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Henry R. Snyder Jr.
University of Kentucky

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better position, and if he has the basic fact plus a strong public policy he is in an even better position. The Kentucky Court seems to require more and stronger evidence to dispel the presumption as you ascend the scale from probability to public policy.

**Conclusion**

In conclusion, it is believed that Kentucky follows the majority Thayer-Wigmore theory which is the best solution to the problem of presumptions. Its antagonists seem afraid that unscrupulous or dishonest witnesses could cause a genuine claim to be lost. They seem to state the majority rule in this way, “The presumption disappears upon the introduction of any evidence to the contrary.” It is submitted that their interpretation is wrong, and if so it defeats their whole argument against the majority view. The correct way to state the rule is, A presumption serves the purpose of making a prima facie case, and it continues to serve this purpose until the adversary has gone forward with his evidence. How much evidence is required to meet or overcome the presumption is determined not by a fixed rule, but according to the strength and value of presumption. Very little proof may be required in the case of a presumption which lacks a basic fact from which a valid inference can be drawn, or it may require a great deal where the presumption has a basic fact plus a strong public policy. As for the fear of perjury, the same problem exists any time a case goes to trial. If the safeguards are adequate for the ordinary case why should not they also be in the case of presumptions? A strong reason for acceptance of the majority rule is its simplicity. The submission of a presumption to the jury for their decision on whether it disappears places too great a burden on the normal jury. It is submitted that the jury could not and probably would not even try to understand such instructions. The Thayer-Wigmore theory avoids this difficulty and is, therefore, the better view.

Earl M. Henry

**GARNISHMENT IN KENTUCKY—SOME DEFECTS**

The purpose of this article is to summarize and clarify the present-day garnishment procedure in Kentucky for the benefit of the beginning practitioner and to suggest reforms to those who may question the adequacy of the present system.

*Much of the information contained in this note was obtained from conversations with practicing attorneys. The writer is particularly indebted to Rufus Lisle, Esq., of Lexington, and to Robert Caldwell, Esq., of Ashland, whose letter to the writer is quoted at some length in this note.
For some reason, garnishment as an independent subject, separate from attachments generally, has been treated infrequently by treatises and law reviews. Perhaps this is due to a paucity of cases on the subject and also to the fact that proper treatment of any problems arising in this area requires judicial interpretation of the statutes in each jurisdiction. Since garnishment is widely employed, directly affecting the financial situation of large numbers of persons, a survey of the process as employed in Kentucky seems to be in order.

Attachment, as a mesne process or provisional remedy, is a remedy for the collection of an ordinary debt, proceeding by a seizure under legal process. It is tantamount to an involuntary dispossession of the defendant prior to any adjudication of the plaintiff's rights—an execution in advance of trial and judgment. When the debtor's property has been thus levied upon, it is conserved for eventual execution after the action shall have proceeded to judgment.1

Garnishment today is a process by which the property, money or credits of the debtor-defendant owed to him or held for him by another, the garnishee, are applied to payment of the defendant's debt by a proceeding brought against the debtor-defendant and the garnishee by the creditor-plaintiff. The garnishee may not then settle with the debtor, but must answer to the creditor. Where garnishment is instituted before judgment, it is sometimes properly referred to as a mode of attachment, or as ancillary to attachment. In such cases the only difference between the ordinary attachment and garnishment is that in the latter case the defendant's property reached is in the hands of a third person rather than the debtor himself, and the same statutory grounds as would support attachment prior to judgment would have to be alleged.2

Garnishment is nearly always an ancillary or auxiliary proceeding, growing out of, and dependent on, another original or primary action or proceeding. Hence, the two proceedings are generally, but not always, regarded as a single unit. The object of garnishment is to enable a plaintiff to subject to payment of his claim property of the defendant in the hands of a third person,3 or to discover property or debts owed the defendant by a third person,4 or to obtain something in the nature of a lien on such property pending judgment in a suit between the plaintiff and the defendant,5 or to reach property of the

