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DEBTOR EXEMPTION IN CONNECTICUT AND NEW YORK

STATUTES dealing with debtor exemption must serve a double purpose: to make just allowance for the daily needs of the debtor and to provide creditors with adequate methods for the collection of their claims. In the past, creditors have been concerned mainly with reaching physical property of the debtor which existed in a readily available form. The increasing importance of trusts and the development of installment selling, however, have brought into prominence as debtors the cestui and the wage earner, whose resources are available solely in an intermittent flow. The fairly crystallized body of law which surrounded creditor relief has had, therefore, to be readjusted to fit these new problems. This process of readjustment, as might be expected, has taken divergent forms in different states. The two prominent industrialized states of New York and Connecticut, recognizing the inadequacy of

standard provisions for levy and sale,[1] have both afforded creditors the additional remedies of garnishment[2] and proceedings supplementary to judgment;[3] in their approach, however, the statutes in the two states are fundamentally different. The Connecticut statutes generally provide the creditor with but a single process for each situation. In New York, on the other hand, sections dealing with the mode of creditor relief overlap; different types of debtor are subject to different treatment, and often several sections are applicable to one type. This diversity of remedy has led to considerable uncertainty as to which section should apply,[4] and the confusion is heightened by the fact that a debtor may be exempted under one provision but not under another. Available judicial authority does not, perhaps, dispel this uncertainty with absolute finality, since cases in this field, as a result of the small amounts generally involved, seldom reach the higher courts and the lower court decisions do not seem wholly uniform. It is possible, however, that the conflict is more apparent than real. The purpose of this Comment is to determine whether the varied New York provisions have been sufficiently reconciled and correlated by the decisions to provide a workable system; and whether the complex New York provisions or the more unified provisions of the Connecticut statutes have more successfully solved the modern problems of creditor relief.

In accordance with well-established New England usage,[5] the Connecticut creditor may garnish or attach at the institution of his action[6] and thus effectively tie up the debtor's assets for the payment of the anticipated judgment.[7] Garnishment, however, is restricted to debts already due the debtor

1. Surveys made prior to the recent changes in supplementary proceedings disclose that from 75% to 90% of the money judgments rendered in New York City remained unsatisfied. See Levien, *Making Money Judgments Collectible,* N. Y. L. J., Nov. 20, 1934, p. 1900, col. 1; 1 JOHNS HOPKINS UNIVERSITY INSTITUTE OF LAW, SURVEY OF LITIGATION IN NEW YORK (1931) 3.

2. CONN. GEN. STAT. (1930) § 5763; N. Y. CIV. PRAC. ACT § 684.

3. CONN. GEN. STAT. (Supp. 1937) § 846d; N. Y. CIV. PRAC. ACT § 773 *et seq.* The Connecticut provision for wage earner installment payments is in effect a supplementary proceeding. Provision has also been made for examination of the judgment debtor, but no orders may be obtained in that proceeding directing either the debtor or third parties to deliver to the creditor property of the debtor. See CONN. GEN. STAT. (1930) § 5830.

4. Many writers have attempted to disentangle the snarls into which the New York courts have been led by the statutes. Some of the better treatments of the problems are: Newman and Kaufman, *The New York Garnishee Execution As a Practical Remedy* (1934) 12 N. Y. U. L. Q. REV. 255; Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings* (1935) 35 COL. L. REV. 1007; Cohen, *Collection of Money Judgments in New York: Third Party Orders* (1935) 35 COL. L. REV. 1196; Cohen, *Execution Process and Life Insurance* (1939) 39 COL. L. REV. 139.

5. ARNOLD AND JAMES, TRIALS, JUDGMENTS AND APPEALS (1936) 462, n. 6.

6. CONN. GEN. STAT. (1930) § 5763.

7. Imprisonment for debt is still a possibility in Connecticut. See CONN. GEN. STAT. (1930) § 5803; *cf.* N. Y. CIV. PRAC. ACT § 764. For property exempted from garnishment, see HANNA, CASES ON CREDITORS' RIGHTS (1st ed. 1931) 91.

and those to become due from a deceased's or an insolvent's estate.[8] When judgment has been obtained, the garnishee may pay the amount caught by the garnishment. If he fails to pay the sheriff upon service, he may be sued on a scire facias, and thereby be made a judgment debtor.[9] Wages, which are not included in the traditional methods of relief, may be neither garnished nor assigned, but in line with the modern trend may be levied upon through a judicial decree establishing definite installments which the debtor must regularly pay.[10] The court has been given much discretion in fixing the size of these installment payments, since in establishing this sum it takes into consideration the general circumstances of the defendant, such as pending actions or outstanding judgments, the debtor's income, and the amount of the creditor's claim.[11]

