Florida Law Review

Volume 19 | Issue 1 Article 5

June 1966

Garnishment in Florida: Analysis, Assessment, and Proposals

Linden K. Cannon

Joseph Thomas Caldwell

met the challenge with the proposed rules, and the burden of leadership now rests with the Florida Supreme Court.

CHARLES P. PILLANS

GREGORY A. PRESNELL

GARNISHMENT IN FLORIDA: ANALYSIS, ASSESSMENT, AND PROPOSALS

One thing stands out from our long weary struggle with the case and that is the complex and confusing state of the law relative to garnishment. It occurs to us that it need not be so and that the whole subject should have a thorough legislative overhauling.[1]

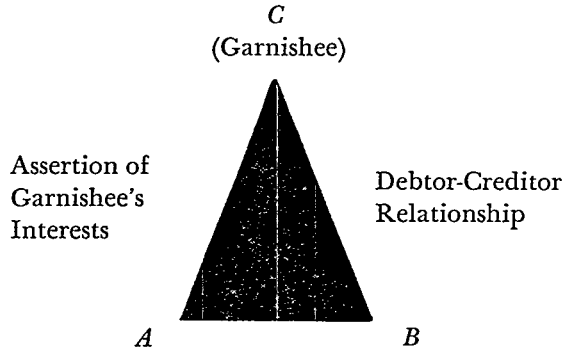
— Florida Supreme Court

Garnishment, a common tool of the legal trade, is much like an iceberg; the part that is normally seen is but a small part of all that is present. In its simplest terms, garnishment is a device ancillary to the main suit, which aids in securing a judgment by allowing a creditor to reach property of his debtor that is in the hands of a third party.

The object of this note is to analyze present garnishment law,[2] to assess its effectiveness, and to propose statutory changes. The need for statutory reexamination is clear; over the years economic change and court interpretation have led to weakened effectiveness of the remedy. It is the thesis of this note that the statutes must be overhauled to conform with modern commercial practices and that the courts must be persuaded not to construe garnishment narrowly. The interests of the respective parties should be the guiding standard of both the courts and the legislature. If no prejudice can come to either the participants or the public, then the writ should be allowed to issue.

1. Nash v. Walker, 78 So. 2d 685, 687 (Fla. 1955).
2. FLA. STAT. ch. 77 (1965).

Because of the number of parties involved and the various relationships among them, it will perhaps be valuable to use a model for analysis that will apply in all garnishment situations. Basically, garnishment may be thought of as a triangle with each of the lines representing a different relationship and each of the angles representing one of the parties who operates in two of the separate relationships.



Principal Suit

In the triangle analogy, reference should first be made to the base line connecting parties *A* and *B*. This base line represents the principal suit in which *A* is the plaintiff and *B* the defendant. This is the main action out of which the ancillary writ of garnishment is issued and thus, if there is some defect in the underlying relationship, none of the other problems are even reached. The "*A-B* relationship" then is the foundation of the garnishment process.

Once the base of the garnishment process has been established by the suit or judgment between *A* and *B*, attention must be directed to finding the relationship between *B* and *C* which can be made the subject of the garnishment process. The relationship sought to be established in this context is that of debtor-creditor. Once *C* is found to be a debtor of *B* within the requirements of garnishment law, he can be served as garnishee for the obligation owing from *B* to *A*. It cannot be overemphasized that there are two distinct obligatory relationships in the total garnishment context. There is an obligation running from *B* to *A* as well as from *C* to *B*. In the *B-C* relationship we are concerned exclusively with the obligation existing between the garnishee, *C*, and the principal defendant *B*. Primary emphasis in the *B-C* analysis will be upon legal doctrines and concepts controlling the determination of a legally enforceable obligation between *B* and *C*.

The *A-B* and the *B-C* relationships taken together form the basis for the actual ancillary garnishment proceeding. With these two re-

lationships established, *A* has only to perfect the process by successfully avoiding any policy factors militating in favor of *C*'s not being made a garnishee or any procedural bars to recovery. The major concern of the *A-C* relationship is the actual determination of *A's* claim against *C* for money or property held owing to *B*. More specifically, this concern is directed toward the interests of the disinterested stakeholder, *C*. Although *C* is generally a passive party to the garnishment with regard to property actually owing to *B*, he quickly becomes interested when a possibility exists that his own position will be prejudiced. This concern with *C*'s interest is reflected in two ways: first, in the form of specific statutes exempting parties from being held as garnishees and second, restrictive court construction of the general garnishment statute.

THE *A-B* RELATIONSHIP

Garnishment After Judgment

Since garnishment is an ancillary remedy,[3] any logical analysis must initially be concerned with that which underlies it, namely the *A-B* relationship or principal suit. Failure to establish as a prerequisite this essential relationship between *A* and *B* will bar use of the garnishment remedy.

Few problems are presented when the plaintiff seeks issuance of the writ on a judgment already rendered in the *A-B* suit. This situation is controlled by section 77.03 of the Florida Statutes. In essence, this statute provides that after obtaining judgment, plaintiff *A* must file an affidavit in the court in which the judgment issued, stating (1) the amount of the judgment and (2) that "affiant does not believe the defendant has in his possession visible property upon which a levy can be made sufficient to satisfy the said judgment." One further averment, not found in the statute, is required by court construction. Interpreting section 77.03 with the wage exemption statute,[4] it was held in *Noland Co. v. Linning*[5] that the affidavit for the writ must affirmatively allege that the money sought to be garnisheed was not due from labor or personal services rendered by the head of a household residing in the state.

In interpreting the requirement set forth in section 77.03 that the affidavit "shall be filed in the court where such judgment has been obtained," it has been held that when the judgment rendered in a cause is less than the jurisdictional amount of the court, such court

3. Goldenkoff v. General Acc. Fire & Assur. Co., 116 So. 2d 780 (3d D.C.A. Fla. 1960).
4. FLA. STAT. §222.11 (1965).
5. 132 So. 2d 802 (1st D.C.A. Fla. 1961).

nevertheless maintains original jurisdiction so that it may properly issue the writ.[6] The only exception to the above-noted provision of section 77.03 is that when a judgment issued in a foreign federal court is registered[7] in Florida, the garnishment laws of this state are available to enforce it.[8]

Garnishment Prior to Judgment

The more difficult situation in which to obtain a writ of garnishment is when no judgment has yet been secured. The need for such a procedure prior to judgment is obvious, since without it the defendant in the principal suit could get the indebtedness discharged and dispose of the proceeds, leaving the plaintiff nothing to execute upon should a decision in his favor be rendered.

However, the legislature in enacting statutes and the courts in construing them must balance this policy of protecting *A*'s interest in recovering on a judgment with the protection of the interests of the garnishee. *C*'s rights must be protected, and the *A-B* suit in which he has no real interest must not be allowed to work to his prejudice.

In reflecting the balance between these policies, section 77.18, the provision permitting garnishment prior to judgment, does not apply in two major areas. The first is set out in section 77.02, which provides: "Prior to judgment against a defendant, no writ of garnishment shall issue in any action sounding in tort." Because it is impossible to predict with any certainty the ultimate recovery in a tort action courts are reluctant to permit attachment of what may be an unjustified amount.[9]

The second situation is when the principal suit is in equity. In *Williams v. T. R. Sweat & Co.*[10] the court said: "[T]he initial clause [of 77.01][11] evidently cannot apply to suits in chancery, for a suit merely 'to recover a debt' cannot be brought in an equity court." In laying down the rule that garnishment prior to judgment is not proper when the principal action is equitable, the court in *Sweat* implies that the amount asked for in the main action must be liquidated, even if in a suit at law.[12] It is perfectly clear that garnishment is not proper when the *B-C* obligation, the debt between the defendant in

6. Goldenkoff v. General Acc. Fire & Assur. Co., 116 So. 2d 780 (3d D.C.A. Fla. 1960).

7. 28 U.S.C. §1963 (1958).

8. Gullet v. Gullet, 188 F.2d 719 (5th Cir. 1951).

9. Nevada Co. v. Farnsworth, 89 Fed. 164 (C.C.D. Utah 1898).

10. 103 Fla. 461, 137 So. 698 (1931).

11. "Every person who shall have brought a suit to recover a debt or shall have recovered a judgment in any court of this state. . . ."

12. 103 Fla. 461, 463, 137 So. 698, 700 (1931).

the principal suit and the garnishee, is contingent or unliquidated.[13] This is because it would be unjust to subject property in the hands of *C* to process if in fact he does not owe it to *B*. The question raised by *Sweat*, however, is whether the *A-B* action must also be for a fixed and certain amount before garnishment will be available.

The Florida Supreme Court touched on this issue in *Moss v. Sperry*,[14] but the failure to delineate which relationship was under discussion renders the opinion ambiguous.[15] Because of this, there is no firm indication as to the Florida court's understanding of the nature of the *A-B* relationship. However, the tenor of cases in Florida shows that the courts frown on any contingency or uncertainty in the garnishment obligations. Further, the reasons for denying garnishment prior to judgment in tort suits would apply equally to uncertain claims in nontort actions. These factors, combined with the strict and literal interpretation given to the garnishment provisions, lead to the conclusion that contingency in the *A-B* relation would be a bar to use of the remedy.

There are, however, persuasive reasons for not requiring the principal suit to be for a fixed and certain amount. The contingency is only between *A* and *B*, the main parties to the action, and the plaintiff is required to provide a bond to protect the defendant against improper suing out of the writ.[16] Property in the hands of *C* can be reached only if his debt to *B* is already fixed, thus no interest of the garnishee is prejudiced. Finally, there is always a contingency in garnishment prior to judgment since the plaintiff may not win the suit, yet the statute clearly recognizes that this is no impediment to use of the remedy.[17] The reasons for allowing garnishment where the *A-B* debt is not yet fixed are well stated in a Washington case, where the court, interpreting a statute[18] similar to that of Florida, said:[19]

13. West Fla. Grocery Co. v. Teutonia Fire Ins. Co., 74 Fla. 220, 77 So. 209 (1918).

14. 140 Fla. 301, 318, 191 So. 531, 539 (1939).

15. Although a contrary interpretation is possible, the opinion indicates that the "debt" the court feels is contingent so as to prevent garnishment is the debt that is the subject of the principal suit.

16. The terms of §77.18 require that bond be posted by the garnishor in at least double the amount demanded to protect the debtor, *B*, from damages incurred by improper suing out of the writ. Corbin v. St. Lucie River Co., 78 So. 2d 396 (Fla. 1955) indicates that Florida will treat liberally amendments to the garnishment bond, making it possible for the garnishee to add to the bond where initially it was insufficient, without the writ being quashed.

17. FLA. STAT. §77.18 (1965).

18. WASH. REV. CODE ANN. §7.32.010 (1961).

19. Basset v. McCarty, 3 Wash. 2d 488, 101 P.2d 575 (1940).

> It can logically be said, we think, that if the plaintiff makes the required affidavit that such debt is due and unpaid, there is no valid reason why he should be deprived of the remedy afforded by the attachment and garnishment statutes merely because his claim is not liquidated. Only the immediate parties to the main action are affected by the fact that the claim is unliquidated. No hardship is imposed upon anyone else.

