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Florida Procedures in Satisfying or Avoiding a Money Judgment

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FLORIDA PROCEDURES IN SATISFYING OR AVOIDING A MONEY JUDGMENT*

Theoretically, entry of judgment marks the end of litigation and determines the rights and obligations of the parties to the suit. If a money judgment has been rendered in favor of the plaintiff, the entry of judgment is the beginning of a new relationship of the parties, that of judgment creditor and debtor. The money judgment is not self-executing and, in the absence of a voluntary payment by the debtor, the attorney for the winning creditor realizes that the time for celebrating his victory does not arrive until he fulfills his client's wishes — not the judgment, but the collection of the judgment. In order to fulfill this wish, the attorney may have to spend more of his time and his client's funds and use a variety of statutory devices in order to relieve an uncooperative judgment debtor of his non-exempt assets.

Likewise, the judgment debtor may attempt to avoid the collection of the judgment against him through the use of the defensive devices afforded him by the statutes and judicial decisions of Florida. The judgment debtor's position has never been an enviable one. Under English common law the judgment creditor had a very effective procedure by which he could collect his debt, that of levying execution against the debtor's person. The creditor, by obtaining a writ of *capias ad respondem,* could have the debtor brought into court and under a writ of *capias ad satisfaciendum* could have him imprisoned until the judgment was satisfied.[1] Debt is no longer a heinous crime, and imprisonment for debt has ceased to be regarded as a proper creditor's remedy.[2] Changing attitudes and social reform have resulted in the judgment debtor being afforded certain legal rights and remedies to protect him from undue hardships at the hands of his creditor.

The object of this note is to set out the various devices available within Florida by which the unsecured creditor may satisfy or the debtor avoid the collection of a money judgment. The terms "collection of a judgment" and "satisfaction of a judgment" will be used interchangeably throughout this note. The former terminology will be more familiar to practicing attorneys while the latter is found

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*A table of headings and subheadings is appended at the end of this note.

1. 8 HOLDSWORTH, HISTORY OF THE ENGLISH LAW 231 (2d ed. 1937).

2. FLA. STAT. §55.14 (1963): "In no case shall a capias ad satisfaciendum be issued upon a judgment, nor shall the body of any defendant be subject to arrest or confinement for the payment of money, except it be for fines imposed by lawful authority."

within the structure of the Florida statutes.[3] No attempt will be made in this note to deal with the bankrupt debtor.

PART I — THE CREDITOR

Since the judgment debtor may sit back and ignore the judgment creditor until the creditor initiates some type of legal machinery to aid him in satisfying a money judgment, the creditor's remedies should logically be set out first.

Execution

The first step in obtaining the collection of a money judgment in Florida is the recordation of a certified transcript of the judgment or decree with the clerk of the circuit court of every county in which the judgment debtor holds title to real property.[4] The purpose of recording the judgment is to place subsequent purchasers on constructive notice that all real property in that county owned by the judgment debtor is subject to a lien represented by the judgment.[5] This recorded lien attaches not only to property owned by the debtor at the time of recordation,[6] but also to property that he may acquire after recordation.[7] It has been stated that only a certified transcript of the judgment or decree will satisfy the recording requirement and that recording the original noncertified judgment will be ineffective.[8]

Once the certified copy of the judgment or decree has been recorded, priority of lien should also be established as to personal property by delivery of a writ of execution to the sheriff of the county in which the property is located.[9] These two recording procedures should be completed as soon as possible after obtaining judgment. The burden of obtaining the writ of execution is upon the party seeking execution and the writ may be obtained from the clerk upon direction of the court that rendered the judgment.[10] The writ will be issued only after expiration of the time allowed for moving the court for a new trial, or, if a motion for new trial is filed, after the motion has been disposed of by the court; however, a writ may be issued by special order of the court before expiration of the time allowed for filing the motion.[11]

3. See, *e.g.*, FLA. STAT. §55.55 (1963).
4. FLA. STAT. §55.10 (1963).
5. Giddens v. McFarlan, 152 Fla. 281, 10 So. 2d 807 (1943).
6. FLA. STAT. §55.10 (1963).
7. B. A. Lott, Inc. v. Padgett, 153 Fla. 304, 14 So. 2d 667 (1943).
8. 1953-1954 FLA. ATT'Y GEN. BIENNIAL REP. 51.
9. See 1961-1962 FLA. ATT'Y GEN. BIENNIAL REP. 549, 552.
10. See Childs v. Boots, 112 Fla. 282, 152 So. 214 (1933).
11. FLA. R. CIV. P. 2.13. See also FLA. R. CIV. P. 3.15 where executions on

The writ of execution, technically labeled the writ of *fieri facias*,[12] may be issued at any time within three years of the final judgment.[13] The writ may be renewed from time to time until twenty years after judgment unless it has been returned satisfied.[14] Renewal becomes necessary when the writ is delivered to the sheriff and he returns it unsatisfied or partially satisfied.[15] Issuance of the second or alias writ and subsequent or pluries writs is also authorized in the event the original writ has been lost or destroyed.[16] The judgment must be satisfied within the twenty-year limitation period. Proceedings started just prior to the expiration of the period in order to discover assets of the debtor, will not extend the period.[17] Failure to obtain the writ of *fieri facias* within three years after judgment necessitates a revival of the judgment by the issuance of the judicial writ of *scire facias*.[18] The effect of the judgment in the *scire facias* proceedings is not to prolong the lien of the original judgment beyond the time prescribed by statute, but simply to revive it.[19] The writ of execution is directed to all sheriffs of the state of Florida and is in force throughout the state.[20] A writ issued by a justice of the peace has force only in the county in which it is issued,[21] but it may be presented to a justice of the peace or county judge of any other county for endorsement and then it will be of force throughout that county.[22]

Delivery of the writ of execution to the sheriff obligates him to execute it[23] and to enter it upon the execution docket.[24] The execution docket, maintained by the sheriff, is indexed alphabetically as to each defendant and cross-indexed alphabetically as to each plaintiff.[25] This affords the judgment creditor a procedure by which to establish and ascertain his priority of lien. A deposit is usually required by the sheriff[26] for the various fees prescribed by statute.[27] The judg-

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decrees of money shall issue and be governed by the law relating to executions on judgments.

12. FLA. R. CIV. P. 2.13.
13. FLA. STAT. §55.15 (1963).
14. *Ibid.*
15. See Tedder v. Morrow, 100 Fla. 1486, 131 So. 387 (1930).
16. FLA. STAT. §55.16 (1963).
17. Young v. McKenzie, 46 So. 2d 184 (Fla. 1950).
18. Massey v. Pineapple Orange Co., 87 Fla. 374, 100 So. 170 (1924).
19. *Ibid.*
20. FLA. STAT. §55.17 (1963).
21. FLA. STAT. §81.23 (1963).
22. *Ibid.*
23. FLA. STAT. §30.19 (1963).
24. FLA. STAT. §30.17 (1963).
25. FLA. STAT. §30.23 (1963).
26. ENGLAND, SHERIFF'S AUTHORITY, DUTIES AND RESPONSIBILITIES AS TO EXECUTIONS 4 (1954).
27. FLA. STAT. §30.23 (1963).

ment creditor has an election whereby he may point out to the sheriff specific property upon which levy may be made,[28] and the sheriff may require him to furnish a bond if this election is taken.[29] If no specific property is selected, the sheriff must levy on any property assessed against the debtor on the current tax rolls of the county or registered in his name under any law of the United States or of Florida.[30] This provision is strictly applied and a sheriff will even go to the extent of checking the state boat registration records.[31]

When the sheriff has levied upon the property, provision is made to allow the debtor to retain the property by posting a bond with the sheriff.[32] This provision is equitable in that it allows the debtor to continue his use of the property while affording the creditor security for his judgment.

Once the property has been levied upon by the sheriff, it becomes his duty to post a notice of sale by advertisement in a county newspaper once each week for four successive weeks.[33] This time may be shortened in the discretion of the court, from which the execution issued, upon submission of an affidavit that the property to be sold is subject to decay, and will not sell for its full value if held for a period of thirty days.[34] The creditor has the right to control the sale and time of sale if this control does not conflict with the statutory scheme; the sheriff must respect and obey the creditor's wishes when the right is properly exercised.[35] This includes the right to delay the sale when market conditions will prevent the realization of an adequate sale price.[36]

If the sheriff is unable to find any or adequate property to satisfy the judgment, he returns the writ as unsatisfied or partially satisfied.[37] At this point, the judgment creditor may select one of the statutory devices available for discovering whether there are any nonexempt assets that the judgment debtor may have concealed from the searching eyes of the judgment creditor. The return of the unsatisfied or partially satisfied writ of execution is one of the most important

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28. See FLA. STAT. §30.30 (4) (1963).