4 Fentress v. Rutledge, 140 Va. 785, 125 SE 668 (1926).
5 Smith v. Davis, 131 Me. 3, 158 A 359 (1932).
defendant not subject to direct levy.\(^6\)

Garnishment in Kentucky is available not only to the plaintiff in whose favor a final judgment in personam has been rendered by a court of record,\(^7\) but also to the plaintiff without a judgment whose situation comes within the statutory conditions requisite to securing an attachment against a defendant at or after the commencement of an action.\(^8\) In short, any property or claim which would be subject to attachment or execution if in the hands of the defendant is subject to garnishment when held for the debtor by a third party.\(^9\)

Since the purpose of garnishment is to enable the creditor to reach the debtor's property, although in the hands of a third person, it naturally follows that the right of a creditor against a garnishee cannot by garnishment rise higher than the right of the debtor against the garnishee,\(^10\) and that the test of the garnishee's liability is whether the principal debtor has a right of action against the garnishee.\(^11\)

**Requisites of Garnishment**

An action within the attachment or garnishment statutes of Kentucky and the majority of jurisdictions is required to be founded on, or arise out of, a contract, judgment or decree.\(^12\) In general, no person


\(^7\) KRS sec. 425.190(1).

\(^8\) KRS sec. 425.185. Subsection (3) of this section provides the widely-used avenue for the procuring of orders of garnishment prior to judgment, since the creditor has only to allege that he believes that collection of the demand will be endangered by delay in obtaining the judgment.

\(^9\) Jurisdiction to issue writs of garnishment after judgment is conferred upon the court having jurisdiction to issue execution against the debtor in the principal case. KRS sec. 425.190. A presumption of jurisdiction will not be assumed beyond that expressly conferred in the statute. Hartford Fire Insurance Co. v. Green, 282 Ky. 466, 138 SW 2d 933 (1940). Jurisdiction to issue writs of garnishment prior to judgment resides in the court in which the principal action is brought or is pending. KRS sec. 425.185. Thus, in the latter case, garnishment, as an ancillary remedy, cannot be maintained where an attachment against the debtor would be void. The United States Supreme Court has held that the temporary presence of the garnishee within a state gives a court of that state jurisdiction to render judgment against him in the garnishment proceedings upon personal service of process within the state, if, during such temporary presence within the state, the principal debtor could have sued him there to recover the debt, and the laws of the state permit the garnishment of the debtor of the principal debtor. The decision, in Harris v. Balk, 198 U.S. 215 (1905), also held that the rendition of the judgment is entitled to full faith and credit in the courts of other states. Thus, the situs of the debt itself loses its importance, and the fact that a transaction arose in another state does not defeat jurisdiction.

\(^10\) Metropolitan Life Insurance Co. v. Hightower, 211 Ky. 36, 276 SW 1063 (1925).


\(^12\) KRS sec. 425.185; Roberts, Kentucky Practice Forms (1953, 1955 supp., p. 10). For notes concerning the debt owed by the garnishee to the debtor-defendant, see 12 A.L.R. 2d 792 (1950) et seq.
can validly be made a garnishee unless he has actual possession or the absolute right of control or possession of the property sought to be attached. It is, however, sometimes sufficient if the garnishee has the power to take the property into his personal custody, as where the property is in the care of the garnishee's agent, provided the principal's possession is something more than constructive. Probably the general test as to whether or not property is of such a nature that it may be reached by garnishment is whether or not it is capable of assignment by the defendant to a third party. Employment of this test would seem to resolve the question of garnishability of both tangible and intangible assets.

**Construction**

In construing the Kentucky garnishment statutes, the Court of Appeals has consistently held, in accordance with the majority view, that the remedy of garnishment is in derogation of the common law and must be strictly construed. For example, it has been held that since the Kentucky Statutes provide the creditor no direct cause of action against the third party, the latter cannot be joined as a defendant and summoned as such. Moreover, this rule of strict construction seems to have been adhered to without exception, in spite of the existence of particular provisions in the Kentucky Statutes relating to their construction and specifically requiring all statutes in derogation of the common law to be liberally construed.