The Washington court then recognized the distinction between the *A-B* and the *B-C* relationships stating: "To say however, that unliquidated claims are the *subject* of garnishment would be, in our opinion, to impose a burdensome and unreasonable duty upon third parties who are in no way concerned with the outcome of the main action."[20]

The confusion engendered by the question whether *C* can be made garnishee where the *A-B* debt is not fixed readily lends itself to statutory solution. If *A* were required to put up a bond to indemnify the garnishee against possible damage he might suffer as a result of the writ, this would undercut the principal reason for denying the remedy — the possible harm to *C*. Any overhaul of chapter 77 should consider such a solution.

THE *B-C* RELATIONSHIP

Underlying Principles

Controlling the *B-C* relationship is section 77.01, which provides the right to a writ of garnishment where there is an "indebtedness due" from a third party to *B*. To take advantage of the garnishment statute it is necessary for *A* to establish that there is an indebtedness due within the meaning of the statute. The debt itself is, of course, based on such principles as contract or negotiable instruments law.

The concepts that courts have developed for determining if there is an indebtedness due have evolved as a result of the tension between the policies of making the remedy an effective device to insure recovery of a judgment and that of protecting affected parties who have no interest in the primary litigation. Out of this balancing process three main concepts have been developed: (1) contingency, (2) liquidation, and (3) maturity.

The problem most frequently encountered in the *B-C* relationship is whether the obligation is contingent and not whether an indebtedness is due as stated in section 77.01. Florida's position is

20. Basset v. McCarty, 3 Wash. 2d 488, 497, 101 P.2d 575, 578 (1940). (Emphasis added.)

set out in *West Florida Grocery Co. v. Teutonia Fire Insurance Co.*[21] in which the court said: "If there is *anything* contingent or to be done by a person before the liability of another becomes fixed, there is not an indebtedness due as contemplated by the statute to which the garnishment can apply." Such language is, on its face, quite restrictive and tends to narrow the scope of the remedy.

The phrase "anything . . . to be done" should not be taken literally because one can successfully procure a writ of garnishment even though the garnishee denies liability entirely.[22] Garnishment, then, is proper even though *B* has not perfected his claim against *C* by securing a judgment against him. Perhaps this can be made clear by reference to *Zimek v. Illinois National Casualty Co.*[23] in which the defendant, Zimek, claimed his insurer could not be garnisheed because it denied any liability to him. In reply to this, the Supreme Court of Illinois stated:[24]

> But defendant misconceives the nature of the contingency contemplated by the rule. A contingent claim is one where liability hinges on some future event, which may or may not occur; it is dependent on some condition as yet unperformed. . . . Here, whatever right Zimek had against the [insurance] company has vested; all the events which can fix the garnishee with liability have taken place. It only remains to be determined whether those events make the casualty company liable to Zimek.

The distinction made here seems to be valid: if there are events still to be performed by the parties, which may change their relationship, there is a contingency that will defeat any "indebtedness due." But if there remains only a judicial determination of the effect of the events completed, then there is no contingency within the meaning of the statute.[25]

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21. 74 Fla. 220, 77 So. 209 (1918). (Emphasis added.)

22. Standard Acc. Ins. Co. v. Hancock, 124 Fla. 725, 169 So. 617 (1936). See also Poole v. Travelers Ins. Co., 130 Fla. 806, 179 So. 138 (1937).

23. 370 Ill. 572, 19 N.E.2d 620 (1939).

24. *Id.* at 576, 19 N.E.2d at 623.

25. This analysis is clearly stated in Ackerman v. Tobin, 22 F.2d 541, 543 (8th Cir. 1927), *cert. denied*, 276 U.S. 628 (1928). "The contingency which will prevent garnishment is not presented by the mere fact of denial by the garnishee of the obligation. The uncertainty contemplated by the law is one that conditions the obligation, rendering it uncertain in the sense that it may never become due or owing, the determination of that being contingent upon the happening of some future event." For an excellent discussion see Knudson v. Anderson, 199 Minn. 479, 272 N.W. 376 (1937).

The second consideration cutting through all specific *B-C* relations is whether the obligation is liquidated. This was touched upon in *Cobb v. Walker*[26] where the Florida Supreme Court indicated garnishment was not permissible when the "amount is uncertain" because it is unfair to subject property in the hands of the garnishee to garnishment where it is not determinable how much is due to *B*. Although there is no clear statement in Florida as to what is meant by an unliquidated debt in the context of garnishment, a good analysis is found in a New Hampshire decision[27] in which the court stated: "When 'the exercise of judgment, discretion and opinion, and not mere calculation or computation' is required to determine the amount of the claim, it is unliquidated. Moreover, the staking of reasonable limits is a matter of judicial inquiry." There is no reason to think Florida would hold differently, and support for such analysis may be found in *West Florida Grocery* where it is indicated that garnishment would be permissible when the indebtedness is "determinable by a fixed and certain method of calculation."[28]

The third factor courts consider is whether the *B-C* obligation is matured. The usual approach is to say that a debt that is absolute and certain may be reached even though it is not presently matured.[29] This turns on the distinction between "owing" and "payable." An obligation not yet owed is clearly not subject to garnishment (as it would fall under the rule against garnishment of contingent debts), but if it is owed but not yet payable, as in the case of periodic installments payable under an insurance policy, garnishment has been allowed.[30]

The language in *West Florida Grocery* that a debt would be subject to garnishment if it is "determinable by a fixed and certain method of calculation,"[31] indicates Florida would follow the majority view as to maturity. However in the subsequent case of *Cobb v. Walker*[32] it was stated that a debt must be "due absolute" if the writ is to properly issue. It is hoped that Florida will follow the better view and permit garnishment when the obligation will become due absolutely merely by the passage of time. Legislation directed to

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26. 144 Fla. 600, 198 So. 324 (1940).
27. Brahmey v. Rollins, 87 N.H. 290, 179 Atl. 186 (1935).
28. 74 Fla. 220, 226, 77 So. 209, 211 (1918).
29. Dawson v. Bank of America Nat'l Trust & Sav. Ass'n, 100 Cal. App. 2d 305, 223 P.2d 280 (4th D.C.A. 1950); Brown v. Nasin, 21 Conn. Sup. 16, 142 A.2d 59 (Ct. C.P. 1958); Charles A. Klinges, Inc. v. Camblos Constr. Co., 194 Pa. Super. 585, 168 A.2d 916 (1961).
30. Roth v. Kaptowsky, 401 Ill. 424, 82 N.E.2d 661 (1948).
31. 74 Fla. 220, 226, 77 So. 209, 211 (1918).
32. 144 Fla. 600, 605, 198 So. 324, 326 (1940).

this point stating that a debt definitely due at a future date could be reached by garnishment would eliminate any possible ambiguity.

Two-Party Relationship

The *B-C* relationship may be broken down into two classifications: two-party and three-party relationships. The term "two-party" is used to designate the situation in which the obligation is fixed between two specific parties and is unlikely to shift or change. Examples of this are found where the *B-C* debt is founded upon insurance, trust, or probate law. In each of these cases any obligation will, in all probability, continue to exist between the initial parties so that the garnishor need only concern himself with proving that the obligation is a "debt" within the terms of section 77.01. Three-party relationships describe those cases in which the obligation is transitory, as in the case of negotiable instruments, assignments, and bank accounts. Thus, the creditor must not only find the requisite debt, but also make sure that it exists between the proper parties. Because of this fluidity, the usefulness of garnishment as a device to secure a judgment is substantially impaired in the three-party relationship.

Application of the basic considerations to which the courts look in ascertaining if the *B-C* relationship will sustain garnishment has given rise to much litigation where the garnishee is an insurance company. In the absence of a statute to the contrary, it is generally held that the obligation running from the insurance company to *B* is a proper subject for garnishment.[33] Although no explicit statement of this rule has been made in Florida, the number of cases in which the garnishee is an insurance company makes it clear that Florida follows the general approach.[34] The real problem, however, is not whether the insurer can be garnishee, but rather when it is proper to invoke the remedy.

In applying the underlying principle that a contingent debt is not subject to garnishment the question arises whether it is proper to garnishee a liability policy when the loss has occurred but the procedural prerequisites necessary to recovery by *B* have not been complied with. Florida has taken a firm stand; unfortunately not with the better-reasoned position. *West Florida Grocery Co. v. Teutonia Fire Insurance Co.* stated that the proceeds of a fire insurance policy were not subject to garnishment where *B* had not yet filed the proof

33. Drysch v. Prudential Ins. Co. of America, 287 Ill. App. 68, 4 N.E.2d 530 (1st Dist. 1936).

34. Poole v. Travelers Ins. Co., 130 Fla. 806, 179 So. 138 (1937); Standard Acc. Ins. Co. v. Hancock, 124 Fla. 725, 169 So. 617 (1936).

of loss. The reasoning of the court was that since *B* could not collect until the proof of loss was made, there was no debt. In the words of the court: "If there is anything contingent or to be done by a person before the liability of another becomes fixed, there is not such an 'indebtedness due' as contemplated by the statute to which a writ of garnishment can apply."[35] The key to this position is that the proof of loss is to be considered a condition precedent to the establishment of any obligation from the insurance company. The effect of this language has been to create a situation in which the judgment debtor is able to defeat the rights of *A* simply by inaction. He may do this out of spite or in collusion with the insurance company, since he might naturally feel that any recovery would only satisfy the party to whom he has lost in litigation.

There is little valid reason why Florida should choose to so narrow the scope of the garnishment remedy. A better position is taken by *Finch v. Great American Insurance Co.*[36] in which the Connecticut court held that a liability insurer can be made subject to garnishment prior to performance of mechanical prerequisites. The court reasoned that while the liability policy was in force, but before any loss occurred, the debt was contingent. However, when the loss occurred: "[T]he contingent liability of the underwriter is thereby converted into a present contract obligation to pay whatever the sum, not exceeding the amount of the policy . . . payment being necessarily deferred until the amount of the loss is ascertained." Thus, the steps the insured is required to take before the money is received by him do not create the debt; "on the contrary, the filing of the proof of loss necessarily involves the assertion by the insured of the existence of an antecedent debt."[37] The holding in *Finch* is predicated on the conception that the contingency is the loss itself, and those acts the insured does of his own volition merely liquidate the existing obligation and such liquidation should not be prevented by the refusal of *B* to act, especially when it can be done conveniently in the garnishment proceeding.

Florida does not follow the *Finch* view apparently because *B* has not complied with the terms of the policy and he could not sue; thus, *A*, having no greater rights than *B*, could not sue either.[38] This reasoning, however, is not consistent with the fact that situations are recognized in Florida in which the garnishor can recover even though his debtor, *B*, could not. An example of this is where *B* fraudulently disposes of his cause of action against the garnishee: *A*

35. 74 Fla. 220, 226, 77 So. 209, 211 (1918).
36. 101 Conn. 332, 125 Atl. 628 (1924).
37. *Id.* at 336, 128 Atl. at 630.
38. Howe v. Hyer, 36 Fla. 12, 17 So. 925 (1895).

can still enforce *B*'s original rights though *B* cannot.[39] If the courts are concerned with fraud, there is no reason to make *A*'s recovery depend upon *B*'s performing mechanical conditions in which he has no interest, since this itself is fertile ground for collusion or spite.