29. FLA. STAT. §30.30 (3) (1963).

30. FLA. STAT. §30.30 (1) (1963). See Hall, *Florida Property Tax Procedure*, 13 U. FLA. L. REV. 493 (1960) for a description of the various tax rolls maintained by the county.

31. Letter From James W. Knight, Chief Civil Division, Office of the Sheriff, Broward County, Florida to Earle W. Peterson, Jr., Nov. 12, 1963.

32. FLA. STAT. §55.34 (1963).

33. FLA. STAT. §55.44 (1963).

34. *Ibid.*

35. Lawyers' Co-op. Publishing Co. v. Bennett, 34 Fla. 302, 16 So. 185 (1894).

36. *Ibid.*

37. See FLA. STAT. §55.52 (1963).

requisites in obtaining the aid of other statutory remedies in attempting to satisfy the judgment.[38]

Discovery of Assets

If the judgment creditor has had his writ of execution returned unsatisfied by the sheriff, he can then select one or more of the alternatives open to him. He may investigate, on his own, in order to discover assets that may be applied to the satisfaction of the judgment, and using an alias writ,[39] he may reach those assets. His investigation may reveal that his debtor is "judgment proof," that is, the debtor is without nonexempt assets that may be subjected to collection of the judgment. This may lead the creditor to question whether he should have wasted his time and funds in obtaining the judgment and writ of execution; but he should remember that the judgment may be collected at any time within twenty years from entry.[40] Also, the judgment that was recorded in the clerk's office will create a lien on any real property that the creditor may obtain in that county within twenty years.[41] A plaintiff usually knows whether his defendant is judgment proof before he files a complaint. Resort to judicial remedies in the "judgment proof" situation can either be attributed to a matter of principle or to the fact that the plaintiff was willing to run the risk that the defendant would not remain judgment proof for twenty years.

If the creditor believes that the debtor does have assets that may be subjected to collection of the judgment, but has been unable to discover them, he may invoke the remedies available to him by the use of depositions,[42] or proceedings supplementary.[43]

Florida's Rule of Civil Procedure 1.40 provides for discovery in the aid of execution: "In aid of a judgment, decree or execution, the judgment creditor or his successor in interest, when that interest appears of record may examine *any person,* including the judgment debtor, in the manner provided in these rules for taking depositions."[44] Thus, a judgment creditor is permitted to examine a judgment debtor or any other knowledgeable person and, in so doing, may utilize the discovery procedure provided for in the rules. Rule 1.40 does not supplant the method provided by statute[45] for examination of a

38. *E.g.,* FLA. STAT. §55.52 (1963).
39. See FLA. STAT. §55.16 (1963).
40. FLA. STAT. §55.15 (1963). *But see* Orr v. Allen-Hanford, Inc., 158 Fla. 34, 27 So. 2d 823 (1946).
41. B. A. Lott, Inc. v. Padgett, *supra* note 7.
42. FLA. R. CIV. P. 1.40.
43. FLA. STAT. §§55.52-.61 (1963).
44. FLA. R. CIV. P. 1.40 (Emphasis added.)
45. FLA. STAT. §§55.52-.61 (1963).

judgment debtor but is additional.[46] It provides a flexible and inexpensive method for uncovering assets that are subject to a levy, but it does not have the teeth of the supplementary proceedings.[47] In some instances it may be found helpful to use discovery as a preliminary aid to supplementary proceedings. Depositions may be taken without a court order at any time after judgment as long as notice is given and they may be taken before any person authorized to administer oaths.[48] The statutory proceedings supplementary to execution require that there be an unsatisfied return of a writ of execution and an application to the court for an order requiring the judgment debtor to appear for examination before the judge or commissioner appointed in the order. The two procedures are cumulative in that the depositions may supply information in aid of the judgment or execution, and the statutory supplementary proceedings authorize the court to make various orders pertaining to the property discovered.[49] Since the Florida rule is patterned after Federal Rule of Civil Procedure 69, it would seem that the examination of persons other than the judgment debtor does not give the judgment creditor any right to require the disclosure of assets of persons other than the judgment debtor.[50]

The legislature provided a complete remedy for the discovery of assets of a judgment debtor when it authorized the use of supplementary proceedings.[51] Such proceedings are considered as a substitute for a creditor's bill[52] in chancery, and they provide a useful and efficacious remedy at law that enables the judgment creditor not only to discover assets that may be subjected to the satisfaction of his judgment, but to subject them to the settlement of the judgment by a speedy and direct proceeding.[53] At any time after an execution has been returned unsatisfied by the sheriff, the judgment creditor may file an affidavit with the court stating this fact and that the writ is still valid and outstanding.[54] The court will then issue an order requiring the defendant or any other person selected by the judgment creditor to appear before the court, or a commissioner designated in the order, for the purpose of being examined concerning the de-

46. Arnow & Brown, *Florida's 1954 Rules of Civil Procedure*, 7 U. FLA. L. REV. 125, 138 (1954).
47. 30 FLA. STAT. ANN., FLA. R. CIV. P. 1.40, *Author's Comment* (1956).
48. *Ibid.*
49. *Ibid.*
50. Burak v. Scott, 29 F. Supp. 775 (D.D.C. 1939).
51. FLA. STAT. §§55.52-.61 (1963).
52. FLA. STAT. §62.37 (1963).
53. Richard v. McNair, 121 Fla. 733, 164 So. 836 (1935).
54. FLA. STAT. §55.52 (1963).

fendant's property.[55] This order must be served at least fifteen days prior to the examination.[56] The Florida Supreme Court has stated that the statutes:[57]

> [W]ere intended to give the Circuit Court broad discretionary powers to carry out the full intent and purpose of the proceedings supplementary to execution law which was to confer on Circuit Courts the right to subject any and all property, or property rights of any defendant in execution, however fraudulently conveyed, covered up or concealed the same might be, whether in the name or possession of third parties or not, to the satisfaction of an execution outstanding against him.

The Florida statutes provide further that when the defendant has had title to or has paid, within one year prior to the date of the issuance of execution, the purchase price of any personal property, which at the time of the examination is claimed by his wife or any person on confidential terms with him, the burden of proof is upon the defendant to show that the transfer was not made to avoid the collection of the judgment.[58] When a third party does claim property that the court considers to be available for the satisfaction of the judgment, he must be impleaded as a party and accorded an opportunity to be heard.[59] Thus, a judgment debtor's wife must be impleaded when the property is held at the time of the proceedings as an estate by the entirety.[60] This rule also applies to funds derived from property held as an estate by the entirety.[61] Deprivation of due process of law may be used as a defense by a third party who is not joined in the proceedings.[62]

Even though the supplementary proceedings are ancillary to the main cause of action, a final order of the court in a proceeding supplementary to execution is subject to appellate review.[63]

The legislature has put teeth into supplementary proceedings by providing that any person who refuses or neglects to obey an order or direction by a judge or commissioner may be punished for con-

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55. *Ibid.*
56. FLA. STAT. §55.53 (1963).
57. Ryan's Furniture Exch., Inc. v. McNair, 120 Fla. 109, 119, 162 So. 483, 487 (1935).
58. FLA. STAT. §55.56 (1963).
59. Kornberg v. Krupka, 118 So. 2d 790 (3d D.C.A. Fla. 1960).
60. *Ibid.*
61. Crawford v. United States Fid. & Guar. Co., 139 So. 2d 500 (1st D.C.A. Fla. 1962).
62. Kornberg v. Krupka, *supra* note 59.
63. First Nat'l Bank v. Bebinger, 100 Fla. 1455, 128 So. 862 (1930).

tempt.[64] A party or witness may not refuse to answer a question on the ground that it would tend to show him guilty of, or a party to, the commission of a fraud, but an answer cannot be used as evidence against the person answering in any criminal proceeding.[65] In *Reese v. Baker*,[66] a judgment debtor refused to make disclosure of out-of-state property held by him or by others in his behalf and was imprisoned for contempt of court. The Florida Supreme Court upheld the sentence against charges of a violation of the Florida Declaration of Rights, section 16, which provides that no person shall be imprisoned for debt. The Florida Supreme Court has also upheld a criminal conviction for perjury when a third person falsely testified as to the location of personal property in order to gain financial advantage.[67]

Although the most effective procedures afforded a judgment creditor allowing him to discover a judgment debtor's assets may be found in Florida's supplementary proceedings,[68] the attorney who wishes to satisfy his client's judgment may still remain frustrated by Florida's equally effective exemption laws that shield the judgment debtor regardless of financial position or his motives for invoking the shield.