Whether this provision will be taken into consideration in any future litigation concerning garnishment must of course remain a moot point. It would seem that as a matter of policy, in view of the general hostility toward garnishment, as discussed below, the Court has prop-

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16 In Kentucky, where goods are delivered to a warehouseman, and upon a negotiable warehouse receipt, the goods cannot thereafter be garnished while in possession of the warehouseman, without prior surrender of the receipt to the warehouseman or enjoining its negotiation. KRS sec. 355.250.
17 38 C.J.S. 308 (1943).
19 United Collieries v. Martin, 248 Ky. 808, 60 SW 2d 125 (1933); Ray v. Peter Fox Sons Co. of Ky., 272 Ky. 497, 114 SW 2d 750 (1938); Hartford Fire Insurance Co. v. Green, 282 Ky. 466, 138 SW 2d 693 (1940).
21 KRS sec. 446.080(1).
erly remained reluctant to widen the scope of the garnishment statutes beyond the words of those enactments.

**Procedure**

The judgment creditor first files an affidavit with the clerk of the court in which the judgment was rendered. The affidavit must state the rendition of the judgment and the property or debts owed by third persons to the judgment debtor. The judgment creditor then obtains an order of garnishment, which is directed to the sheriff.

The creditor who seeks an order of garnishment at or after the commencement of an action must also file an affidavit in the office of the clerk of the court in which the action is brought or pending. The affidavit must allege the nature of the plaintiff's claim, that it is just, the sum claimed and the existence of one of the requisite statutory grounds for issuance of the order. The order is then issued by the clerk.

In neither of the above instances does the order make the garnishee a defendant as such, but is issued and executed as required by statute to such persons as the plaintiff deems to be garnishees. It is to be noted that the judgment creditor need not post bond, as is required in attachments as a provisional remedy directly against the defendant to the main action, or in the case of garnishment in aid of attachment before judgment.

The sheriff then serves the order on the named garnishees and delivers a copy to the judgment debtor. The order does not specify the particular assets attached, but only serves notice that the named persons are to appear as garnishees. If the officer making service doubts the validity of any attachment, he may require the creditor to post bond. Any garnishee may waive service to himself, but in the case of a garnishee corporation, the waiver must be made by an officer of the corporation, properly entitled to make such waiver. The sheriff's return states the name and time of summons of each garnishee. If

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22 KRS sec. 425.190(1).
23 KRS sec. 425.195.
24 KRS secs. 425.185, 425.195.
25 Note 20, supra.
26 KRS sec. 425.225(3).
27 KRS sec. 425.190(2).
28 KRS sec. 425.205.
29 Ibid.
30 KRS sec. 425.190(3).
32 KRS sec. 425.265.
33 Gibson v. Auxier, 264 SW 2d 287 (Ky. 1953).
34 KRS sec. 425.285.
the garnishee so desires, he may pay an amount not exceeding the plaintiff's claim and costs to the sheriff at the time of service, or into the court.35 Failing that, the garnishee must answer or appear in person at his option, at the time specified in the summons.36

In addition to answer or appearance, the garnishee has the further statutory duty, when called upon to do so by the sheriff, to give a proper statement of the assets of the defendant which the garnishee has in his control.37 Failure to do so is punishable as a contempt.38 In his answer or appearance the garnishee has the right to assert the applicability of any statutory exemptions to the property of the defendant held by the garnishee.39

Should the garnishee fail to answer or appear, the court may compel his appearance, as in cases of contempt, or it may render a default judgment against him.40 If the garnishee appears in person, he may be examined under oath and the court at its discretion may require him to turn over the assets in his possession to the court, or he may be permitted to retain the debtor's assets upon execution of a bond.41

The garnishee who submits in good faith to the procedure outlined above, and who properly complies with the order of garnishment, is allowed his costs, deductible from the funds attached,42 and thereby pays only the amount of the debt actually owed by him to the defendant in the main action. If, however, the disclosure, by appearance or answer, is unsatisfactory to the plaintiff, he may bring action against the garnishee by petition or amended petition and attach, as in other actions, and the action shall proceed as an attachment.43