Florida, by way of *West Florida Grocery*, has unduly restricted the scope and effectiveness of the garnishment remedy.[40] Florida has consistently indicated that, with few exceptions, if there is "anything" at all to be done before *B* could sue *C*, then *A* will be precluded from the benefit of the remedy. Other jurisdictions, however, do not follow this restrictive position,[41] and theirs is the better view. The reason for the requirement that the debt not be contingent or unliquidated is to protect the garnishee, a disinterested stakeholder, so that his interest will not be prejudiced by the litigation between *A* and *B*. Thus, a court in deciding whether to permit garnishment should measure its decision against the interest of the garnishee. The standard the courts should apply in doubtful situations is to allow garnishment unless it can be shown the garnishee will be injured. Applying this to the liability insurance situation, it may be seen that a narrow construction of the garnishment statute does not give the garnishee any additional protection while it does create a situation in which fraud on *A* is possible. A more liberal interpretation should be adopted to conform with the purpose of this remedy.

The two-party analysis also applies where the *B-C* relationship is controlled by probate law. Florida has held that the relationship between an executor or administrator of a decedent's estate and the distributee prior to the decree of distribution is not an "indebtedness

39. Standard Acc. Ins. Co. v. Hancock, 124 Fla. 725, 169 So. 617 (1936).

40. *West Fla. Grocery* also stands for the proposition that where under the contract of insurance, the insurer has an option to replace the thing damaged rather than pay the equivalent in money, then any obligation asserted before the exercise of the option cannot be made the subject of garnishment. This is in line with the great weight of authority. Hurst v. Home Protection Fire Ins. Co., 81 Ala. 174, 1 So. 209 (1887); Godfrey v. Macomber, 128 Mass. 188 (1880); Smaltz Goodwin Co. v. Poppe, 172 Minn. 33, 214 N.W. 762 (1927); Dowling v. Lancashire Ins. Co., 89 Wis. 96, 61 N.W. 76 (1894); Cases, 38 A.L.R. 1072 (1925). The related question whether the requirement that the policy be turned in for cancellation before payment in made will be such a contingency as to prevent garnishment has never been decided in Florida. In view of the intractable attitude and almost literal interpretation of "indebtedness due" in *West Fla. Grocery*, which has not been subsequently modified; Cobb v. Walker, 144 Fla. 600, 198 So. 324 (1940); Williams v. T. R. Sweat & Co., 103 Fla. 461, 137 So. 698 (1931); the policy would have to be physically turned over before the insurance company could be made garnishee.

41. Molloy v. Prudential Ins. Co. of America, 129 Conn. 251, 27 A.2d 387 (1942); Brack v. Logan, 350 Ill. App. 425, 113 N.E.2d 197 (3d Dist. 1953); for good discussion of authorities, see Marquis v. New York Life Ins. Co., 92 Ohio App. 389, 108 N.E.2d 227 (1st Dist. 1952).

due" within the garnishment context.[42] Since it is not certain what the beneficiary will be entitled to receive on distribution of the decedent's property, courts reason that the relationship is both contingent and unliquidated. It is further argued that having the executor liable to garnishment process will interfere with administration of the estate[43] and will present jurisdictional difficulties since probate court is not the proper forum in which to bring a garnishment action.[44]

That garnishment is not proper *before* there has been a decree of distribution is agreed upon by the great majority of courts.[45] However, those jurisdictions that have considered the problem seem in agreement that *subsequent* to the decree, property in the hands of the executor or administrator can be reached by a creditor of the distributee.[46] The reasoning behind this position is persuasive, for as the California court stated in *In re Nerac*:[47]

> By the decree each share is finally and definitely ascertained, and a cause of action thereafter exists against the administrator in favor of the distributee, and we are unable to perceive why, on the score of public policy or anything else, the money thus judicially determined to be due from the administrator to the distributee should not be within the reach of the creditors of the latter.

While it is still an open question in this state whether garnishment *after* the decree is permissible there seems to be no reason why Florida would not agree with the *In re Nerac* rationale. The handing down of the decree would settle the rights of the parties sufficiently to fit within the narrow construction of "indebtedness due" propounded in *West Florida Grocery*. Other difficulties, such as interference with the handling of the estate and the jurisdictional problem caused by incapacity of the probate court to issue a garnishment writ, would likewise dissipate.

Should Florida hold that garnishment of an estate is improper under all circumstances, then the proceeds would go directly into the hands of the judgment debtor thereby significantly diminishing any chance of the creditor's actual recovery. Should it be held that

42. Post & Hobby v. Love, 19 Fla. 634 (1883).
43. *Id.* at 642.
44. *Id.* at 640.
45. Orlopp v. Schuller, 72 Ohio St. 41, 73 N.E. 1012 (1905); Woodbine Sav. Bank v. Yager, 58 S.D. 542, 237 N.W. 761 (1931); Island Pond Nat'l Bank v. Chase, 101 Vt. 60, 141 Atl. 474 (1928); Olson v. Gilbertson, 239 Wis. 241, 300 N.W. 918 (1941).
46. Annot., 59 A.L.R. 777 (1929), and cases cited therein.
47. 35 Cal. 392 (1868).

garnishment is available, but only after the decree of distribution has issued, then the creditor's rights may still be defeated, or seriously interfered with, if the debtor assigns or sells the expected proceeds. Further, there may well be a race to the administrator, each trying to claim the property first.

Applying the criterion that the garnishor should be afforded every opportunity to make good his claim against the judgment debtor while protecting the rights of third parties who are only fortuitously involved, it is seen that legislative action is needed. The best approach would provide that the representative of the estate can be served as garnishee at any time, but that execution of the writ would be stayed until the decree of distribution is final.[48] Thus, the creditor of the distributee would have a prior claim on the property without interfering with the administration of the estate.

A third two-party relationship that has raised problems in application of *B-C* principles to garnishment is the attempt by the creditor of a beneficiary of a trust to hold the trustee as garnishee. Although no court in Florida has dealt with this problem, the Fifth Circuit Court of Appeals in *McLeod v. Cooper*[49] stated that Florida follows the general rule[50] that: "[E]quitable interests of this nature are not subject to garnishment unless expressly authorized by statute." The reasoning is that garnishment is a legal remedy, not equitable, and that since "garnishment is purely statutory, operation thereof should not be extended beyond statutory authority."[51]

This position is by no means universally accepted, as there are many statutes that permit the trustee of a nonspendthrift trust to be held as garnishee.[52] Many states, recognizing the desirability of such laws, have provided that the creditor can reach the beneficiaries'

48. An example of such a statute is to be found in ILL. REV. STAT. ch. 62, §35 (1959), which states: "Administrators and executors may be summoned as garnishees regarding indebtedness or other property belonging to any heir or distributee of any estate; but judgment shall not be rendered against an administrator or executor until an order of distribution is entered by the court which appointed him." Jenner & Davenport, *Historical and Practice Notes*, S.H.A. ch. 62, §35 (Supp. 1965) note that the above quoted language was enacted especially to provide the creditor with protection before any order was entered by the probate court.

49. 88 F.2d 194 (5th Cir. 1937).

50. Teague v. LeGrand, 85 Ala. 493, 5 So. 287 (1889); Shelton v. Wolthausen, 80 Conn. 599, 69 Atl. 1030 (1908); Stowe v. Phinney, 78 Me. 244, 3 Atl. 914 (1886).

51. Williams v. T. R. Sweat & Co., 103 Fla. 461, 137 So. 698 (1931).

52. *E.g.*, ALA. CODE tit. 7, §1005 (1958); CONN. GEN. STAT. REV., §52-321 (1958); HAWAII REV. LAWS §237-1 (1955); KAN. GEN. STAT. ANN. §60-965 (Supp. 1949); N.J. STAT. ANN. §2A:17-57 (1951); N.Y. JUSTICE CT. ACT §300; W. VA. CODE ANN. §3885 (1961).

interest in a trust to the same extent as could the beneficiary himself, and that the income of the trust is available to the creditor to satisfy his claims.[53] This accords with the better view that *A* should be given every opportunity to recover as long as the rights of third parties are not detrimentally affected. Acceptance of this view negates the reason given for denying garnishment of the trustee – that garnishment is a legal remedy and that the trust is administered in equity. For example, if *B* were the beneficiary of a nonspendthrift trust that pays him an income of one hundred dollars per month, there should be no bar to garnishment; the amount is liquidated, it is not contingent, the position of the trustee is in no way adversely affected, and the beneficiary, *B*, is not deprived of anything he does not owe. Statutes allowing this have been construed as not interfering with a spendthrift provision,[54] which continues to be effective in preventing garnishment. The conclusion is that there is nothing in the law of garnishment or the law of trusts or the policy behind either that militates against the adoption of a statute allowing the trustee to be subject to garnishment.

A caveat should be noted in relation to Florida Statutes, section 62.22, entitled "Equitable Garnishment." An eminent authority in the field of trusts[55] has apparently been misled by this statute. He states that section 62.22 authorizes garnishment of the trustee by creditors of the beneficiary. A close reading of this law, however, will not support this. It provides only that one can institute an action against the holder of property of the defendant (*B*) in a suit in equity when (1) such defendant is not in the state, (2) the person holding the property is in the state, and (3) the equitable claim is liquidated and not contingent.[56] Thus, the equitable relationship contemplated by the statute is between *A* and *B*, not between the debtor in the principal suit and the person obligated to him. Section 62.22 provides no basis for a creditor of a beneficiary of a trust to proceed against the trustee in Florida.

Three-Party Relationships

The term "three-party relationship" is not to be taken literally, but rather as a warning to the prospective garnishor to prepare for the possibility of a shift in the debtor-creditor relationship on which he is relying. The three-party situation arises most frequently in

53. See language in ALA. CODE tit. 7, §1005 (1958).

54. Henderson v. Sunseni, 234 Ala. 289, 174 So. 767 (1937); Bridgeport City Trust Co. v. Beach, 119 Conn. 131, 174 Atl. 308 (1934); *In re* Manley's Estate, 112 Vt. 314, 24 A.2d 357 (1942).

55. BOGERT, TRUSTS AND ESTATES, §193 n.71 (2d ed. 1963).

56. Cobb v. Walker, 144 Fla. 600, 198 So. 324 (1940).

commercial transactions in which the desired debtor-creditor relationship is centered about an easily-shifted or transitional debt. The creditor is therefore faced with the possibility of being able to establish a very definite debtor-creditor relationship, but one running from *C* to *D* rather than from *C* to *B*. Because of the transitory nature of the debt relationship involved, the three-party relationship generally provides the least effective framework for the operation of the garnishment remedy. However, garnishment may still prove useful under these circumstances if special care it taken to analyze the situation properly. The discussion below will concentrate on various three-party relationships in an effort to point up some of the more common pitfalls of the garnishment process in this context. A number of suggestions will be made with a view toward possible legislation that would set out more definite guidelines for the garnishing creditor, keeping in mind the policy of allowing garnishment in all instances where the interests of third parties would not be sacrificed.