The limitation of installment orders to a reasonable amount in view of all the surrounding circumstances may induce Connecticut to modify its rule that creditors may not interfere with the wage payments of state or municipal employees who hold positions requiring an oath of office.[12] This principle was enunciated before the institution of the present provision for installment orders, at a time when courts still recognized wage garnishment. Its basis was not that garnishment would unduly burden the governmental instrumentality served with process, but rather that the complete collection of wages which garnishment permitted to the creditor, would deprive the employee of his means of support.[13] Presumably, therefore, "his efficiency as an officer would be impaired, if not destroyed, and public interest would suffer serious detriment."[14] Since New York, where provision for installment orders against

8. CONN. GEN. STAT. (1930) § 5763. Although the statute says "persons" may be garnished, this, of course, includes corporations. Knox v. Protection Ins. Co., 9 Conn. 430 (1833).

9. CONN. GEN. STAT. (1930) § 5814. The creditor has no claim to payment from the garnishee until judgment has been rendered against the debtor and an execution attempted. See Century Indemnity Co. v. Kofsky, 115 Conn. 193, 161 Atl. 101 (1932). The garnisher-creditor must wait until the claims of prior garnishers have been settled before he may obtain his scire facias. Hawthorne Sash & Door Co. v. New London, 99 Conn. 672, 122 Atl. 658 (1923). While a legacy is garnishable by the legatee's creditors before the will is probated, a scire facias cannot issue until the legacy is due. Johnes v. Jackson, 67 Conn. 81, 34 Atl. 709 (1895).

10. CONN. GEN. STAT. (Supp. 1937) § 846d.

11. *Ibid.*

12. If no oath of office is required, the official's salary may be garnished. Seymour v. Over River School Dist., 53 Conn. 502, 3 Atl. 552 (1886) (school teacher's wages may be garnished). Ordinary debts due from a town to a debtor may be garnished. Bray v. Wallingford, 20 Conn. 416 (1850). Money collected on execution by a sheriff in his official capacity may be garnished, since he is acting as an agent of the executing creditor and not of the law.

13. Prudential Mortgage and Investment Co. v. New Britain, 123 Conn. 390, 195 Atl. 609 (1937).

14. See Prudential Mortgage and Investment Co. v. New Britain, 123 Conn. 390, 393, 195 Atl. 609, 610 (1937).

wage earners is similar to Connecticut, allows such decrees to be issued against governmental employees,[15] it is to be expected that Connecticut will follow the New York interpretation in this, as well as in most situations where wage earner installment orders are in question.

In New York, the creditor of a wage earner is not restricted to an installment order as he is in Connecticut. Where execution on a judgment has been returned wholly or partly unsatisfied, the creditor may resort to garnishment, which permits a continuing levy not exceeding ten per cent of any income or earnings due the debtor, if these earnings amount to $12.00 a week or more.[16] Wages of state and municipal employees,[17] as well as payments in the form of commissions and trust income, are expressly included within this remedy.[18] While only one garnishment may attach at a time, outstanding processes will be fulfilled according to priority of service.[19] Supplementary proceedings, however, may be instituted[20] without attempted execution[21] or even in the face of similar measures by other creditors.[22] Through this expedient, the creditor may obtain a third party order commanding payment from the debtor's debtor[23] or a decree directly against the debtor, instructing

15. See notes 18 and 38, *infra*.

16. N. Y. Civ. Prac. Act § 684. Garnishment may also be had for jurisdictional purposes. See N. Y. Civ. Prac. Act §§ 902, 903.

17. Salary of county officer is garnishable. Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. Supp. 901 (Sup. Ct. 1932).

18. N. Y. Civ. Prac. Act § 684.

19. Friedenberg v. Hollander, 157 Misc. 663, 284 N. Y. Supp. 207 (Sup. Ct. 1935). Priority of judgment is immaterial. First Nat. Bank & Trust Co. of Elmira v. Lovell, 139 Misc. 891, 249 N. Y. Supp. 493 (Sup. Ct. 1931). For a discussion of the priority problem, see Comment (1929) 29 Col. L. Rev. 504.

20. N. Y. Civ. Prac. Act § 773 provides for the institution of these proceedings at any time before the judgment is satisfied, vacated, or barred by the Statute of Limitations (20 years under N. Y. Civ. Prac. Act § 44). The proceedings continue until closed, or until discontinued by consent or by court order, and are not to be deemed abandoned through nonactivity until after two years following their commencement. N. Y. Civ. Prac. Act § 802.