Garnishment Before Judgment

Since the courts are required to grant orders of garnishment of wages before judgment upon the formal allegation by affidavit of the statutory requirements, and the majority of cases involve debtors who have little or no property that can be mortgaged or attached, creditors are allowed to freely allege that collection of the debt may be endangered by delay, on the theory that it is possible that the debtor may quit his job and leave the jurisdiction.44 The result in many cases

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35 KRS sec. 425.310.
36 KRS sec. 425.315(1).
37 KRS sec. 425.235.
38 Ibid.
39 KRS sec. 425.190(4).
40 KRS sec. 425.315.
41 KRS sec. 425.320.
42 KRS sec. 425.310.
43 KRS sec. 425.325.
44 It should be emphasized at this point that the writer found no cases to support this contention, but conversations with practicing attorneys give ample support to the statement.
is vicious, allowing "loan sharks and collection agencies practically to blackmail a debtor by tying up his wages in advance of proving the validity of their claim, and without prior notice of intent to attach."\textsuperscript{45}

Such practice can be condoned, if at all, only on the basis of its expediency in providing speedy acquisition of the debtor's assets, since it is doubtful whether in the majority of such cases there is any real reason to suspect that the delay necessary to obtain judgment will endanger collection of the debt. In any event, such a practice tends to cast additional doubt on the justice and wisdom of the garnishment proceeding, since the over-liberal issuance of garnishments clearly violates the spirit, if not the letter, of the statutes. If, as seems to be the case, orders of garnishment prior to judgment are so liberally granted as to be the usual \textit{modus operandi} in recovery by creditors, there is strong need of a method by which the debtor and the garnishee can obviate the essential harshness of the practice.\textsuperscript{46}

\textbf{Statutory Exemptions From Garnishment}

The general Kentucky rule concerning attachments was stated by the Court of Appeals in 1843:

\begin{quote}
[A creditor] may . . . attach whatever may be due to his debtor, for labor already performed, and he may attach whatever may become due upon an existing contract for future labor: but neither the creditor nor the Chancellor can compel the debtor to work out his part of such a contract, so as to earn the promised reward for the exclusive use of the creditor.\textsuperscript{47}
\end{quote}

Since this holding has been interpreted to mean that unearned salaries or wages cannot be reached, even where the employment is for a definite term,\textsuperscript{48} a new writ of garnishment of wages must be obtained each pay day or whenever wages are again owed to the defendant until the judgment is satisfied.\textsuperscript{49} As a result, where the courts can find no evidence of collusion, they are forced to uphold the payment of a salary in advance, where the employer finds it necessary to do so in order to retain the services of an employee.\textsuperscript{50}

\textsuperscript{45} The quotation is taken from a letter written by Robert Caldwell, Esq., of the firm of Caldwell and Robinson, Ashland, Kentucky. Mr. Caldwell has done a large amount of research into the questions arising in this area, and is of the opinion that reform of the Kentucky garnishment statutes is imperative.

\textsuperscript{46} It might also be pointed out that most garnishments concern relatively small amounts. Thus, since the cost to the creditor in a collection by judgment may exceed the amount recovered, garnishment in many cases may be the creditor's only resource.

\textsuperscript{47} Teeter v. Williams, 42 Ky. 562 (3 B. Mon. 1843).


\textsuperscript{49} KRS sec. 425.190(6).

The employee's relief from garnishment of wages, as provided by statute, extends only to those who are heads of families.\textsuperscript{51} Such protection, if that is the proper word, affords an exemption of only $67.50 a month to the person suffering the garnishment. Further, the special privilege formerly enjoyed by state employees or contractors has now been abolished by the enactment of a statute providing that salaries or other sums due any party from a state governmental agency is subject to garnishment by service upon the Commissioner of Finance and the State Treasurer.\textsuperscript{52}

It is clear upon reflection that the wage exemptions provided in Kentucky are designed for a by-gone economic era, as, indeed, are the statutory exemptions of property held by a debtor.\textsuperscript{53} In a letter to the writer, Robert T. Caldwell, Esq., who has thoroughly examined the Kentucky statutes relating to garnishment, made the following pertinent comments:

The basic error in our law is that it is based entirely on dollars and not on percentage of income. When our law was enacted, over forty years ago, the average wage in industry was less than two dollars per day; hence a law that allowed an exemption of $67.50 per month was actually a 100% exemption to practically all industrial employees. The legislative policy, in enacting the law, may be assumed to have been to that effect; at least that is what the law actually did result in for a number of years . . .