Negotiable Instruments. Garnishment of negotiable instruments clearly fits into the three-party category and requires close analysis. The problems that arise in this area are primarily attributable to the nature of negotiable paper. The debt underlying the negotiable instrument is not payable exclusively to a specified payee, but rather to any holder in due course of the instrument. The superior interests of protecting the garnishee, payor of the negotiable paper, from the risk of double liability and of preserving the debt's attribute of negotiability have preempted the field with respect to the rights of the garnishing creditor. The Florida courts are in agreement with the generally accepted rule that the obligor on negotiable paper cannot be charged as garnishee except in circumstances where it is certain that he will be clearly protected against the actual holder of the paper.[57]

When the note is still current, a single situation presents itself where the obligor will be fully protected from the risk of double liability — where he either has possession of the note or it is under his control. Florida has incorporated this particular situation into its general rule, disallowing garnishment of debts evidenced by negotiable instruments unless the obligor, or maker, holds the notes in his possession.[58] One instance in which the maker of such notes may have them in his possession is when they are delivered by the payee to the maker for delivery to a third person on payment of an agreed

57. Huot, Kelly & Co. v. Ely, Candee & Wilder, 17 Fla. 775 (1880).

58. Hollopeter & Post v. Saenz, 133 Fla. 279, 182 So. 906 (1938); Huot, Kelly & Co. v. Ely, Candee & Wilder, 17 Fla. 775 (1880); Universal C.I.T. Credit Corp. v. Broward Nat'l Bank of Ft. Lauderdale, 144 So. 2d 844 (2d D.C.A. Fla. 1962).

price.[59] Here the maker could not possibly be subjected to double liability because the notes are in his possession. In effect, the notes cease to be current negotiable paper while held by him. Thus, the creditor's search is essentially limited to circumstances in which the notes are not current or are nonnegotiable.

Generally, if the instrument is found to be in the hands of the judgment debtor *after* maturity the debt evidenced thereby may be subjected to garnishment,[60] but there is some doubt whether Florida would follow this view. Two factors support the conclusion that such garnishment would be permitted. After maturity, a note loses its quality of negotiability, and under negotiable instruments law a holder of a note is not a holder in due course unless he became holder of the note before it was overdue.[61] For this reason, one who acquires a negotiable instrument after its maturity acquires only the rights of an assignee rather than those rights accorded a holder in due course.[62] If such assignment were subsequent to the service of the writ of garnishment, the assignee would take the note subject to the prior notice of garnishment served on his assignor. Thus, a showing that the note matured in the hands of the principal defendant would render irrelevant the reasons set out above for disallowing garnishment of commercial paper in the effort to protect the rights of a holder in due course. Hence, a rule allowing garnishment of a matured promissory note in the hands of *B* seems entirely consistent with the policy underlying the expressed Florida rule as to garnishment of negotiable instruments.

The case of *Sessions v. Stevens*[63] seems to lend further support to the above conclusion. In that case, a garnishee who was maker of a promissory note was sued by the assignee of the judgment debtor. The garnishee set up the judgment against him in a previous garnishment proceeding as a defense to this action. The court held in favor of the garnishee on the ground that the judgment was a prima facie bar to subsequent recovery on the same note in the hands of anyone, and that the garnishor in legal effect had become assignee of the note from the time of service of the writ of garnishment and therefore stood in higher priority than the assignee of the judgment debtor. The court further held that by the garnishment judgment "the note

59. Hutcheson v. King, 83 S.W. 215 (Civ. App. Tex. 1904).

60. Great Western Fin. Co. v. Hamilton Nat'l Bank, 76 Colo. 48, 230 Pac. 115 (1924); Serviss v. Washtenaw Cir. J., 116 Mich. 101, 74 N.W. 310 (1898); Jacoby v. Dvorak, 111 Neb. 683, 197 N.W. 428, 199 N.W. 726 (1924).

61. Taylor v. American Nat'l Bank of Pensacola, 63 Fla. 631, 57 So. 678 (1912); FLA. STAT. §674.54 (1965).

62. Maryland Cas. Co. v. Orr, 109 Fla. 184, 147 So. 271 (1933); Stegemann v. Emery, 108 Fla. 672, 146 So. 650 (1933).

63. 1 Fla. 233 (1847).

in legal contemplation, becomes extinguished, loses its identity and character, and ceases to be the subject of future action."[64] Although not expressly articulated, the court seemed to base its decision on the fact that the plaintiff took the note after maturity and therefore was not a holder in due course. The record seems to indicate this, and the court went on to say that if the plaintiff were a bona fide holder of the note before service of the writ of garnishment the contrary result must be reached. He would be entitled to recover on the note, notwithstanding the judgment against the garnishee. Additional support for the conclusion that the court in *Sessions* approved of garnishment of a note, not in the hands of the garnishee, after its maturity, is found in the court's affirmance of the trial court's instructions that Sessions the subsequent assignee, "was bound to take notice of the garnishee process, taking the note after due."[65]

The suggested policy of allowing matured negotiable paper to be garnisheed cannot be applied indiscriminately in light of Florida's recent adoption of the Uniform Commercial Code.[66] The Code provides that a holder may take a note that is overdue and still be a holder in due course with all attendant rights, if he receives the commercial paper without notice of its maturity or its having been dishonored.[67] This change, however, will not significantly restrict the use of the remedy because of the rarity of situations in which the holder of a negotiable instrument will have taken it without notice of its date of maturity.

Apparently there has been no determination in Florida of the issue whether a writ of garnishment can be procured to subject a negotiable instrument itself to payment of a judgment creditor's claim by means of levy and seizure. The desirability of such a procedure might arise when negotiable paper is held by a third person in a trust relationship to the judgment debtor; the term "trust" is used here quite broadly, meaning any relationship in which the holder of the note has no interest in it. This situation may arise when the note is held by a friend, an agent for resale, or even secured in a safe-deposit box.[68] Although the issue has never come before Florida courts, it is reasonable to conclude that physical seizure of negotiable instruments would be precluded by a strict construction of Florida's general garnishment statute.[69] Reinforcing this conclusion is the

64. 1 Fla. 233, 240 (1847).
65. *Id.* at 236.
66. FLA. STAT. §673.3-302 (1965), effective Jan. 1, 1967.
67. UNIFORM COMMERCIAL CODE §3-302 (1) (c).
68. See Tillinghast v. Johnson, 34 R.I. 136, 82 Atl. 788 (1912); Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125 (1900).
69. FLA. STAT. §77.01 (1965) provides that a creditor "shall have a right to a

fact that other jurisdictions[70] having statutory language identical with that of Florida have found such laws not to comprehend the physical seizure of negotiable notes.[71] This is a product of the common law rule that choses in action may not be subjected to garnishment in the sense of being actually seized and sold.[72] It seems logically unsound, however, to read the common law rule into the garnishment statute. To do so allows the judgment debtor (*B*) to secure property he legally owes to the judgment creditor (*A*). Thus, the effectiveness of the creditor's remedy is unduly restricted while not furthering the interests of any innocent parties.

A more just and logically sound approach would be to provide by statute for the court to appoint a receiver to collect the note or other security held by the trustee for the judgment debtor and to satisfy the claim of the garnishing creditor with the proceeds. A number of jurisdictions[73] have adopted this procedure in an effort to maximize the effectiveness of the creditor's remedy when no innocent parties stand to be harmed. Florida would do well to follow their example.

Suretyship. The three-party problems are not limited to negotiable instruments, but cause equal difficulty in the areas of surety, assignments, and banking. The garnishor quickly runs afoul when he seeks recovery of a debt by garnishment of a surety of the principal defendant (*B*). Initially, it appears that a typical debtor-creditor relationship exists between the surety and principal defendant that would present a proper subject of garnishment, but a closer examination of the relationship between the parties will show an absence of any debt running between *B* and *C*, which *A* can reach. Until the bond is breached, there is nothing but a contingent contractual relationship between *B* and *C*. Furthermore, after breach of the bond the debt relationship exists between the surety and the obligee of the bond, rather than the surety and the obligor. Because the requisite debtor-creditor relationship is lacking under such circumstances, the

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writ of garnishment . . . to subject any indebtedness due to the defendant by a third person, and any goods, money, chattels or effects of the defendants in the hands, possession or control of a third person."

70. See Crawford v. Schmitz, 139 Ill. 564, 29 N.E. 40 (1891); Taylor v. Cillean, 23 Tex. 508 (1859); Price v. Brady, 21 Tex. 614 (1858).

71. *Ibid.*

72. *In re* Dukes, 276 Fed. 724 (D. Del. 1921); Craft v. Summersell, 93 Ala. 430, 9 So. 593 (1890); McGehee v. Cherry, 6 Ga. 550 (1849).

73. See Elser v. Rommel, 98 Mich. 74 (1893); Kibling v. Burky, 20 N.H. 359 (1850). See, *e.g.*, N.H. REV. STAT. ANN. §512:30 (1955); N.Y. PERS. PROP. LAW §121.

Second District Court of Appeal has held that the usual surety relationship is not a proper subject of the garnishment process.[74]

Assignments. By the assignment of a debt owed him from an anticipated garnishee, the judgment debtor (*B*) rearranges the relationship among the parties, thus complicating the garnishor's task of establishing the all-important debtor-creditor relationship between *C* and *B*. For example, when *A* is about to perfect his claim to the garnisheed property through execution, *D* arrives on the scene claiming a superior right to the same property by a prior assignment from *B*. In a jurisdiction adhering to a strict priority of time with regard to assignments, *D* would prevail leaving *A* to pursue another remedy.

From this example it can be seen that the theory underlying a determination of the relative superiority of competing claims to property held by *C* has a great impact on the efficacy of the garnishment remedy in a particular jurisdiction. There are two general theories on which such priority between claims, including those based on garnishment, is determined. On the basis of the early case of *Walters v. Whitlock*[75] it was thought that Florida adhered to the majority view, often called the "American rule," which bases priority solely on the time of assignment.[76] Under this rule, notice to the debtor (*C*) is not essential to complete the assignment from *B*. Thus, the assignee is accorded priority notwithstanding the fact that at the time of the service of the writ of garnishment the debtor (*C*) had no notice of the assignment. However, recently in *Boulevard National Bank of Miami v. Air Metals Industries*[77] it was held that Florida is definitely aligned with the minority view on this point, and the court strongly implied that the longstanding conclusion to the contrary was without substantial basis and erroneous *ab initio*. The minority view, commonly referred to as the "English rule," holds that notice of an assignment prior to the service of a writ of garnishment on *C* is indispensable to the priority of the assignment over the garnishment. The rule of *Boulevard National Bank* has been applied directly to the garnishment context with the holding that in determining the priority between the two claims, first in time as to notice should prevail.[78]

74. Seaboard Surety Co. v. Acme Wellpoint Corp., 156 So. 2d 688 (2d D.C.A. Fla. 1963).

75. 9 Fla. 86 (1860).

76. Annot., 52 A.L.R. 109, 110 (1928); 6 AM. JUR. 2d *Attachment and Garnishment* §483, 902 n.20 (1963).

77. 176 So. 2d 94 (Fla. 1965).