Creditor's Bill

The creditor's bill is a statutory device filed in the court of equity and used to aid the satisfaction of judgments at law.[69] Section 62.37 of the Florida Statutes provides that the bill may be filed:

> [B]efore the claims of *indebtedness* of the persons filing the same shall have been reduced to judgment, but no such bill shall be entertained by such court, unless the complainants therein shall have first instituted suits in the proper courts at law for the collection of their claims; and no final decree shall be entered upon such creditor's bill until such claims shall have been reduced to judgment. (Emphasis added.)

The bill may be brought by a creditor who has received a judgment at law, and who has in vain attempted to satisfy it at law. After finding he cannot get satisfaction at law, this bill allows him to sue in equity in order to subject property of the debtor to the payment of his judgment.[70] Creditors' bills originated as a result of the in-

64. FLA. STAT. §55.61 (1963).
65. FLA. STAT. §55.59 (1963).
66. 98 FLA. 52, 123 So. 3 (1929).
67. Sherman v. State, 135 Fla. 243, 184 So. 843 (1938).
68. FLA. STAT. §§55.52-.61 (1963).
69. FLA. STAT. §62.37 (1963).
70. Armour Fertilizer Works v. First Nat'l Bank, 87 Fla. 436, 100 So. 362 (1924).

effectiveness of legal execution and were designed to aid creditors who, having exhausted their legal remedy, still remain with their judgments unsatisfied.[71]

The bill may also be brought by a creditor before receiving judgment. The requirement of section 62.37 of the Florida Statutes that a creditor's bill shall not be entertained unless the complainant shall have first instituted suit in the proper court of law, has usually been strictly construed.[72] A court of equity will dismiss a complaint for not stating a cause of action unless it contains allegations that a suit has been filed in a court of law.[73] It would seem that the proper manner in which the courts should deal with such a complaint is to transfer it to the law side of court under rule 1.39 of the Florida Rules of Civil Procedure. Such a transfer was recognized under a similar provision[74] of the Florida Acts of 1931 in *Hillsborough Co. v. Dickenson*,[75] and the court remanded with directions that the case be transferred to a court of law even though the plaintiff had declined to plead further after a demurrer to a creditor's bill had been sustained.

Once a suit has been filed at law, a court of equity is still not required to entertain a complaint unless a further statutory requirement has been met. Section 62.37 provides for the filing of a complaint in a court of equity before a judgment at law has been obtained only if the claim is for an indebtedness. The complaint that asks for unliquidated damages does not satisfy this requirement.[76] It should also be noted that a court of equity will not issue a final decree granting relief to a complainant before a final judgment at law has been obtained.[77] The decree will not be issued until the judgment at law has been rendered and a writ of execution returned unsatisfied. This rule as to final decrees holds true whether the basis for the suit was indebtedness or unliquidated damages; but if the basis for the suit was indebtedness the creditor is allowed to file his bill in equity before a judgment is rendered by the law court.[78] The purpose for filing the complaint in equity before a judgment at law has been obtained is to invoke the ancillary remedies of injunction or receivership and to establish priority of lien.[79] Attempts to invoke

71. *Ibid.*
72. *E.g.*, Brooks v. Levin, 123 So. 2d 45 (3d D.C.A. Fla. 1960).
73. *Ibid.*
74. Fla. Laws 1931, ch. 14658, §75, at 74.
75. 125 Fla. 181, 169 So. 734 (1936).
76. B.L.E. Realty Corp. v. Mary Williams Co., 101 Fla. 254, 134 So. 47 (1931).
77. Brooks v. Levin, *supra* note 72.
78. FLA. STAT. §62.37 (1963).
79. See *In re* Porter, 3 F. Supp. 582 (S.D. Fla. 1933); Punta Gorda State Bank v. Wilder, 93 Fla. 301, 112 So. 569 (1927); Armour Fertilizer Works v. First Nat'l

such remedies in order to prevent the withdrawal of assets from the state or to preserve the assets of an insolvent corporation have been futile when the action is brought for unliquidated damages.[80]

The equity courts have allowed a complainant to obtain a decree even though a judgment had not been obtained. In order to obtain this relief, one must show that circumstances exist that would make the law proceedings a needless formality.[81] Decrees have been awarded before judgment had been obtained where a creditor sought to set aside a fraudulent transfer or conveyance,[82] and where a debtor admitted that he had no property other than an equitable title out of which a judgment could be satisfied.[83] While allowing equity jurisdiction when it was shown that a debtor was a nonresident with only an equitable interest in property, the Florida Supreme Court has stated:[84]

> The general rule is not so strict as to deny a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of a court of law to there take preliminary steps and produce what ordinarily may be treated as the condition precedent, to the application for equitable relief.

These types of cases could probably be more accurately labeled "proceedings in the nature of a creditor's bill."[85] Even though the equity court may relax its requirement of exhaustion of legal remedies in certain circumstances, it is clear that the mere consent of the debtor will not serve to give the equity court jurisdiction in absence of a showing that a judgment at law could not be obtained.[86]

A foreign judgment cannot be the basis for a Florida writ of execution or a creditor's bill filed in Florida, and the creditor is required to sue on the foreign judgment, recover a new judgment in a Florida court, and then obtain a writ of execution that must be returned unsatisfied.[87] The creditor can then show that he has exhausted his local legal remedies in order to obtain relief under the creditor's bill. One who files a creditor's bill to enforce a Florida court's judgment, which is predicated on a foreign judgment, need

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Bank, *supra* note 70.

80. B.L.E. Realty Corp. v. Mary Williams Co., *supra* note 76.
81. See Megdall v. Scott Corp., 40 So. 2d 139 (Fla. 1949).
82. *Ibid.*
83. Howell v. Bennett, 140 Fla. 837, 192 So. 409 (1939).
84. First State Bank v. Fitch, 105 Fla. 435, 441, 141 So. 299, 301 (1932).
85. See Stephenson, *Quarterly Synopsis of Florida Cases*, 4 MIAMI L.Q. 37, 54 (1949).
86. Armour Fertilizer Works v. First Nat'l Bank, *supra* note 70.
87. Miller v. Security-Peoples Trust Co., 142 Fla. 434, 195 So. 191 (1940).

not show that his legal remedy in the foreign state has been exhausted, but need only show that the remedy at law has been exhausted on the Florida court's judgment.[88]

Equity jurisdiction of a creditor's bill cannot be shown by general averments in the bill. Simply stating that the creditor has no remedy or no adequate remedy without the assistance of a court of equity is not sufficient; the bill must allege facts showing in themselves that only a remedy at equity will be full, adequate, and complete.[89]

The supplementary proceedings were designed to give an adequate remedy at law to the judgment creditor with an unsatisfied judgment. The equitable procedures available in that action should take the place of those procedures that were once only available by way of a creditor's bill, but the bill is still available and should prove useful when the plaintiff can show that the usual requisite of an action at law would be a needless and wasteful formality and when it is important to establish a priority of lien.

Attachment

While attachment may be considered a form of execution, it is generally sought before the court renders judgment. It is a remedy whereby property within the state may be seized before judgment and applied to the satisfaction of the plaintiff-creditor's claim after it is reduced to judgment.[90] Its primary function is to provide security for the debt of the creditor, but it may be used at other times to satisfy jurisdictional requirements.[91] The writ of execution is normally used to obtain collection of a judgment, but this is only available to the judgment creditor after a judgment has been entered.[92] Attachment is not available to all plaintiffs who wish to maintain control over property of the defendant in order to provide assets through which they can satisfy their judgment. The Florida statutes set out definite grounds for the use of attachment:[93]

> The creditor may have an attachment upon a *debt actually due to him* by his debtor, whenever the debtor: (1) Will fraudulently part with his property before judgment can be obtained against him. (2) Is actually removing his property out of the state. (3) Is about to remove his property out of the state. (4) Resides beyond the limits of the state. (5) Is actually

88. *Ibid.*
89. Stewart v. Monget, 132 Fla. 498, 181 So. 370 (1938).
90. Tilghman v. United States Fid. & Guar. Co., 90 Fla. 282, 105 So. 823 (1925).
91. See FLA. STAT. §76.04(4) (1963).
92. FLA. STAT. §55.15 (1963).
93. FLA. STAT. §76.04 (1963). (Emphasis added.)