Today, with the greatly reduced value of the dollar, and the fact that the average industrial weekly wage in Kentucky is now around $75.00 per week, the present Kentucky law permits creditors to take up to 75% of the employee's monthly earnings, leaving only 25% for him to support his family on.\textsuperscript{54}

If the purpose of the exemption statutes is to provide a wage earner who is head of a family a bare minimum for the subsistence of himself and his family, it is imperative to increase the present level of exemptions, either on the basis of percentage of income, as suggested by Mr. Caldwell, or by increasing the amount of income exempt from attachment or garnishment.\textsuperscript{55}

There is, however, one modern touch in our exemption statutes in the provisions for the exemption of proceeds from life or disability insurance policies from execution or other process.\textsuperscript{56} To that extent

\textsuperscript{51} KRS sec. 427.010(2),(3).
\textsuperscript{52} KRS sec. 427.130.
\textsuperscript{53} KRS sec. 427.010(1): [O]ne loom and spinning wheel and pair of cards; all of the spun yarn and manufactured cloth manufactured by the family necessary for family use . . . two saddles and their appurtenances . . .
\textsuperscript{54} Supra, note 45.
\textsuperscript{55} For a comparison of the Kentucky wage exemptions with those of other states, the reader is referred to Schwartz and Schiffer, The Master Chart of Creditors' Rights (1953).
\textsuperscript{56} KRS sec. 427.110:
the economic problems of specific classes of persons are recognized in the statutes. Generally, however, the law in Kentucky reveals a need for readjustment of the permitted exemptions from both attachment against defendants and garnishment against third persons.

In addition to the foregoing defects in the Kentucky exemptions from garnishment, there are some rather obvious defects in the procedure itself. Where garnishment is sought to be utilized by the creditor, neither debtor nor garnishee has any choice other than to acquiesce in what is essentially a harsh proceeding, with resultant annoyance to the employer-garnishee and, in many cases, risk of loss of employment by the employee-debtor. If at all possible, it would be both more humane and efficient to provide the debtor who is attempting to meet his obligations some other means of satisfying his creditors that would avoid the hazards and tensions of garnishment. From the creditor's viewpoint, the procedure is also defective in that he is put to the completely unnecessary and bothersome practice of obtaining issuance of a new order of garnishment each time the garnishee again owes wages or salary to the defendant debtor. There seems to be no valid reason, in the absence of highly unusual circumstances, to require such repetitive procedure.

Recommended Reforms

The garnishment of wages has never enjoyed the respectable status of attachments, which proceed directly against the debtor-defendant. Described by employees as "humiliating", it is detested as an unmitigated nuisance by employers, to such an extent that even union contracts tacitly or specifically recognize the right of an employer to discharge an employee whose debts result in more than a prescribed number of garnishments within a specified period. If such process is to

\[\begin{align*}
(1) \text{Any money or other benefit to be paid or rendered by any assessment or cooperative life or casualty insurance company is exempt from execution or other process to subject such money or other benefit to the payment of any debt or liability of a policyholder.}
(2) \text{Any money or other benefit to be paid or rendered by any fraternal benefit society is exempt from attachment, garnishment or other process to subject such money or other benefit to the payment of any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment.}
\end{align*}\]

It has already been pointed out that the debtor is not sufficiently protected by existing wage exemptions so as to insure his well-being under modern economic conditions.