78. Oper v. Air Control Products, Inc. of Miami, 174 So. 2d 561 (3d D.C.A. Fla. 1965).

In essence, both the American and English rules rely on the same basis – that the time of assertion of a valid claim is determinative as to priority. The Florida rule merely refuses to recognize a claim as being asserted until the debtor holding the property is made aware of it. Quoting from *Boulevard National Bank*: "[T]o regard the debtor as a total non-participant in the assignment by the creditor of his interests to another is to deny the obvious."[79] The advantages of the English rule are immediately apparent in the garnishment context because the garnishing creditor as well as the garnishee are now provided with some measure of certainty. The garnishor is thereby relieved of the anxiety of having his diligent efforts voided at the last minute by a totally unforeseen transfer out of his judgment debtor. It cannot be reasonably argued that the assignee who claims without giving prior notice has any superior policy interests militating in his favor since it is through his lack of diligence that his claim is impaired. Furthermore, he is not without remedy since he can turn to his assignor for satisfaction. Adherence to the English rule of priority of notice greatly relieves some of the complexities of possible three-party situations and certainly adds to the effectiveness of the garnishment remedy.

Bank Deposits. One of the more obvious and lucrative sources for satisfying the judgment creditor's claim is the bank deposit of the judgment debtor. Statutory law of banking and negotiable instruments plays a major role in characterizing the various types of transfers affecting deposited funds and checks, which in turn profoundly affects the efficacy of the garnishment remedy in this context. The right to reach such deposits in banks through garnishment is generally conceded once the bank has become liable to the depositor absolutely and without contingency.[80] There is a conspicuous lack of Florida cases in this area of garnishment probably due to the facility with which the debtor-creditor relationship can be fixed to the normal bank deposit situation. Garnishment of bank accounts does run into difficulty, however, when the funds on deposit with the bank have been assigned to a third party or otherwise rendered owing from the bank to someone other than the judgment debtor.

In light of the earlier discussion concerning negotiable instruments, it would seem clear that a bank's acceptance or certification of a check drawn by its depositor in favor of a third party would thereafter exclude the deposit from garnishment to the extent of the

79. 176 So. 2d 94, 98 (Fla. 1965).

80. Savings Bank of Danbury v. Loewe, 242 U.S. 357 (1917); *In re* Lloyd's Estate, 185 Wash. 61, 52 P.2d 1269 (1936); Baden Bank of St. Louis v. Trapp, 180 S.W.2d 755 (Mo. App. 1944).

check. The bank in such case becomes liable to the holder of the check under the provision of Florida Statutes, section 676.52, providing: "[A] check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."[81] A different situation arises, however, when the bank certifies a check drawn by its depositor payable to his own order or to the order of his agent. The mere fact of certification of the check by the bank under these circumstances will not generally permit the bank, after garnishment, to pay it to the depositor or the agent.[82]

A troublesome problem in this area concerns the right to subject a joint bank account to garnishment at the instance of a creditor of only one of the depositors. Two major factors generally enter into the solution of the question: (1) the effect of the agreement between the depositors and the bank under which the account was opened and (2) the respective title to or right in the money as between the depositors prior to its deposit in the account.[83] When one depositor holds, under agreement, the complete right to make withdrawals, including the power of independent exercise, and the other's interest in the joint account is contingent upon his survival of the former, it is generally concluded that the account cannot be reached by garnishment for the latter's debt since his interest is too contingent or uncertain.[84] But when a deposit agreement has given each depositor in the account complete and absolute authority over it and unconditional power to withdraw all or any part of the account, it has been held that a creditor of one of the depositors may garnishee the entire account without regard to the question of actual ownership.[85] The other party to the joint account has the burden of proving what part, if any, of the funds belong to him.[86]

When title of the respective depositors is the more influential factor, Florida courts have held that a bank account of husband and wife constituted an estate by the entirety not subject to garnishment

81. There is no apparent change here resulting from Florida's adoption of the UNIFORM COMMERCIAL CODE because the quoted language is practically identical with that in the new FLA. STAT. §673.3-409 (1965), effective Jan. 1, 1967.

82. Boswell v. Citizens Sav. Bank, 123 Ky. 485, 96 S.W. 797 (1906); Bills v. National Park Bank, 89 N.Y. 343 (1882).

83. Annot., 116 A.L.R. 1340 (1938).

84. Fairfax v. Savings Bank of Baltimore, 175 Md. 136, 199 Atl. 872 (1938).

85. Leaf v. McGowan, 13 Ill. App. 2d 58, 141 N.E.2d 67 (1957); Park Enterprises v. Trach, 233 Minn. 467, 47 N.W.2d 194 (1951). See United States v. Third Nat'l Bank & Trust Co., 111 F. Supp. 152 (M.D. Pa. 1953); Republic of China v. Pong-Tsu Mow, 15 N.J. 139, 104 A.2d 322 (1954).

86. Leaf v. McGowan, 13 Ill. App. 2d 58, 141 N.E.2d 67 (1957).

or judgment against only one of the joint depositors.[87] In appropriate cases courts may overlook legal title and consider the real or beneficial interest in individual accounts. For example, a Florida court allowed funds deposited in the account of the defendant's wife to be reached by garnishment because of defendant's exclusive interest in the funds.[88] There has been occasional judicial expression in other jurisdictions, to the effect that if there is substantial evidence to show equal right between the depositors to the funds of the joint account, a garnishing creditor of one of them may recover one-half of the moneys therein.[89]

The problem of priorities also arises with respect to garnishment of bank accounts with the rule generally stated that garnishment of funds on deposit has priority over a check subsequently given or accepted against such funds.[90] However, priority of garnishment of deposited funds where a check has been previously given or accepted against such funds poses a much more complicated problem. This complexity depends largely upon whether the giving or acceptance of the negotiable paper constitutes an assignment. Both the Uniform Commercial Code[91] and the Florida Statutes[92] provide that a check does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment. Thus, it is generally concluded that a subsequent garnishing creditor has a right to the funds in an ordinary deposit account superior to that of the payee or holder, if such check or draft has not been presented for acceptance or payment at the time of garnishment.[93]

The above areas of commercial transactions, grouped within the category of "three-party" relationships, are among the most complicated in any garnishment context due primarily to the fluid debt relationship existing between the anticipated garnishees and the judgment debtors. Under such circumstances the garnishor must, to effectuate his remedy, be capable of thoroughly analyzing the relationship before him and of acting with due speed once the relation-

87. Ruth Gross Agency, Inc. v. Oppenheimer, 1 Fla. Supp. 5 (1951); see Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951).

88. Mizner Land Corp. v. Abbott, 128 Fla. 489, 175 So. 507 (1937).

89. Catlow v. Whipple, 83 Atl. 753 (R.I. 1912). See also Dover Trust Co. v. Brooks, 111 N.J. Eq. 40, 160 Atl. 890 (1932).

90. Loewe v. Savings Bank of Danbury, 236 Fed. 444 (2d Cir. 1916), *aff'd*, 242 U.S. 357 (1917).

91. UNIFORM COMMERCIAL CODE §3-409.

92. FLA. STAT. §676.52 (1965).

93. See Salem Trust Co. v. Manufacturer's Fin. Co., 264 U.S. 182 (1924); Florence Mining Co. v. Brown, 124 U.S. 385 (1888); Bowker v. Haight & Fin. Co., 146 Fed. 257 (C.C.S.D.N.Y. 1906), *writ of error dismissed*, 208 U.S. 423 (1908); Cook v. Lewis, 172 Ill. App. 518 (1912).

ship is deemed suitable for garnishment. The structural approach employed in this analysis was intended to serve as a guide for the prospective garnishor, to make him aware that when there is a possibility of a three-party relationship, or a debtor-creditor relationship with *B* a mere spectator, he should be put on inquiry notice before attempting his garnishment. As suggested throughout this discussion, careful legislation could effectively close many of the pitfalls that trap the unwary creditor and could greatly increase the effectiveness of his remedy.

THE *A-C* RELATIONSHIP

Substantive Considerations

Assuming the principal suit is of the proper nature to support garnishment, and there is a valid subsisting obligation between the judgment debtor and the prospective garnishee, there still may be impediments to the issuance of the writ. Broadly stated, it may be found, either by the courts or the legislature, that considerations weighing against the use of garnishment counterbalance its use to secure recovery of a judgment. These considerations may be broken down into three categories: (1) the nature of the property sought to be levied upon, (2) the nature of the garnishee, and (3) adverse effects on the garnishee.

Nature of Property. The Florida Statutes contain several provisions exempting certain funds from the reach of the writ. The most familiar of these is the Wage Exemption Statute, section 222.11. Since this particular subject has been thoroughly treated by other sources[94] the mechanics of it are not discussed in detail here. Suffice it to say that the head of a household residing in Florida has an unlimited exemption of wages from garnishment. This of course means if it can be established that one is not the head of a family the statute does not apply. When garnishment of wages is proper, Florida stands on the universal rule that the date of filing of the answer fixes the limit of the liability of the garnishee. Thus, the garnishee-employer is answerable only for any earnings of the defendant that were accrued and unpaid at the time the writ was served and "thereafter earned by defendant, up to the date of the filing of the garnishee's answer, but not beyond that date."[95]

94. Feibelman, *Florida Law on Administration in Bankruptcy*, 32 FLA. BAR J. 175 (1958); LaGrone, *Recovery of a Florida Judgment by Garnishing Wages of the Head of a Family*, 17 U. FLA. L. REV. 196 (1964); Nadler, *Insolvent or Bankrupt Wage Earner in Florida*, 10 U. FLA. L. REV. 465 (1957).

95. Chaachou v. Kulhanjian, 104 So. 2d 23 (Fla. 1958).

This requires that a new writ be sued out after the answer is filed in order to reach wages for the next pay period, an inefficient and cumbersome procedure.

It would seem desirable for Florida to allow garnishment of wages, of course giving proper consideration to restrictions to protect the wage earner. The underlying policy of the wage exemption is to prevent creditors from reaching money necessary for the support of the debtor's family. However, the flat one hundred per cent exemption allowed by Florida goes too far and does injustice to the creditor while the affluent debtor simply hides behind the exemption. For this reason the one hundred per cent exemption has not won favor in many jurisdictions.[96]

A more realistic approach is typified by the Illinois Wage Deduction for the Benefit of Creditors Act.[97] This law, enacted in 1961 as a part of the legislative overhaul of the garnishment statutes, provides that wages are exempt in the amount of forty-five dollars per week or eighty-five per cent of gross wages, whichever is greater, not to exceed two hundred dollars a week.[98] Further, the original writ requires that the garnishee continue to pay over to the creditor wages not exempted as they come due until the amount of the judgment is paid or the expiration of the employer's payroll period terminating just prior to the thirty days after service or the termination of employment, whichever comes first. Florida should adopt similar legislation.