> moving himself out of the state. (6) Is about to move himself out of the state. (7) Is absconding. (8) Is concealing himself. (9) Is secreting his property. (10) Is fraudulently disposing of his property. (11) Is actually removing himself beyond the limits of the judicial circuit in which he resides, or (12) is about to remove himself out of the limits of such judicial circuit.

The legislature also provided a remedy for the creditor who is faced with the situation in which a debtor, realizing that his obligation will become due in the near future, attempts to frustrate collection of the debt:[94]

> Any creditor may have such attachment upon a *debt not due*, whenever the debtor: (1) Is actually removing his property beyond the limits of the state. (2) Is fraudulently disposing of his property for the purpose of avoiding the payment of his just debts or demands. (3) Is fraudulently secreting his property for such purpose.

The writ for the attachment of the property of a defendant is an extraordinary remedy because it allows property of a defendant to be seized before there has been a judicial determination, or even an opportunity for judicial determination, as to the fact of an existing indebtedness. The nuisance value of such a remedy without procedural safeguards is apparent and the Florida statutes are strictly construed in favor of the person against whom they may be invoked.[95] Thus, any inconvenience caused by the deprivation of a defendant's property before judgment is greatly overcome by the provisions of the statutes that recognize that a debtor must engage in objectionable tactics to avoid payment of just debts before the remedies of attachment are available to a plaintiff.

While most property is subject to levy or attachment[96] as authorized by a blanket statutory provision, corporate stock is the subject of special provisions of the Florida statutes.[97] The statutes state that stock of a domestic[98] corporation is subject to levy of attachments and executions[99] and once it is ascertained that a debtor is a stockholder,

94. FLA. STAT. §76.05 (1963). (Emphasis added.)
95. Robinson v. Robinson, 154 Fla. 464, 18 So. 2d 29 (1944).
96. FLA. STAT. §55.20 (1963).
97. See FLA. STAT. §§55.25-.31 (1963).
98. *But see* FLA. STAT. §55.20 (1963) which states that "stock in corporations . . . shall be subject to levy and sale under execution." This provision does not seem to limit levy to stock of domestic corporations and was once construed to allow stock in a national bank to be subjected to execution and sale. Bronson v. Willis, 142 Fla. 64, 194 So. 245 (1940).
99. FLA. STAT. §55.25 (1963).

the creditor may direct the sheriff to subject the shares to levy. It is then the sheriff's duty to visit an officer of the corporation in which the debtor holds shares and demand that the officer prepare a statement in writing showing the number of shares owned by the debtor and any amount still due on the stock.[100] Refusal to give the statement or giving an untrue statement subjects the corporate officer to criminal liability.[101]

Entries made in the stock records for the purpose of avoiding the effect of the levy subjects the person who alters or procures the alterations to the same penalties.[102]

Garnishment

In garnishment as well as in attachment proceedings, a plaintiff-creditor may deem it advisable to procure the issuance of a conservatory writ in order to preserve the defendant-debtor's property so that when the judgment against the defendant is finally obtained, property will be available out of which the judgment may be satisfied. The proceedings, attachment and garnishment, may be distinguished by noting that an attachment involves only the rights of a creditor with respect to property in the possession of his debtor, while garnishment reaches property or credits belonging to the debtor in the hands of a third person. Also, property of a defendant is taken into legal custody pending judgment in an attachment proceeding, but property is left in the hands of the garnishee until judgment in a garnishment proceeding.[103] The Florida Legislature has provided for issuance of the writ and allows every person who files suit or recovers a judgment against a person or corporation to subject to a writ of garnishment any indebtedness due to the defendant by a third person, and any goods, money, chattels, or effects of the defendant in the possession or control of a third person.[104] The writ will not issue before judgment in an action sounding in tort.[105]

100. FLA. STAT. §55.27 (1963); see Note, *Levy and Attachment of Corporate Stock*, 10 U. FLA. L. REV. 209 (1957) for a discussion of subjecting stock of a foreign corporation to levy and the conflict of laws problem. The note also labels Florida as a "notice" state thus requiring a purchaser of shares of stock to make inquiry of the custodian of corporate stock records in order to determine whether levy had been made.

101. FLA. STAT. §55.27 (1963): "[A]ny officer . . . [who refuses or makes] an untrue statement . . . shall be guilty of a *misdemeanor*, and shall, upon conviction, be fined a sum of not less than one hundred dollars or be imprisoned in the county jail not less than ten days." (Emphasis added.)

102. FLA. STAT. §55.30 (1963).

103. 3 FLA. JUR. *Attachment and Garnishment* §4 (1955).

104. FLA. STAT. §77.01 (1963).

105. FLA. STAT. §77.02 (1963).

In order to procure the writ of garnishment, the plaintiff-creditor must file an affidavit stating, *inter alia*, that the defendant does not have sufficient visible property on which a levy can be made to satisfy the amount of the judgment.[106] If the affidavit is filed prior to judgment, it must state that the affiant does not believe that the defendant will have in his possession, after execution, sufficient visible property in the county in which suit is pending upon which a levy could be made to satisfy the amount of the claim.[107] Another requirement not readily apparent in chapter 77 of the Florida Statutes dealing with garnishments is found in section 222.11 dealing with exemptions. The exemption statute, providing that no process shall issue when it is sought to attach money due for personal labor or services of the head of a family residing in the state, imposes a mandatory duty on a court to refrain from issuing a writ of garnishment unless it is first made to appear that the money sought to be garnished is not due for such labor or services.[108]

PART II — THE JUDGMENT DEBTOR

Although the defendant may have lost the first battle by becoming a judgment debtor, he has not necessarily lost the war. The Florida statutes offer a variety of procedures to the judgment debtor through which he may temporarily stave off the levy of execution. If these delaying tactics fail, there is always the broad shield of the debtor's exemption provisions, behind which he may be able to find complete protection.

Stays of Execution

Assuming that a decree for the payment of damages has been entered against the defendant, the plaintiff is now entitled to seek the enforcement of his judgment by execution. If the defendant wishes to seek a redetermination of the dispute by a new trial or rehearing, the Florida Rules of Civil Procedure allow him a brief period of grace from execution.

Florida Rule of Civil Procedure 2.13, provides that "no execution shall issue on any judgment until the time for filing a motion for new trial has expired, or, if a motion for new trial is filed, until after such motion shall have been disposed of by the court, except that execution may be issued upon special order of the court." Therefore, the defendant has at least ten days after the rendition of the verdict

106. FLA. STAT. §77.03 (1963).
107. FLA. STAT. §77.18 (1963).
108. Noland Co. v. Linning, 132 So. 2d 802 (1st D.C.A. Fla. 1961).

or the entry of summary judgment before a writ of execution can be issued against him.[109] If the judgment debtor files a motion for new trial, execution is stayed until the hearing on the motion. The provision allowing execution to be issued by special order of the court can protect the judgment creditor if the judgment debtor attempts to use the delay to remove his property from the jurisdiction of the court.

If the rights and obligations of the litigants were determined by a court of equity, a petition for rehearing must be brought within ten days from the recording of the decree.[110] Florida Rule of Civil Procedure 3.15 provides that executions on decrees for money shall issue and be governed by the law relating to money judgments. Therefore, where the chancery court has awarded the plaintiff a decree for damages, a writ of execution cannot properly issue until after the time for filing a petition for rehearing has elapsed unless the court has issued a special order allowing execution. In *Childs v. Boots*,[111] a court of equity erroneously granted a rehearing that had been filed after the time limit allowed for such a petition. The Florida Supreme Court held that even though the order granting a rehearing was unauthorized the clerk was without authority to issue an execution as long as the order remained unvacated. Until the order had been quashed or disposed of, a valid writ of execution could not be issued.

a. Stay of Execution Incident to an Appeal

Assuming that the judgment debtor has failed in his bid for a new trial and wishes to make a direct attack on the judgment through appeal, he has an adequate statutory remedy to stay execution by the posting of a supersedas bond. If the judgment debtor fails to post a supersedas bond the appeal alone will not stay the execution of judgment.[112]

Florida Appellate Rule 5.5 authorizes the lower court to prescribe the amount, terms, and conditions of the bond that is made payable to the adverse party. No definite amount is fixed for the value of the bond since this determination is left to the discretion of the lower court. If the appellant believes the amount of the bond is excessive, he can move the appellate court to reduce it. In *State Farm Mutual Automobile Insurance Co. v. Gantz*,[113] the judgment debtor appealed a $55,000 money judgment entered against

109. FLA. R. CIV. P. 2.8.
110. FLA. R. CIV. P. 3.16.
111. 112 Fla. 282, 152 So. 214 (1933).
112. Lawson v. County Bd. of Pub. Instruction, 114 Fla. 153, 154 So. 170 (1934); see FLA. APP. R. 5.3 (a), 5.5, 5.7, 5.8.
113. 111 So. 2d 91 (3d D.C.A. Fla. 1959).

him by the circuit court. The lower court had set the supersedas bond at $110,000. The appellant moved the appellate court to modify the order of the court setting the amount of the bond on the grounds that the amount was excessive, arbitrary, and unreasonable. The court agreed that the amount was excessive and reduced the bond to $60,000.