The writer has been employed in the personnel departments of several industrial plants. In every case, with the tacit consent of the union involved, the company set a limit on the number of garnishments that might be sustained within a given period as the result of debts of any employee. The Oliver Corpora-
continue to be tolerated, it must conform in a much greater degree to accepted notions of justice and economic wisdom than it does at the present time in Kentucky. Further study should be made as to the feasibility of legislative relief along the following general lines:

1. Relief should be provided for the debtor by amendment of the statutory exemptions to fit the realities of present-day economic survival. Enforcement of creditors' remedies to the extent of rendering a family financially helpless is detrimental to the best interests of the entire Commonwealth.

2. On the creditor's behalf, provision should be made so that a single writ of garnishment of wages will be operative until the entire amount of the debt is paid. Successive writs create only additional confusion in an already complex situation.

3. A provision permitting election by the debtor of a voluntary trusteeship, designed to assist any individual debtor who in good faith wishes to meet his financial obligations, should be considered for possible enactment. Such provisions seem to have efficiently and fairly accomplished this purpose in the jurisdictions in which they are operative. The Ohio plan, since it is operative in an adjoining jurisdiction, has been chosen for discussion here.

Under the Ohio provisions, a debtor must be given notice of any garnishment within five to thirty days before it is sought. During this period he may apply to any municipal court or justice of the peace court for a trusteeship. All unsecured creditors, with the amounts owing to each, must be listed. Depending on which court has proper jurisdiction, the trusteeship is granted to the debtor either free of charge or on payment of a fee of four per cent of the amount disbursed by the trustee (who is usually the clerk if the case arises in a municipal court). The debtor must then pay to the trustee, promptly and regularly, as often as his wages are paid, that portion of his wages which is not exempt from garnishment. Creditors secured by a chattel mortgage may also participate if they forbear enforcement of their lien.

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51 Three states have seen fit to adopt plans of this nature. See: Wis. Stat. sec. 128.21 (1953); 4 Mich. Compiled Laws sec. 691.711 et seq. (1948); Ohio Rev. Code Ann. sec. 2329.70 (Page 1954).
during the period of trusteeship. As long as the debtor makes the required payments to the trustee, he is immune from garnishment of his wages, either in an attachment or proceeding in aid of execution, by any creditor listed.

It is submitted that the above recommendations, though not comprehensive of all improvements that could be suggested in the area of garnishments, would go a long way toward relieving the harshness of the remedy as it presently exists in Kentucky.

Henry R. Snyder, Jr.

IMPEACHMENT OF WITNESSES ON COLLATERAL MATTERS

Kentucky Rules of Civil Procedure 43.07 and 43.08 outline the accepted procedure by which a witness's testimony may be impeached. Rule 43.07 specifies the four methods of impeachment presently allowed in Kentucky. They are: (1) introduction of contradictory evidence, (2) proof of prior inconsistent statements made by the witness, (3) proof of the witness's general reputation for untruthfulness, and (4) a showing that the witness has previously been convicted of a felony. We are here concerned primarily with the second of these, contradiction by introduction of prior inconsistent statements of the witness. Rule 43.08 requires that a foundation be laid for this type of impeachment in order to avoid unfair surprise. This involves merely asking the witness if he made the out-of-court statement, identifying it as closely as possible with regard to time, place, and persons present. Then, if the witness denies having made the statement, contradicting witnesses may be called when the cross-examiner puts on his case. Their testimony is admissible, in this respect, only for purposes of impeachment and the opposing party is entitled to an admonition by the trial judge as to the limited effect the testimony is to have.

One very significant limitation upon this practice exists. A virtually universal rule of evidence prohibits contradiction, either by prior statements of the witness or by contradictory evidence, upon matters which are collateral to the issues in the case. It is said that upon such


1 3 Wigmore, Evidence 702 (3rd Ed. 1940).
2 Id. at 657, et. seq. 692; McCormick, Evidence 66 (1954); 58 Am. Jur. 418, 432 (1948). The rule is deemed necessary to prevent undue waste of time resulting from the contradiction of any or all points in a witness's testimony. As was said in Powers v. Leach, 26 Vt. 277 (1947):