Legislative policy assessments are also reflected in other situations in which particular funds have been exempted from garnishment. Florida Statutes, section 222.14, exempts the cash surrender value of life insurance policies from garnishment.[99] Even without the statute, until the insured exercises his option to take the cash value, the obligation with the insurance company is contingent as that term is defined in *West Florida Grocery* and cannot be reached until an election of options is taken. Whether section 222.14 means that the proceeds cannot be made the subject of garnishment even after the insured has perfected his claim to the cash surrender value is not clear. If it does, the statute should be modified to prevent such an interpretation. Assuming the election is valid, once *B* elects the cash surrender value there is no contingency. Thus, there is no more reason for excepting this fund than any other over which the debtor has

96. For a breakdown of the various types of wage exemption statutes see Abrahams, *The Exemption of Wages From Garnishment*, 3 DEPAUL L. REV. 153 (1954); see also Wolf v. Commander, 137 Fla. 313, 188 So. 83 (1939).

97. ILL. REV. STAT. ch. 62 §§71-87 (1963).

98. ILL. REV. STAT. ch. 62, §73 (1963).

99. Slatcoff v. Dezen, 76 So. 2d 792 (Fla. 1954).

asserted control. Legislation should be enacted in this regard to prevent *B* from disposing of the proceeds due him, to the creditor's detriment.

The clearest example of a pure policy exemption is found in section 222.18 of the Florida Statutes, which exempts disability benefits from legal process. The theory is that a person injured and unable to work is likely to have creditors who will attempt to take his property. To allow execution on what may well be the debtor's only source of income would not be in the public interest.[100]

The most important statutory exemption, aside from wages, is found in section 222.13, which states that the proceeds of a life insurance policy cannot be reached by creditors unless (1) the policy provides otherwise or (2) it is payable to the estate of the deceased and his will does not provide for the estate to pay the benefits to a named beneficiary or (3) the deceased dies intestate leaving no surviving spouse or children.[101] Even if there were no section 222.13, garnishment of insurance benefits would be quite limited. If the debtor owns insurance payable on his death to a named beneficiary, when the debtor-creditor relationship comes into existence, it is between the insurance company (*C*) and the beneficiary (a third party), not *B*, the debtor. This points out the necessity of determining between which parties a particular relationship exists.

However, section 222.13 does have the salutary effect of making it clear that when the proceeds of the policy are to be paid to the estate and then specifically distributed according to a will, the fact that they go through the debtor's estate does not allow creditors to reach them. In the case of intestacy, the statute provides that the surviving spouse or children get the proceeds regardless of the fact the money is paid to the debtor's estate.[102] In terms of public policy, the reason behind the statute is to see that the dependents of the insured are cared for and that responsibility for them does not fall on the state. Thus, the proceeds of the life insurance policy may be made the subject of garnishment only when the policy is payable to the estate alone, if there is a will, or in the case of intestacy when there are no wife or children.

There is one situation in which the legislature felt that policy considerations weighed in favor of permitting garnishment where it would not otherwise be allowed. Section 65.13 provides that neither

100. This section of the Florida Statutes was enacted in response to Bank of Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1935) in which the court held that disability payments could not be made the subject of garnishment under §222.14 relating to cash surrender values. Section 222.18 assumes that under no circumstances can disability payments be reached.

101. Thomas v. Nuckols, 157 So. 2d 712 (1st D.C.A. Fla. 1963).

102. Ruza v. Ruza's Estate, 132 So. 2d 308 (3d D.C.A. Fla. 1961).

the wage exemption act nor governmental immunity can serve as a bar to garnishment for the purpose of securing alimony.[103] This specific authorization demonstrates that such a competing policy as providing support for a divorced wife is thought to be strong enough to overturn the contrary policy of protection of wages.

Nature of Garnishee. The nature of the garnishee is the second category of considerations to which the courts look in the *A-C* relationship. Whether a municipal corporation can be held as garnishee turns on this factor. Florida's position is clearly stated in *Duval County v. Charleston Lumber & Manufacturing Co.*[104] The court there held that public policy demanded the county not be considered a "person" such as to be the subject of a writ of garnishment under the terms of section 77.01. This view, which is in line with the majority of other jurisdictions,[105] was later extended to municipal corporations in *Taylor v. Ackerman.*[106]

In a thorough opinion the court in *Duval County* concluded:[107]

> The garnishment laws, which authorize corporations to be proceeded against as garnishees in the same manner and with like effect as individuals, applies [*sic*] only to private corporations, and were not designed to include municipal corporations charged with the interests of the public. Counties are public corporations, and their officers are public officers. The varied relations which such bodies, through their officers, hold towards individuals as their debtors, would render them liable to be constantly attacked with such process, and would very materially embarrass them in the performance of their duties. If they are subject to such suits, they are bound to give them the same attention which is required of individuals; and this would involve them in attendance upon distant courts, and absence from respective offices.

A minority of courts have held that the terms "person" or "corporation" in the garnishment statutes will include a municipal corporation, in the absence of a statute to the contrary. The rationale of these courts turns on either of two premises. Some will simply say

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103. Reynolds v. Reynolds, 113 Fla. 361, 152 So. 200 (1934).

104. 45 Fla. 256, 33 So. 531 (1903).

105. Central of Ga. Ry. v. City of Andalusia, 218 Ala. 511, 119 So. 236 (1928); Roosevelt Park v. Norton Township, 330 Mich. 270, 47 N.W.2d 605 (1951); McDougal v. Hennepin County., 4 Minn. 184 (1860); Walker Constr. Co. v. Construction Mach. Corp., 223 Miss. 145, 77 So. 2d 712 (1955).

106. 85 Fla. 485, 96 So. 838 (1923).

107. 45 Fla. 256, 262-63, 33 So. 531, 533 (1903) quoting McDougal v. Hennepin County, 4 Minn. 184 (1860).

there is little or no distinction between the municipal and the public corporation;[108] other courts hold the language of the charter that allows the city to "sue or be sued" broad enough to permit garnishment.[109]

Although a Florida municipal corporation cannot be compelled to serve as garnishee,[110] it apparently can waive its exemption by the affirmative act of appearing in court and submitting to process.[111] Since the exemption inures only to the municipal corporation, the principal debtor cannot complain of the municipality's waiver.[112]

The failure of the courts to permit garnishment of municipal corporations is unsupportable in view of modern developments in the law. At the time courts were first faced with the application of garnishment to public bodies, the doctrine of governmental immunity held sway over American courts. However, it has since been pared down in most states and subjected to severe criticism.[113] There are two main lines of reasoning courts take in permitting garnishment. The first is to recognize the distinction between a city in its governmental and its proprietary capacities. While there may be some reason to deny garnishment where the municipality is operating in the public sphere, there surely can be none where the city is acting in a capacity similar to private corporations.[114] Second, a court could go even further and reject the governmental-proprietary distinction completely. This has been done on the ground the distinction is an outdated reaction to the doctrine of immunity. Thus, in the related field of attachment the rule has been formulated that process will be permitted in every case except when it can be shown there would be a substantial interference with essential public functions.[115] Such an approach has the virtue of being founded in the practicality of the particular case[116] and not on the bandying about of concepts that have no modern significance.

In light of subsequent changes in Florida law, it is particularly incredible that Florida has not receded from the views expressed in

108. See Wales & Son v. City of Muscatine, 4 Iowa 302 (1856).

109. Packard Phoenix Motor Co. v. American-LaFrance Corp., 37 Ariz. 34, 288 Pac. 1024 (1930).

110. Duval County v. Charleston Lumber & Mfg. Co., 45 Fla. 256, 33 So. 531 (1903).

111. *Ibid.*

112. *Ibid.*

113. See Hargrove v. Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

114. Wales & Son v. City of Muscatine, 4 Iowa 302 (1856). *Contra*, Irllary v. City of San Diego, 186 Cal. 535, 199 Pac. 1041 (1921).

115. Merritt-Chapman & Scott Corp. v. Public Util. Dist. No. 2, 319 F.2d 94 (2d Cir.), *cert. denied*, 375 U.S. 968 (1963).

116. For a severe attack on municipal immunity see Fordham, *Garnishment of Public Corporations*, 39 W. VA. L. Q. 224 (1933).

West Charleston. Since the basis of denying garnishment expressed in that case was that it would interfere with the orderly administration of the city, it seems incongruous that a state that permits tort suits against municipalities, even in their governmental capacity,[117] could yet maintain that allowing the city to serve as garnishee is so damaging as to violate public interest.

Many states have statutes providing that a municipal corporation may be held as garnishee.[118] Regardless of the possible courses that Florida courts might take, if there is to be any garnishment procedure allowed against a municipal corporation in Florida without affirmative waiver, it will most likely have to be by state legislation. Whether this ought to be done depends upon the factual determination whether allowing garnishment will interfere with the municipality in carrying out its governmental functions. If garnishment will substantially hamper proper administration of the city, it should not be allowed; if it will not, then there is no reason to deny creditors their remedy.[119]

Effects on Garnishee. The third factor to which the courts look in assessing the *A-C* relationship is the adverse effects upon the garnishee. In order to protect the disinterested stakeholder, the courts will allow him to set off his claim against the debtor *B*. It is settled law that if *C* has a matured liquidated claim against *B*, he may set it off upon the service of the writ and thus be obligated to the garnishor only for the amount, if any, he would have to remit to *B*.[120] This position was accepted by the Florida Supreme Court in *Howe v. Hyer*.[121] There, the court based its decision on the proposition that: "The rights of the plaintiffs against the garnishee are not greater than those of the defendant. The garnishee is not, by service

117. Hargrove v. Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

118. See, *e.g.*, Wilson v. Walters, 19 Cal. 2d 111, 119 P.2d 340 (1941); Stephens v. Bragg City, 224 Mo. App. 469, 27 S.W.2d 1063 (1930); Portsmouth Gas Co. v. Sanford, 97 Va. 124, 33 S.E. 516 (1899); ALA. CODE tit. 7, §§1032-37 (1958); COLO. REV. STAT. ANN. §§77-12-1 to -5 (1953); MINN. STAT. ANN. §571.45 (1945).

119. Professor Fordham, in his article *Garnishment of Public Corporations*, 39 W. VA. L. Q. 224, 230 (1933) argues strongly that the judicial bar to garnishment of both municipal corporations and counties is an outdated anchronism. He states that the only substantial reason given for the policy, that of inconvenience, is unfounded in practicality and "viewed in terms of a single city the anticipated volume of litigation would be modest."

120. Howe v. Hyer, 36 Fla. 12, 17 So. 925 (1895); Holmes & Co. v. Pope & Fleming, 1 Ga. App. 338, 58 S.E. 281 (1907); Henderson v. Northwest Airlines, 231 Minn. 503, 43 N.W.2d 786 (1950); Plante v. M. Shortell & Son, 92 N.H. 38, 24 A.2d 498 (1942); Bowling v. Bluefield-Graham Fair Ass'n, 84 W. Va. 41, 99 S.E. 184 (1919).

121. 36 Fla. 12, 17 So. 925 (1895).

of the writ, to be placed in any worse condition than if the defendant, his creditor, had brought suit upon the claim which is garnisheed. As to the garnishee, the plaintiffs take the shoes of the defendant, the principal debtor, and can assert only the rights of the latter."[122] If the garnishee would have the claim as a defense against *B*, should *B* bring an action, the service of the writ cannot deprive him of the defense as against *A*. This reflects judicial implementation of the general rule that garnishment will not be allowed when the rights of the stakeholder may be prejudiced.