In *American Southern Insurance Co. v. Driscoll*,[114] the First District Court of Appeal was faced with a situation in which the appellant had been able to obtain a stay of execution without the posting of bond. In deciding this issue, the court nullified the possibility of such a procedure being repeated. In the *Driscoll* case, a tort action was brought in the circuit court and the plaintiff was awarded a money judgment against the insured defendant. The insurer took an appeal from the judgment and did not post a supersedas bond. While this appeal was pending, the judgment creditor instituted garnishment proceedings against the insurer in an attempt to collect the money judgment. The judgment creditor was awarded judgment in the garnishment proceeding. The insurer then appealed the garnishment judgment and simultaneously filed a motion to stay the hearing on the garnishment appeal until the appeal from the tort judgment could be decided. This motion was granted with the result that the judgment creditor was stayed from executing his garnishment judgment until the appeal from the tort action had been acted upon. By coincidence, both appeals were argued before the district court of appeal on the same day. The judgment in the tort action was reversed and the appellate court directed the lower court to dismiss the garnishment proceedings. The court took note of the fact that this procedure had been effective as a substitute for a bond in staying execution and warned that in the future an appeal from a garnishment judgment would not be permitted to serve as a substitute for a supersedas bond.

The appellant may apply to the lower court for a supersedas bond at the time the appeal is taken, or at any time prior to the filing of the record on appeal.[115] If the judgment creditor has levied upon the debtor's property before the supersedas has been perfected, the posting of the bond alone will not restore his property to him. In *Bacon v. Green*,[116] a writ of execution had been issued and the debtor's property was levied upon before the supersedas had been perfected. The court refused to restore the appellant's property and stated that while the supersedas had suspended all further proceedings in relation to the judgment, it did not act to restore the defendant's

114. 125 So. 2d 105 (1st D.C.A. Fla. 1960).
115. FLA. APP. R. 5.5.
116. 36 Fla. 313, 18 So. 866 (1895).

property. The sheriff was instructed to hold the defendant's property until the issue on appeal had been decided or until the defendant had posted bond in an amount equal to twice the value of the property.[117]

b. Stay of Execution by the Issuing Court

The judgment debtor may not have to make a direct attack on the judgment to obtain a stay of execution. Florida Statutes, sections 55.37 and 55.38, authorize a procedure through which the judgment debtor can, in some situations, obtain a stay of execution from the court that issued the judgment. Section 55.37 provides for the stay of an illegal execution[118] by the posting of a bond payable to the plaintiff for twice the amount of the judgment. Section 55.38 provides for a stay of execution on the showing of good cause to the court that rendered the verdict. This latter section does not require that the judgment debtor post bond, but leaves the terms of the stay within the discretion of the court. In *Mitchell v. Duncan*,[119] the Florida Supreme Court construed the forerunners of these two statutes as being in *pari materia* and held that an illegally issued execution would satisfy the requirements of "good cause." Thus, if the judgment debtor can bring his motion within the scope of "good cause" he can save the expense of posting bond.

The Florida Supreme Court has permitted a stay of execution for "good cause" in a variety of situations.[120] In *National Trucking Co. v. Gill*,[121] the court held that the defendant was entitled to have a stay of execution issued on a default judgment that had been rendered without proper notice having been given to the defendant. In *Higgins v. Driggs*,[122] a stay of execution was upheld where the judgment had been obtained against the defendant as administrator of an estate but where the writ of execution had failed to indicate the defendant's representative capacity. In *Fair v. Tampa Electric Co.*,[123] a stay was allowed when the defendant produced evidence that the plaintiff

117. FLA. STAT. §55.34 (1963) provides that the defendant in execution may regain any property that has been levied upon by executing a bond payable to the plaintiff in a sum double the value of the property covered.

118. An example of an illegally issued execution appears in Mathews v. Hillyer, 17 Fla. 498 (1880). The defendant in execution alleged that the judgment upon which the execution was issued had been satisfied and discharged before the issuing of the execution.

119. 7 Fla. 13 (1857).

120. See 9 U. FLA. L. REV. 201 (1956), for an analysis of the "good cause" requirement for stays of execution.

121. 132 Fla. 844, 182 So. 220 (1938).

122. 21 Fla. 103 (1884).

123. 158 Fla. 15, 27 So. 2d 514 (1946).

had obtained his judgment through perjured testimony.

In the *Fair* case, the court, in discussing stays of execution granted upon a showing of "good cause," noted that the statute[124] placed no limitations upon the time in which a motion for a stay of execution could be granted. In *Kellerman v. Commercial Credit Corp.*,[125] a default judgment had been entered against the defendant and execution had issued. One hundred nine days after the writ of execution had been issued, the defendant made motions to set aside the default and final judgment and permanently stay the execution. The Florida Supreme Court, in affirming the lower court's stay of execution, held that the lapse of time would not prevent the defendant from obtaining a stay, and because the judgment had been predicated on fraud, mistake, and surprise it was proper for the lower court to make the stay permanent.

The stay of execution prescribed by section 55.38 of the Florida Statutes cannot be used by the judgment debtor to stay execution on a judgment that has been affirmed by the appellate court. In *State v. Holt*,[126] the Third District Court of Appeal held *inter alia*: "The statute allowing the trial court to stay execution for 'good cause' . . . does not operate to affect the jurisdiction of the appellate court over its judgments and their invulnerability, without permission of the appellate court."[127]

c. Stay of Execution by Injunction

If the judgment debtor has sufficient grounds to invoke the jurisdiction of a court of equity, he may be able to successfully stay an execution issued by a court of law by the use of an injunction.

Florida Statutes, section 54.07, specifically empowers the circuit courts to enjoin the levy or the sale of real estate that has been levied upon in the erroneous belief that it is the property of the judgment debtor. Section 222.09 empowers the circuit courts to enjoin the sale of all real and personal property that is exempt from forced sale. Thus, in circumstances involving exempt personal property the circuit courts are granted the power of injunction, but injunctions have been denied where they were sought to stay execution upon nonexempt personal property. In *Florida Packing & Ice Co. v. Carney*,[128] the Florida Supreme Court affirmed a denial of an injunction to prevent the levy of an execution on personal property and stated that "a court of equity will never interfere to restrain by

124. FLA. STAT. §55.38 (1963).
125. 138 Fla. 133, 189 So. 689 (1939).
126. 117 So. 2d 428 (3d D.C.A. Fla. 1960).
127. *Id.* at 432.
128. 49 Fla. 293, 38 So. 602 (1905).

injunction a levy upon and sale of *personal* property, unless the same is of such peculiar and intrinsic value to the owner that its loss cannot be compensated adequately in damages. . . ."[129]

Courts of equity will grant an injunction to stay execution if it can be shown that the judgment was predicated upon fraud. The Florida Supreme Court has held that in a collateral attack on a judgment via a chancery suit in which fraud is alleged as the basis of the attack, the type of fraud shown must be extrinsic or collateral as opposed to intrinsic fraud.[130]

Since the defendant is provided with an adequate procedure to stay the execution upon motion to the court that rendered the judgment, equity courts will ordinarily deny a petition for an injunction unless the petitioner has exhausted all his remedies at law.[131] In *Goldfarb v. J. A. Cantor Association, Inc.*,[132] the district court of appeal in quashing an injunction stated the general rule:[133]

> It is fundamental that a court of equity will not restrain the execution upon a judgment obtained at law simply upon the ground that it was unjust, irregular, or erroneous, or because the equity court would, in deciding the same case, have to come to a different conclusion. A judgment which appears upon its face to be regular cannot be collaterally attacked when entered by a court having jurisdiction of the subject matter and the parties.

The stay of execution, whether by the issuing court or on motion to a court of equity, is only a temporary suspension of the levy of execution. It allows the debtor relief from the levy while he seeks to alter or reverse the decision upon which the writ is based. If the debtor fails in his bid for reversal the stay terminates and the creditor is free to resume execution.

Vacation of Execution Sale

Even after the judgment debtor's property has been levied upon and sold by the sheriff in an execution sale, the judgment debtor is

129. *Id.* at 295, 38 So. at 602.

