ohio App. 1931).

⁷⁹See references to statutes, *supra* n. 73.

⁸⁰See n. 29, *supra*. It is desirable to make the language of the statute explicit to avoid a narrow construction. See the unwarrantably narrow construction given the California statute in *Weiser v. Payne*, 110 Cal. App. 378, 294 Pac. 407 (1930). See also *Central of Ga. Ry. Co. v. City of Andalusia*, 218 Ala. 511, 114 So. 236 (1928); *Troy Laundry Co. v. City of Denver*, 11 Colo. App. 368, 53 Pac. 256 (1898).

⁸¹The New York scheme is similar but the statute is too restricted in application. It applies only to salaries and wages and affects only sums coming due after service of execution. N. Y. CIV. PRAC. ACT. §§ 684, 685.

The Washington statute is unique. It reads in part:

“No regular judgment in garnishment shall be entered against any municipal corporation, but the judge of the superior court or justice of the peace shall by written order command the auditing officer, or body of such municipal corporation to audit and pay to the judgment creditor the amount due from the garnishee to the principal defendant, not exceeding the amount of the judgment in the main action, whereupon the same shall be paid by the garnishee,”

WASH. COMP. STAT. (Remington, 1922) § 680-2.

⁸²See n. 29, *supra*.

tachment pending the principal controversy. That gap could be filled by specifically providing that from the time of service of notice of the pending proceeding on the corporation it should withhold payment till final determination of the case. It would be necessary to bring the corporation into the suit only where it contested the claim and there the issue could be tried as in garnishment. That takes care of the second deficiency of the California and Wisconsin statutes. For the case of an uncontested claim it would be desirable to require a bond of the plaintiff to indemnify the corporation from liabilities to third persons arising from withholding the fund.

A third bald spot is the lack of specific refernce to the situation where the corporation is unable to pay an established debt, a not uncommon affair these days. Insofar as the corporation in a given case had authority to issue a "no fund" warrant that might be required of it. For the case where the principal debtor had a warrant for the sum due him it would be necessary to stipulate that the issuance of a further warrant under the statute would invalidate it to the extent of the amount of the new warrant. The instance of want of power to issue "no fund" warrants would cause no difficulty where the claim had been contested since a successful plaintiff would have a personal judgment. That a claim was uncontested might be treated as a sufficient liquidation of the claim to ground resort to mandamus to compel satisfaction.