The difficulty in setoffs is not *whether* they are allowed, but *when* they are permissible. The general rule accepted in the setoff situation is that the garnishee may setoff against the garnishor any claim that he could have setoff against the principal debtor *before* the writ of garnishment was served.[123] The policy behind this rule is to prevent the rights of *A* from being defeated by fraudulent or collusive claims against *B* by *C*.[124]

For the setoff to be permitted it is generally necessary that *C*'s claim against *B* be noncontingent, mature, and liquidated.[125] There are, however, three exceptions to this requirement. The first is when the claim of the garnishee rests upon a preexisting contract with the debtor. A setoff arising out of the contract will be permitted even though it is not presently mature,[126] on the ground that *A*'s litigation with *B* should not interfere with *C*'s contractual rights.

Setoff of claims not presently fixed is also permitted when the debtor (*B*) resides in another state.[127] This is desirable since if the garnishor is allowed to execute on the writ, the chances are substantial that the garnishee will be unable to reach *B* in a foreign jurisdiction to secure the setoff claim when it does mature. Again,

122. *Id.* at 19, 17 So. at 928.

123. Self v. Kirkland, 24 Ala. 275 (1854); W. C. Cayce & Co. v. Milledgeville Banking Co., 91 Ga. App. 664, 86 S.E.2d 717 (1955); Henderson v. Northwest Airlines, 231 Minn. 503, 43 N.W.2d 786 (1950); Mattek v. Hoffmann, 272 Wis. 503, 76 N.W.2d 300 (1956).

124. Henderson v. Northwest Airlines, 231 Minn. 503, 43 N.W.2d 786 (1950).

125. Some states have by statute changed the general rule followed by most courts in absence of legislative expression. ILL. REV. STAT. ch. 62, §40 (1940) provides that the garnishee may set off any claim he has prior to the answer (rather than the service of the writ as is generally held), which is "(1) due at the time of the service of the garnishment summons or thereafter to become due and (2) liquidated or unliquidated (except where the demand sounds in tort)."

126. Farley v. Colver, 113 Md. 379, 77 Atl. 589 (1910); Baltimore & O.R.R. v. Wheeler, 18 Md. 372 (1862); Bowling v. Bluefield-Graham Fair Ass'n, 84 W. Va. 41, 99 S.E. 184 (1919); DRAKE, ATTACHMENT §517 (4th ed. 1873).

127. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U.S. 596 (1894); Holmes & Co. v. Pope & Fleming, 1 Ga. App. 338, 58 S.E. 281 (1907); Kentucky Flower Co.'s Assignee v. Merchants' Nat'l Bank, 90 Ky. 225, 13 S.W. 910 (1890); Mattek v. Hoffmann, 272 Wis. 503, 76 N.W.2d 300 (1956).

this is an example of the application of the criterion that garnishment will not be permitted when the rights of the garnishee will be prejudiced.

A third exception has been made by courts when the debtor (*B*) is insolvent.[128] A court of equity will quash the writ even though the claim is as yet unmatured or contingent, since it is apparent *C* will not be able to avail himself of his claim when it does mature.

Procedural Considerations

The preceding section of this discussion concerning the *A-C* relationship concentrated largely on policy considerations that have evolved making certain potential garnishees immune from garnishment. Some substantive defenses that could be interjected by the garnishee were discussed, such as setoffs and counterclaims, which have the effect of cancelling out of the debt relationship previously existing between the garnishee and principal defendant. Emphasis will now be directed toward the ancillary proceeding itself and the issues that arise therefrom, such as the prerequisites of raising a defense and the devices used to interpose the interested parties.

It is generally accepted that the garnishee can interpose any defense to defeat a recovery against him by the garnishor that he could have used in an action brought by the principal defendant for enforcement of the indebtedness of the garnishee to the defendant.[129] Therefore, *C*'s defenses in the ancillary proceeding are not limited to a general denial of *A*'s claim, that he is indebted to *B*, or that he has in his possession effects of *B*.[130] They also include those defenses that act as a bar to recovering a valid preexisting debt, such as the running of the statute of limitations[131] and res judicata.[132]

Prior to repeal of Florida Statutes, section 77.11, the court in *Howe v. Hyer*[133] held that any legal and proper evidence and defense should be allowed that would show the full amount due from the garnishee to the defendant. On this basis it has been held that matters attempted to be set up following a general denial in the original answer, such as the bar of the statute of limitations[134] or res judicata[135]

128. Schuler v. Israel, 120 U.S. 506 (1887); Cadick Milling Co. v. Dothan Bank & Trust Co., 242 Ala. 132, 5 So. 2d 101 (1941); Minge v. First Nat'l Bank of Birmingham, 191 Ala. 271, 68 So. 141 (1915); United Bank & Trust Co. v. Washburn & Condon, 37 Ariz. 223, 292 Pac. 1025 (1930).

129. Flynn-Harris-Bullard Co. v. Hampton, 70 Fla. 231, 70 So. 385 (1915).

130. Norwich Union Indem. Co. v. Willis, 127 Fla. 238, 168 So. 418 (1936).

131. *Ibid.*

132. Fulton v. Gesterding, 47 Fla. 150, 36 So. 56 (1904).

133. 36 Fla. 12, 17 So. 925 (1895).

134. Norwich Union Indem. Co. v. Willis, 127 Fla. 238, 168 So. 418 (1936).

135. Fulton v. Gesterding, 47 Fla. 150, 36 So. 56 (1904); Little v. Barlow, 37 Fla. 232, 20 So. 240 (1896).

are not required to be specially pleaded, but instead might be proved under the issues raised by traverse of the first answer. Since section 77.11 was repealed to conform to the 1954 Florida Rules of Civil Procedure,[136] the above procedure seems to be on less firm ground. Under the new Rule, 2.12 (a), little change was made as to the general procedure for a trial upon traverse of a garnishee's answer, but in light of Rules 1.8 (d) and 1.11 (h),[137] it appears that such affirmative defenses as the statute of limitations and res judicata must now be specially asserted in a defensive pleading — in this context, the garnishee's answer — or they are deemed to be waived.

In addition to the defenses that may be available to *C* in the garnishment proceeding, there are other factors inherent in this process that may arise to defeat *A*'s claim to the property held by *C*. One such factor is the possibility of opposing claims to the same property by outside parties. These extraneous claims can generally be interposed in the proceeding at the instance of the garnishee by the interpleader device to spare him the risk of double liability, or by the third party himself through intervention.

The use of the interpleader device in Florida is now governed by the new Rule 3.13. This equitable remedy, so long shrouded by highly technical requirements,[138] is substantially broader than that recognized by the early Florida case of *Jax Ice & Cold Storage Co. v. South Florida Farms*.[139] The basic theory remains that conflicting claimants should litigate their claims among themselves without involving the stakeholder in their dispute. However, the requirement of common origin or privity of titles among the opposing claimants, stressed in *Jax Ice* as a condition for the successful maintenance of interpleader, has been expressly deleted.[140] It is uncertain to what extent the

136. Goldenkoff v. General Acc. Fire & Assur. Corp., 116 So. 2d 780 (3d D.C.A. Fla. 1960).

137. Rule 1.8 (d) provides: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . res judicata . . . statute of limitation . . . and any other matter constituting and avoidance or affirmative defense." Rule 1.11 (h) provides: "A party shall be deemed to have waived all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply . . . ."

138. Ashby, *Interpleader* in FLORIDA CIVIL PRACTICE BEFORE TRIAL 623 (1963) states that historically, the successful maintenance of interpleader rested upon four conditions: (1) the claims must be dependent or have a common origin, (2) the same property or money must be claimed by the defendants, (3) the plaintiff must have no interest in that property or money and must not have incurred any independent liability to either claimant, so that he occupies a position of indifference, and (4) no act on the part of the plaintiff has caused the embarrassment of conflicting claims and the peril of double vexation.

139. 91 Fla. 593, 109 So. 212 (1926).

140. FLA. R. CIV. P. (rev. 1962).

latter requirement of *Jax Ice*, concerning the garnishee's failure to truly discloses his liability with regard to the judgment debtor, has been changed by the new interpleader rule.[141] There is little doubt, however, that the new rule has greatly expanded the use of interpleader and will be available to *C* in many more situations than in the past when all of the technical requirements had to be met by the complainant in order to sustain his right to a bill of interpleader.

Still another hazard faces the eager judgment creditor in section 77.16, which provides for the intervention of third-party claims to the garnisheed property. Under that section any person other than the defendant who claims that the indebtedness of the garnishee is due him and not the defendant may intervene. The court will then, without the formality of pleading, direct a jury to inquire of the respective rights of the claimant and the plaintiff to such property.

The responsibility of protecting the interest of third persons rests upon the garnishee until he has actually satisfied *A*'s claim without notice.[142] If the garnishee does have notice of a third-party claim, he may, in an effort to protect himself from the risk of multiple liability, defend the garnishment proceeding on the ground that the indebtedness or property belongs to such third person and not to the principal defendant.[143] This approach is not completely without its risks, for should the judgment go against the garnishee he would not be protected from a subsequent action by the claimant regardless of the zeal with which the defense was made. The claimant has not been before the courts and thus is not bound by any determination as to his rights in the property.[144]

Thus, upon being served with the writ of garnishment, the garnishee should serve notice on the third-party claimant advising him fully of the facts and request that he either appear as a third-party claimant or defend the garnishment suit on his own behalf.[145] Neglect of the third party to interpose his claim after receiving such notice estops him from subsequently prosecuting an action against the garnishee for the debts or property.[146] When the garnishee acquires notice of a third-party claim after judgment has been rendered against him in the garnishment proceeding, he should file a bill of interpleader under Rule 3.13.

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141. Ashby, *supra* note 139, at 624.

142. CRANDALL, FLORIDA COMMON LAW PRACTICE §324 (1928).

143. Flynn-Harris-Bullard Co. v. Hampton, 70 Fla. 231, 70 So. 385 (1915).

144. Jax Ice & Cold Storage Co. v. South Fla. Farms, 91 Fla. 593, 109 So. 212 (1926).

145. CRANDALL, FLORIDA COMMON LAW PRACTICE §324 (1928).

146. Chicago v. Robbins, 67 U.S. (2 Black) 418 (1862); Blackiston v. Smith, 73 Fla. 25, 73 So. 839 (1917).

A finding in favor of the intervening claimant in the ancillary proceeding merely ascertains that the rights of the claimant in the property are superior to those of the plaintiff under his garnishment. This in no way should result in a judgment against the garnishee for the amount of the claimant's claim.[147]

Rule 2.12, which governs the determination of issues arising in the garnishment proceeding, grew out of sections 77.09 through 77.12 of the Florida Statutes, which were repealed to conform to the Florida Rules of Civil Procedure.[148] The actual practice of trying such issues raised in the ancillary proceeding has not been altered significantly. This change, however, does have the salutary effect of promoting uniformity and certainty as to the mechanics of an often complicated proceeding. Without further statutory construction, the parties may rely on the usual tools of civil practice, such as directed verdicts,[149] to achieve speedy disposition of the claims.