130. In Fair v. Tampa Elec. Co., 158 Fla. 15, 18, 27 So. 2d 514, 515 (1946) the court in discussing the distinction between extrinsic and intrinsic fraud cites the following illustrations of extrinsic fraud: "prevention of an unsuccessful party presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise . . . ."

131. *E.g.*, Parrish v. Joyner, 54 So. 2d 50 (Fla. 1951); Jeffery Lumber Co. v. Coleman, 149 Fla. 704, 6 So. 2d 821 (1942); Kearley v. Crawford, 112 Fla. 43, 151 So. 293 (1933).

132. 123 So. 2d 50 (3d D.C.A. Fla. 1960).

133. *Id.* at 51.

not devoid of remedies. There is still the possibility of vacating the execution sale. If the judgment debtor fails to post a supersedas bond and his property is levied upon and sold pending appeal, and the appellate court reverses the judgment, the judgment debtor may or may not be able to obtain a return of the property. If a stranger has purchased the judgment debtor's property at the execution sale under a judgment that is reversed subsequent to the sale, the purchaser's title will be unaffected by the reversal of the judgment.[134] Dictum from an early Florida case[135] indicates that if the plaintiff has received the proceeds of the sale the defendant may proceed against him for its return. There is also indication that if the judgment creditor or any other party to the record purchases at the execution sale, the judgment debtor may proceed directly against him for a return of the property.[136]

A motion to vacate an execution sale may be predicated upon the grounds of accident, mistake, surprise, misconduct, fraud, or irregularity.[137] As a general rule, the court that rendered the judgment upon which the execution was issued has the power to vacate the sale upon the proper motion.[138] If title to the property has already vested in another, the proper remedy for complete relief must be sought in an equitable proceeding. An illustrative Florida case is that of *Strong v. Tedder*.[139] The plaintiff had been awarded a money judgment against the defendant. On November 20, 1939, a writ of execution was issued against the real property of the defendant and on November 25, 1939, a second writ was issued against certain personal property of the defendant. On November 25 the defendant filed a motion for an order to stay execution, which was granted the same day. The real property, which had been specifically included in the writ of November 20, was levied against and sold January 1, 1940. The defendant filed a motion with the court to set aside the execution sale on the grounds that the purchase price was inadequate and that the stay of execution had covered both writs. The circuit court entered an order of continuance, directing the purchaser of the property to refrain from any further action affecting the property until instructed by the court. The purchaser petitioned the Florida Supreme Court to prevent further action by the circuit court, asserting that the law court lacked jurisdiction. The Florida Supreme Court granted the petition on the ground that the remedies of a court of law were in-

134. Ponder v. Moseley, 2 Fla. 207 (1848).
135. Johnson v. McKinnon, 54 Fla. 221, 235, 45 So. 23, 28 (1907).
136. *Ibid.*
137. City of Sanford v. Ashton, 131 Fla. 759, 179 So. 765 (1938).
138. City of Coral Gables v. Hepkins, 107 Fla. 778, 144 So. 385 (1932).
139. 143 Fla. 473, 196 So. 829 (1940).

adequate in this situation and stated that "a motion to vacate a sheriff's sale is properly addressed to the common law court from whence it issues, upon proper notice to the parties; but where additional relief is sought, resort must be had in equity."[140] The court further instructed:[141]

> In order to give complete relief in the circuit court, jurisdiction of the parties must be obtained and evidence taken on the contested points, and if the sale is vacated and set aside the money . . . must be returned. This is primarily a matter cognizable in equity, and the circuit judge sitting as a common-law court erred in assuming jurisdiction of the cause and continuing to act therein.

The circumstances in which a court of equity will set aside an execution sale vary with the fact situations surrounding the sale. There must be some definite injustice shown by the complainant. Inadequacy of price alone will not ordinarily be sufficient to invoke the aid of the equity court. In *City of Sanford v. Ashton*,[142] a judgment debtor's hotel was seized under a levy of execution. The hotel was then sold at execution sale for $1,000 and one year later the judgment debtor brought an action in equity to have the sale vacated. He alleged that the property had been worth $100,000 and that the price paid at the sale was grossly inadequate. He asked for a return of the property and tendered the $1,000, which had been paid for the hotel. The Florida Supreme Court affirmed the lower court's dismissal of the complaint and held that a sale could not be set aside on the grounds of inadequacy of price alone without the showing of accident, mistake, surprise, misconduct, fraud, or irregularity.

In the early Florida case of *Lawyers' Co-operative Publishing Co. v. Bennett*,[143] it was the judgment creditor, rather than the judgment debtor, who petitioned for a vacation of the execution sale. The plaintiff had acquired a money judgment against the defendant in an action at law. The judgment creditor requested the sheriff to postpone the sale of the debtor's property for several months so that a better price might be gained from the sale. By mistake, the sheriff's deputy held the sale prematurely and the property, allegedly worth $400, was sold for $15. The lower court refused to vacate the sale, but the supreme court held that the sale should be vacated saying "authority is abundant and uniform to the effect that where inadequacy of price at a judicial [*sic*] sale is the result of some mistake or

140. *Id.* at 476, 196 So. at 831.
141. *Id.* at 477, 196 So. at 831.
142. 131 Fla. 759, 179 So. 765 (1938).
143. 34 Fla. 302, 16 So. 185 (1894).

misunderstanding . . . it will be set aside."[144]

The vacation of the execution sale is a remedial procedure. It is only available in situations in which a reversal of the original judgment has invalidated the execution or where there has been some fraud or irregularity in connection with the sale.

Action for Wrongful Levy of Execution

A judgment creditor can be held liable in damages for a wrongful levy of execution.[145] Two Florida cases illustrate the liability of the judgment creditor where execution is directed upon property mistakenly believed to be property of the judgment debtor but which was in fact the property of another. In *Granat v. Biscayne Trust Co.*,[146] the plaintiff filed suit for damages against the executors of a deceased judgment creditor for "wrongful and unlawful" execution upon her personal property. The Florida Supreme Court reversed a dismissal of her complaint holding that a judgment creditor is liable in damages to an injured party whose property is wrongfully seized. In *Toomer v. Fourth National Bank*,[147] the judgment creditor had mistakenly levied execution against the automobile of the judgment debtor's son. The Florida Supreme Court held that an action of trover could be maintained against the judgment creditor for wrongful conversion.

Exemption From Forced Sale

Upon a cursory reading of the execution provisions of the Florida statutes, one would think that virtually all property owned by a judgment debtor may be subjected to the collection of a judgment. Section 55.20 provides that:

> Lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations, shall be subject to levy and sale under execution. Likewise, the interest in personal property in possession of a vendee under a retained title contract or conditional sale contract shall be subject to levy and sale under execution to satisfy a

144. *Id.* at 309-10, 16 So. at 188.

145. The courts have held the judgment creditor liable for wrongful execution: Jackson v. Kirschman, 175 So. 105 (La. Ct. App. 1937) (levy was excessive); Beede v. Nides Fin. Corp., 209 Minn. 354, 296 N.W. 413 (1941) (levy made under a wrongfully issued writ); Wollner v. Darnell, 94 S.W.2d 1225 (Tex. Civ. App. 1936) (levy made upon exempt property).

146. 109 Fla. 485, 147 So. 850 (1933).

147. 68 Fla. 555, 67 So. 225 (1915).

> judgment against the vendee. This shall be done by making the levy on such personal property.

From these broad provisions is carved the property of the judgment debtor that may not be subjected to the collection of a judgment.

The judgment debtor's most powerful and extensive remedy is the exemption from forced sale of real and personal property granted to him by the Florida Constitution. Article X, section 1 of the Florida Constitution provides in part:

> A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under the process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists.

The requirements that the judgment debtor must meet to qualify as "the head of a family residing in this State," have been the subject of many judicial determinations. Likewise, the Florida Supreme Court has on numerous occasions been required to designate the exact portion of the debtor's real estate that may be exempted. An analysis of the interpretations the courts have given to this constitutional grant will not be attempted here.[148]

If the judgment debtor qualifies for homestead exemption, there are several statutes outlining the procedure through which the exemption remedy can be effectuated. At any time prior to the levy of execution he can declare his right to the exemption by recording in the office of the county judge a written statement describing the property he wishes exempted from forced sale.[149] If execution has already been levied upon the debtor's property, he can prevent its sale by presenting an affidavit to the levying officer and asserting his right to an exemption.[150] As an alternate remedy, the judgment debtor can apply to the circuit court to enjoin the sale of any property, real or personal, that is exempt from forced sale.[151]

The judgment debtor may assert his right to exemption even after a forced sale of the property has occurred. In *Albritton v. Scott*,[152]

148. For a detailed analysis of Florida homestead exemption laws see Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption*, 2 U. FLA. L. REV. 12 (1949).