Under Rule 2.12 the plaintiff, if not satisfied with the garnishee's answer, may within ten days file a statement traversing the allegations of the garnishee. Upon failure of the plaintiff to file such traverse, the garnishee's answer will be taken as true and, after disposition of any assets disclosed by his answer, the garnishee will be discharged from further liability under the writ. For example, when *A*'s claim that *C* holds property worth 1,000 dollars belonging to the judgment debtor (*B*) is answered to the effect that *C* holds assets of *B* worth only one hundred dollars, and *A* fails to traverse this answer, *C* will be relieved of any liability under the writ in excess of one hundred dollars. A failure on the part of the garnishee to appear or answer as required will result in a default judgment entered against him for the amount of plaintiff's claim.

One other important source of issues in the ancillary proceeding is the traverse by *B* of the allegations in *A*'s affidavit. The case of *Nash v. Walker*[150] offers a useful framework for a discussion of the many problems that have arisen in this context. The case arose from a suit by the appellant-plaintiff on an account showing a balance due. Immediately upon commencement of the suit the appellant procured a writ of garnishment that was served on appellee's bank. The garnishment was immediately dissolved by appellees upon giving a bond under section 77.24 and followed by a counterclaim for injury to their reputation charging that garnishment was maliciously procured with intent to force payment of an unjust obligation.

147. Florida Cent. & P.R. Co. v. Carstens, 48 Fla. 72, 37 So. 566 (1904).

148. Goldenkoff v. General Acc. Fire & Assur. Corp., 116 So. 2d 780 (3d D.C.A. Fla. 1960).

149. Ball v. Inland Mut. Ins. Co., 121 So. 2d 470 (3d D.C.A. Fla. 1960).

150. 78 So. 2d 685 (Fla. 1955).

One of the required allegations in the affidavit for procurement of the writ of garnishment under section 77.18 is that the debt is "just, due and unpaid"; that the writ is not sought to "injure . . . the defendant." A further requirement of that section is that unless the writ is sought after judgment or has its basis in an attachment, a bond must be furnished "conditioned to pay all costs and *damages*, which the defendant may sustain in consequence of the plaintiff's *improperly suing out*" the writ.[151] The *Nash* court recognized that *B* may discharge the garnishment writ in three ways: (1) by a release bond under section 77.24, (2) by the court's granting defendant's motion to dissolve, and (3) by the plaintiff's failure to sustain an allegation of his original affidavit when it has come to issue by a traverse of the defendant. The last method of discharge, which has its basis in section 77.07, apparently threw the court into much confusion and brings us to the focus of our discussion.

Section 77.07, which deals specifically with the dissolution of garnishment, may be treated in two distinct parts. First, it is provided that a trial can be had at any time on any issue arising from the defendant's traverse of an allegation in the plaintiff's affidavit, and if such traversed allegation is not sustained and proved to be true, the garnishment shall be dissolved. This portion of the statute would apply to any writ of garnishment procured either before or after a judgment is obtained in the main action. The latter portion of this statute, although it is not clearly spelled out, deals with the situation when, as in *Nash v. Walker*, the writ of garnishment is issued not only prior to judgment, but also before the main action has gone to issue. It provides that if the defendant's affidavit traverses the debt or sum demanded (apparently meaning the debt in the main action), the judge may, upon application of either party, require formal pleadings as to that debt. Any issues arising therefrom shall be tried as provided in section 77.08 – by jury if demanded by either party. It is further provided that such issue arising from the traverse of the debt in the main action shall be tried "at the same time as the issue, if any, made by the affidavit as to the special cause assigned in plaintiff's affidavit."

This quoted portion of the statute seemed to cause the court great concern. Comparing this language with that of section 77.08, which requires a jury when demanded and specifies that there shall be a trial of the "issue joined aforesaid," the court concludes that it is not plain whether the jury tries only the issue of debt or both the debt and "special cause."[152] Although the statute does not specifically

151. *Id.* at 686. (Emphasis supplied by the court.)

152. There has been no attempt to define clearly the term "special cause" either in §77.08 where it is used or in the court's opinion in *Nash v. Walker*,

provide that the jury try both the issues of debt and special cause, the conclusion seems inescapable that the primary intent of this statute is to provide a jury trial, if one is desired, on any issue of fact upon which the dissolution or affirmance of the writ depends. By the mere juxtaposition of the statutes with respect to the remainder of chapter 77, it seems that the first portion of section 77.07 dealing with the issues arising from the "special cause" assigned in plaintiff's affidavit occupies the position of prominence and is the primary focus upon which section 77.08 was to operate. The purpose of the latter portion of section 77.07 seems to be to take care of situations identical with *Nash v. Walker* in which the main action had not come to issue and of necessity had to be joined in the jury's determination. It would seem rather foolish and wasteful to call a jury to try a traversed allegation of the plaintiff's affidavit for writ of garnishment and not have it also hear the issue arising as to the debt in the main action upon which the successful garnishment ultimately depends. Conversely, to leave an issue of fact, as to an allegation in the plaintiff's affidavit, unresolved until the issue of debt had been tried would be destructive of the numerous provisions in the statutes providing for a writ to issue prior to the judgment in the main action.

The nature of the particular allegation of the plaintiff's affidavit, which is traversed by defendant in *Nash v. Walker,* adds further complications to the problem experienced in that case as well as with the statutes generally. The traverse there was directed to the required allegation that the debt is "just, due and unpaid," and that the writ is not sought to "injure . . . the defendant." In effect, such traverse constituted a counterclaim for malicious garnishment in the main action necessitating a determination of damages if upheld. Although the bond required under section 77.18, as a prerequisite for the issuance of a writ of garnishment prior to judgment, is clearly provided for the purpose of covering any damages to defendant that might ensue from plaintiff's improperly suing out of the writ, the court in *Nash v. Walker* aptly recognizes that no provision has been included for the adjudication in the ancillary proceedings of such damages to defendant. Certainly this must have been an oversight on the part of the legislature, since the lack of such a provision injects into the case an additional element of damages on a completely separate cause of action for the single jury to determine. The supreme court concluded that the counterclaim for malicious garnishment should not have been entertained because of confusion created by the differing causes of action. Although the court is not clear as to

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however, it apparently refers to the specific exceptions taken by the defendant to the allegations in the plaintiff's affidavit.

the final disposition of that counterclaim, there is nothing to suggest that it should have been stricken or dismissed.[153] The more probable conclusion is that it was to be retained for a separate proceeding. The court clearly has the authority under Rule 1.13(a) to "order separate trials of the issues made by any counterclaim" when found necessary to the ends of justice.

The court's resolution of the problem here seems sound, but one way or another this deficiency in the statute should receive legislative attention. The statute should specifically provide either for a means of adjudicating, in the ancillary proceeding, the issue of damages suffered by the defendant from malicious garnishment, or for such adjudication to be relegated to a separate proceeding on every occasion, and relieve the courts of this determination.

The additional problem is brought out by the court that the only procedure provided for adjudging the fact of issuance of the writ without intent to harm the defendant is upon the defendant's traverse, which places the burden on the plaintiff of establishing the truth of a negative assertion. This problem could also be alleviated by statutory treatment in the form of expressly shifting the burden to the defendant on the traverse of that particular allegation.

CONCLUSION

The major portion of the statutes found in chapter 77 was first enacted in 1845 and has remained in force virtually unchanged. What changes there have been reflect no comprehensive appreciation of the garnishment remedy as a whole. While the statutes have remained stagnant, the commercial world in which they operate has changed significantly, and the result has been a decline in the use of the remedy.

The time has come for a reassessment of garnishment in light of the purpose of the remedy and the situation in which it is to be used. A two-fold approach is needed. Judicial construction may help to eliminate some of the problems, but for this to be effective the Florida courts will have to retreat from the strict and narrow interpretation they have followed to date. To simply incant the ritualistic formula that "garnishment is a statutory remedy and so must be strictly construed," is not satisfactory. It would be far more desirable to adjudicate on the basis of the test that the garnishor will be allowed to secure his judgment unless it would prejudice the position of third parties or unless there is some other overriding policy consideration precluding use of the remedy.

153. Jones-Mahoney Corp. v. C. A. Fielland, Inc., 114 So. 2d 18 (2d D.C.A. Fla. 1959).

The second and more fruitful method of improvement is through legislation. There are some areas with which the present statutes do not deal, or if they do, they are so inadequate as to be useless. A comprehensive overhaul of the entire area should be undertaken so as to spell out more clearly the scope of the remedy and to make it more effective in its applications.

The following are specific areas that might be considered in any reevaluation of the garnishment remedy in Florida:

(1) Garnishment should be allowed prior to judgment in a tort action. This could be done and still protect the interests of third parties by providing that the garnishor give a bond to indemnify the garnishee for any loss that he may sustain.

(2) It should be provided that payments of liability insurance policies can be reached before the performance of mechanical prerequisites by the principal defendant. While this could be done by judicial holding, the firm stand Florida courts have taken against it would seem to dictate implementation by statute will be necessary.

(3) The garnishment of executors and administrators should be allowed, at least after the decree of distribution. Since there is no case in Florida determining whether garnishment is possible after the decree, a court decision may clear up the matter. However, codification into law would void any doubt.

(4) A trust should be a proper subject of garnishment to the extent that the beneficiary has a noncontingent interest in it. The policy considerations involved do not require that garnishment be rejected simply because the remedy is in law and the trust is administered in equity.

(5) Garnishment ought to be able to reach matured promissory notes. By judicial interpretation it is now possible to garnishee notes in the hands of the garnishee. Extending this to apply to matured notes is consistent with considerations that negotiability and interests of the garnishee must be protected.

(6) Physical seizure of the notes should be permitted either by judicial interpretation or statute. It might be desirable to provide that the court appoint a receiver to collect the note and satisfy the claim. Injunctive process might be used to acquire the note.

(7) Guidelines should be expressly set out for priorities of claims to property or money held by the garnishee. Since the notice theory of assignments has been adopted in Florida, specific steps the garnishor can take to protect his interest against a last minute assignment should be spelled out.

(8) The wage exemption provision ought to be changed to eliminate the complete exemption. However, protection for necessary expenses of the wage earner should be provided. A percentage figure of the salary, combined with a flat minimum that cannot be reached, may be the answer.

(9) The cash surrender value of an insurance policy ought to be subject to garnishment when the debtor has perfected his right to it.

(10) Statutory control of setoffs should be enacted, spelling out the rights of the parties and the proper time for their assertion. This will prevent confusion from developing in the future. Those exceptions to the general rule that setoff is allowed only after service of the writ should be enacted into statute as they reflect the policy of protecting the interests of the garnishee.

(11) In regard to the pleading and adjudication of claims among the various interested persons, the language of section 77.07 ought to be cleared up to avoid the confusion that exists today. To do this it should be expressly provided that all issues are to be tried by the same jury if one is demanded.

(12) A procedure for handling counterclaims needs to be set out, providing either for separate actions in all cases of counterclaims or providing specifically a procedure by which adjudication of the counterclaim can be handled in the action.

(13) Standards for assessing damages with regard to the bond required to secure garnishment prior to judgment ought to be promulgated.

LINDEN K. CANNON, III
JOSEPH THOMAS CARDWELL