149. FLA. STAT. §222.01 (1963).

150. FLA. STAT. §222.02 (1963).

151. FLA. STAT. §222.09 (1963).

152. 73 Fla. 856, 74 So. 975 (1917).

the Florida Supreme Court held that the forced sale of a homestead qualifying for exemption is void and a mere failure to resist sale is not a waiver of the exemption rights. If the sale is void, the purchaser acquires no title to the property.[153]

In addition to the exemption from forced sale of the judgment debtor's homestead the debtor is allowed an exemption of $1,000 of personal property.[154] Because this $1,000 of personal property is in addition to the exempted homestead, which includes the house and real property, the determination of the point at which the house ends and the furnishings begin presents a difficult question for judicial determination. In *Richards v. Byrnes*,[155] the circuit court certified the following question to the Florida Supreme Court for determination: What portion of the furnishings and equipment for the house constitute or go to make up the homestead? The court neatly sidestepped having to make a detailed analysis by simply replying that: "The personal property may be in cash, furnishings, or any other personalty. . . ."[156]

Florida Statute, section 222.06, outlines a procedure by which the judgment debtor may obtain a release of his exempt personal property from the levying officer if the levy of execution has already occurred. If the debtor fails to make a selection of that portion of his personal property that he desires to be exempted, the levying officer is empowered to make the selection for him.[157] In *Florida Loan & Trust Co. v. Crabb*,[158] the Florida Supreme Court held that if the judgment debtor has concealed a portion of his personal property from execution, the property so concealed will be treated as a selection *pro tanto* by the debtor of his exemption. A person entitled to the exemption cannot waive it by express agreement in a promissory note, and the Florida Supreme Court has held that such a waiver is void.[159] The judgment debtor can assert his right to the $1,000 exemption of personal property up to the time of the execution sale, and a delay by the debtor in asserting his right is not a waiver of the exemption.[160]

a. Additional Statutory Exemptions

In addition to the constitutionally guaranteed exemption covering the homestead and $1,000 of personal property, the Florida statutes

153. Brauer v. Paddock, 103 Fla. 1175, 139 So. 146 (1932).
154. FLA. CONST. art. X, §1.
155. 153 Fla. 705, 15 So. 2d 610 (1943).
156. *Id.* at 707, 15 So. 2d at 611.
157. FLA. STAT. §222.07 (1963).
158. 45 Fla. 306, 33 So. 523 (1903).
159. Carter's Adm'rs v. Carter, 20 Fla. 558 (1884).
160. McMichael v. Grady, 34 Fla. 219, 15 So. 765 (1894).

provide several other exemptions to which the judgment debtor may be entitled.[161] The most liberal and far-reaching of these exemptions is that authorized by Florida Statutes, section 222.11:

> No writ of attachment or garnishment or other process shall issue from any of the courts of this State to attach or delay the payment of any money or other thing due to any person who is the head of a family residing in this State, when the money or other thing is due for the personal labor or services of such person.

This statute uses the same language in prescribing the eligibility for the exemption of wages as that used in the homestead exemption, that is, "the head of a family residing in this State." If the judgment debtor is eligible for homestead exemption he will be eligible for wage exemption. The main concern of the courts in applying the statute has been with the definition of the phrase "money . . . due for the personal labor or service of such person."

The Florida Supreme Court was first called upon for a definition of this phrase in *Patten Package Co. v. Houser*.[162] The judgment debtor had been engaged in the business of delivering petroleum products for an oil refinery. He had several employees, including his son, and used his own truck in the business. He and his son split the profits from the operation. The judgment creditor instituted garnishment proceedings against the refinery to garnish money due to the judgment debtor. The judgment debtor filed an affidavit in the circuit court averring that the money due him was for personal labor and services rendered by a head of a family residing in Florida and was exempt from garnishment. The lower court held that the money was exempt. This was reversed by the Florida Supreme Court when it examined the judgment debtor's operations and decided that only an indeterminable amount of the money due was for his personal labor. Since the money was more in the nature of a return from capital than a payment for personal labor, the court determined that the money was not exempt.

Although the court strictly construed the wage exemption statute in the *Houser* case, the court in two subsequent cases gave a very liberal interpretation to the extent of the statute's coverage. In *Wolf v. Commander*,[163] the judgment creditor sought to garnish the wages

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161. FLA. STAT. §222.11 (1963) (wages of the head of a family); FLA. STAT. §222.13 (1963) (proceeds of a life insurance policy); FLA. STAT. §222.14 (1963) (cash surrender value of a life insurance policy); FLA. STAT. §222.18 (1963) (disability income benefits).

162. 102 Fla. 603, 136 So. 353 (1931).

163. 137 Fla. 313, 188 So. 83 (1939).

of a debtor who was the general manager of the Florida Citrus Exchange. The debtor claimed that his wages were exempt from garnishment. The judgment creditor contended that the exemption provided by the statute pertained only to wages due for manual labor and did not cover wages that were in excess of $10,000 and due for managerial services. The lower court held that the wages were exempt. The Florida Supreme Court affirmed the lower court in a three-three decision.

The opinion of the court reflects an awareness of the injustice of the decision to the plaintiff-creditor, but shows that any change in the construction of the statutes should be made by legislature. The court stated that:[164]

> It is suggested that an affirmance by this Court of the judgment appealed from will protect annual salaries of citizens of Florida ranging from $50,000 to $80,000. While this conclusion may be justified, the responsibility therefor does not rest on this Court but with the legislative department of our government.

Justice Brown's dissent in which Justices Buford and Thomas concurred also made the point:[165]

> It is a matter of common knowledge that quite a number of business men holding important executive positions in the State are paid large salaries, quite a few in excess of $15,000 per year; some as high as $50,000 or more; yet under the construction given this statute these large salaries would be entirely exempt from attachment or garnishment or other process, no matter how just the debt sought to be collected.

This obvious appeal to the legislature for a change was made again twenty-three years later in *White v. Johnson*.[166] The court quoted portions of the plaintiff's brief that suggested limits to the exemptions as adopted by other states. These suggested limitations included allowable exemptions for earnings within a given period and earnings subject to a definite maximum or percentage of the amount earned for a given pay period.[167] The court then went on to say:[168]

> It might be well for some interested person to present the argument . . . to the legislature for we are not prepared to say that it is wholly devoid of merit. However, it is too well

164. *Id.* at 316, 188 So. at 85.
165. *Id.* at 320, 188 So. at 86.
166. 59 So. 2d 532 (Fla. 1952).
167. *Id.* at 533.
168. *Id.* at 534.

> established to require citation of authority that under our form of government providing for three discrete branches thereof — the Executive, the Legislative and the Judicial — no one of them has the right to invade the sphere of operation of either of the others.

It is unfortunate that these opinions have not been reflected by legislative action. The legislature could afford the judgment creditor even more powerful procedural remedies than he already has at his fingertips, but this is not the type of relief needed. Nor does the existing situation demand elimination of certain statutory exemptions; it demands revision of the statutory exemptions to reach the persons characterized by Justice Brown in the *Wolf* case. The type of revision needed has been exemplified by the above quoted portions of the plaintiff's brief in the *White* case.

Florida Statutes, section 222.12 outlines the procedure by which the debtor may exempt his wages from attachment. The judgment debtor must make an affidavit that he meets the requirements for exemption and serve a copy of the statement upon the judgment creditor. If the creditor contests the averments, the matter must be tried in the court that issued the attachment. The wages remain in the custody of the court until a final determination has been made. By use of this procedure, the judgment creditor may contest the debtor's claim and could delay for an appreciable length of time the receipt of wages that the debtor may need desperately.

Section 77.03 of the Florida Statutes sets out the procedure that the judgment creditor must follow in order to obtain a writ of garnishment allowing him to attach the judgment debtor's wages. It requires that the plaintiff file, in the court where the judgment has been obtained, an affidavit stating the amount of the judgment and that the affiant does not believe that the defendant has in his possession sufficient visible property upon which a levy can be made to satisfy the judgment.

In the 1961 Florida case of *Noland Co. v. Linning*,[169] the First District Court of Appeal was called upon to determine what specific facts must necessarily be averred in an affidavit filed as a predicate for the issuance of a writ of garnishment after judgment. Judge Wigginton, writing for the court, traced the historical development of the Florida statutes that have exempted from garnishment the wages of the head of a family and the liberal construction that has consistently been given to those statutes. He construed the language of the wage exemption statute as imposing a mandatory duty upon the courts to refrain from issuing writs of garnishment until the

169. 132 So. 2d 802 (1st D.C.A. Fla. 1961).

plaintiff has made a sworn averment that the wages sought to be garnished are not due for the personal labor or services of the head of a family residing in Florida. The result of this holding is to require the judgment creditor who seeks garnishment to positively aver the fact that the wages are not subject to exemption in addition to the requirements set out in section 77.03. Although the court's interpretation of the statute places an additional burden upon the plaintiff to ascertain the status of the debtor before he can resort to garnishment, it may be justified when one considers that it is necessary in order to prevent the far greater hardship that the delayed receipt of the debtor's wages would produce without the additional requirement read into section 77.03 by the court.

The exemptions from attachment for the homestead, $1,000 of personal property and wages can only be claimed by the judgment debtor who qualifies as the head of a family residing in Florida. The Florida statutes include certain other exemptions that can be claimed by the judgment debtor without the necessity of meeting the specific requirements of the homestead exemption.[170]

Section 222.14 of the Florida Statutes provides that:

> The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured, unless the issuance of the policy was affected for the benefit of such creditor.

In *Bank of Greenwood v. Rawls*,[171] the Florida Supreme Court defined the extent of the exemption provided by the words, "cash surrender value." In this case, the judgment debtor's insurance policy named his wife as beneficiary in the event of death. The policy also included a provision that in case of total disability of the insured, he could take half the face value of the policy in discharge of the obligation of the insurer. The debtor became totally disabled and the insurer paid him $1,500 in discharge of the policy. The Florida court held that the proceeds of the policy were exempt from attachment saying:[172]

> We therefore hold that the "cash surrender value" of a life insurance policy . . . includes any cash value that may be obtained either by means of negotiation or pursuant to an agreement for surrendering the policy in consideration of a

170. See FLA. STAT. §§222.13-.14, .18 (1963).
171. 117 Fla. 381, 158 So. 173 (1934).
172. *Id.* at 384, 158 So. at 175.

sum of money to be paid in whole or in part conditioned upon a surrender of the life insurance feature of the policy . . . .

The residency requirement of the statute was explained in *Marshall v. Bacon.*[173] The Florida Supreme Court held that the determining factor is the domicillary status of the insured at the time an effort is made to subject the cash value of the insurance policy to the claims of creditors. The debtor had acquired the policies while a resident of Florida and had subsequently become a resident of California. The court held that since he was no longer a Florida resident the policies could be attached. In *Slatcoff v. Dezen,*[174] the debtor had acquired the policies before becoming a resident of Florida, but was a resident at the time of the attempted attachment. The court held that the policies could not be attached because the debtor was a bona fide resident of Florida at the time of the attempted attachment.

There are several other statutes that provide freedom from attachment for specific funds. Any benefits due or payable under the Workman's Compensation Law are exempt from all claims of creditors, and from levy, execution, attachments, or other remedies for the recovery of debt.[175] Any proceeds from the recovery for injuries under Florida's Hazardous Occupations Statute are likewise exempted from garnishment or execution.[176] Any money, or other benefit, charity relief or aid that is to be paid by an organization qualifying as a fraternal benefit society is free from attachment or garnishment.[177] The statutes further provide exemptions for the retirement pensions or annuities accruing to municipal police officers,[178] firemen,[179] and school teachers.[180]

CONCLUSION

A study of the Florida Legislature's efforts to afford the judgment creditor the most complete relief possible in satisfying his judgment reveals a sincere effort to obtain such an objective. The statutory scheme is designed to protect the interests of the state, creditor, debtor, and third person who becomes involved in the proceedings by virtue of his interest in property that may be subject to execution. The

173. 97 So. 2d 252 (Fla. 1957).
174. 76 So. 2d 792 (Fla. 1954).
175. FLA. STAT. §440.22 (1963).
176. FLA. STAT. §769.05 (1963).
177. FLA. STAT. §632.271 (1963).
178. FLA. STAT. §185.25 (1963).
179. FLA. STAT. §175.20 (1963).
180. FLA. STAT. §222.14 (1963).

statutes provide for execution, attachment, garnishment, discovery, creditor's bill, and supplemental proceedings and it would appear that virtually no assets of the debtor could escape the many provisions. These remedies seem to be quite adequate until the judgment creditor encounters Florida's liberal exemptions.

Once the creditor has secured a judgment and put the legal machinery into motion to gain its satisfaction, the remedies available to the judgment debtor, with the exception of exemption, amount to little more than procedural safeguards to prevent premature execution. Stays of execution furnish the judgment debtor with a brief respite from levy while he seeks a review of a judgment that may be voidable or void because of lack of jurisdiction, improper service of process, or any element of fraud. The procedures available to the judgment debtor with which to stay execution are adequate and afford sufficient flexibility because of the judgment debtor's ability to turn to the equity courts for relief when his remedy at law is inadequate.

To a judgment debtor attempting to escape the payment of a debt, stays of execution are a delaying procedure at best. A stay of execution is only that, a stay, and if the judgment debtor fails in his attempt to nullify the judgment, the judgment creditor can resume his levy of execution. The stay of execution allows the judgment debtor freedom from execution until every post judgment remedy available to him has been exhausted. It is as beneficial to the judgment creditor as to the judgment debtor since it prevents the circuity of litigation that would result if the property were levied upon, sold, and then the judgment was modified or reversed.

The most powerful remedies at the judgment debtor's disposal are the exemptions from levy and forced sale. These exemptions are the most convincing evidence of the revolution that has taken place in the treatment of the judgment debtor.

Today, there is very little disagreement with the premise that some protection must be afforded the judgment debtor to prevent complete destitution.[181] The major controversy over exemption provisions concerns the amount that the debtor should be allowed to

181. The rationale upon which debtor exemption laws are based was aptly expressed in the early Alabama case of Hines v. Duncan, 79 Ala. 112, 114-15 (1885): "Statutes conferring on a debtor the right to exemption of property from sale for the payment of debts have been generally regarded as founded in a humane and enlightened policy having a respect to the common welfare, as well as to the benefit of the individual debtor. Their obvious purpose is to secure to each family a home and means of livelihood, irrespective of financial misfortune, and beyond the reach of creditors; security of the State from the burden of pauperism, and of the individual citizen from destitution."

exempt from execution. One legal writer, who made a survey of the debtor exemption laws of twenty-two states,[182] noted that Florida's homestead exemption laws were unusually liberal because there was no maximum exemption value imposed on homestead real property. Florida's wage exemption provision was similarly cited as an example of liberality because of the lack of limitation upon the amount exempted. In its efforts to protect the family of low income wage earners from hardships and the taxpayers of the state from supporting indigents, the legislature continues to allow unlimited exemptions to individuals who meet the technical requirements for exempt status, yet are not deserving of it.

Although Florida's exemption provisions are capable of a very liberal interpretation, they are also flexible enough to allow some judicial control to prevent injustice. By a strict interpretation of the provisions providing for exemption of the debtor's personal property, the courts, by allowing only $1,000 worth of furnishings, can limit the debtor to little more than the bare necessities of housekeeping. Lurking in the background, however, is the very good probability that such property is owned as an estate by the entirety and thus insulated from seizure by a creditor of only one of the spouses. The construction given to the wage exemption statute also seems exceedingly liberal. This exemption can similarly be controlled through the enforcement of the homestead provision allowing the judgment debtor only $1,000 worth of personal property.

The Florida appellate courts have never been called upon to determine at what point wages lose their identity and become personal property. Unless the judgment debtor spends his wages on highly perishable items, the conversion of his wages into tangible personal property will furnish the judgment creditor with items that may be subjected to the satisfaction of his judgment. Therefore, the courts can control this exemption by a strict interpretation of the statute as to when wages become nonexempt personal property.

It would appear that in spite of the procedural remedies available to a merchant creditor, his most effective remedy is to price his goods and services so that the costs of credit investigations and bad debts are spread to the paying customers. Spreading the losses should not be the remedy in a system that continually searches for a lower cost of goods and services. The nonmerchant who has a contractual claim and the tort claimant must often allow their claims to be barred by

182. Joslin, *Debtors Exemption Laws*, 34 IND. L.J. 355 (1955).

the statute of limitations because of the futility of obtaining judgment in light of the liberal exemptions. A partial remedy to these situations should be provided by the legislature by placing realistic limits on the present exemptions.

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Table of Headings and Subheadings