21. N. Y. Civ. Prac. Act § 773. It has been impliedly held that supplementary proceedings in accordance with N. Y. Civ. Prac. Act § 773 *et seq.* may be brought in the federal district court in New York which rendered the money judgment. Capital Co. v. Fox, 299 U. S. 105 (1936), *aff'g*, 15 F. Supp. 677 (S. D. N. Y. 1936).

22. Order under § 793 will be upheld over objection that the debtor is required by previous orders to pay other creditors. D. Appleton Century Co., Inc. v. Partridge, 255 App. Div. 830, 7 N. Y. S. (2d) 47 (4th Dep't 1938). Such orders will be granted despite a pending appeal of the judgment, if the debtor fails to obtain a stay of execution. Nat. City Bank of N. Y. v. Clarke, 246 App. Div. 636, 283 N. Y. Supp. 485 (2d Dep't 1935). But supplementary proceedings will not lie against an executor or administrator upon a judgment recovered against him in his representative capacity, since one creditor could thereby obtain a preference over the other creditors of the estate. Dander Corp. v. Connor, 169 Misc. 686, 9 N. Y. S. (2d) 471 (N. Y. City Ct. 1938).

23. N. Y. Civ. Prac. Act §§ 794, 796. While permissive orders to third parties may be issued under § 794(1) without notice to the judgment debtor, mandatory orders under § 794(2) require such notice. Section 796, which permits orders without notice to judg-

him to honor the judgment by installment payments.[24] But these provisions may not authorize the seizure of property otherwise immune from levy and sale,[25] property held in a trust created by someone other than the debtor, and "earnings by the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding; when . . . those earnings are necessary for the use of a family wholly or partially supported by his wages."[26] It is further stipulated that orders for installment payments by debtors may only be made after due regard for the reasonable requirements of the debtor and his dependents, and for prior court orders and garnishments.[27]

Section 793 of the New York Civil Practice Act introduced installment orders into that state in 1935. This procedure savors of an equity *in personam* decree, while Section 684, the garnishment provision, resembles an old common law action dating from the custom of London merchants. Courts have therefore been reluctant to allow resort to Section 793 unless the creditor is confronted by an obstacle to process under Section 684.[28] A more liberal attitude was postulated in *Economy Leases v. Bierman*.[29] There it was held that a judgment creditor should not be required to have recourse to Section 684 before applying for relief under Section 793 unless garnishment would be fully as adequate as an installment order. By this criterion installment orders would not be available to creditors of employees of the state, or a municipality or a large corporation which would honor process, unless the debtor's earnings were so large that he could reasonably be expected to pay more than ten per cent of his wages toward the judgment. But garnishment would not be required where the circumstances disclosed that the employer would discharge the debtor or would aid him in frustrating the creditor. The principle of *Economy Leases v. Bierman* is not only more reasonable than the court's earlier position, but also appears to be a consummation of the legislative intent[30] that installment orders were to be granted "notwithstanding

ment debtors, applies only to cases where the debtor's tangible property is in the hands of a third party. (Money is included as a tangible item.) Bartley v. Bartley, 255 App. Div. 992, 8 N. Y. S. (2d) 327 (2d Dep't 1938). For effect of the service of a third party order see (1937) 6 FORDHAM L. REV. 321.

24. N. Y. CIV. PRAC. ACT § 793.

25. The specific property exempted by this provision is listed in WAIT, MANUAL OF SUPPLEMENTARY PROCEEDINGS AND GARNISHEE EXECUTIONS (1936) 391-410 and WORTHMAN, COLLECTION OF MONEY JUDGMENTS (1936) 107-123.

26. N. Y. CIV. PRAC. ACT § 792. The doctrine of *In re* Trustees of Board of Publication and Sabbath School Work, 22 Misc. 645, 50 N. Y. Supp. 171 (Sup. Ct. 1898) that supplementary proceedings could not reach property acquired subsequent to service was overruled by an amendment in 1938 to N. Y. CIV. PRAC. ACT § 781.

27. N. Y. CIV. PRAC. ACT § 793.

28. Metropolitan Life Ins. Co. v. Zaroff, 157 Misc. 796, 284 N. Y. Supp. 665 (N. Y. City Ct. 1935); Dibner v. Cousminer, 157 Misc. 229, 283 N. Y. Supp. 369 (N. Y. City Ct. 1935).

29. 159 Misc. 367, 286 N. Y. Supp. 732 (N. Y. City Ct. 1936).

30. As expressed by the opening words of N. Y. CIV. PRAC. ACT § 793.

the provisions of sections six hundred eighty-four and six hundred eighty-five of this act." Although there are apparently no decisions reported subsequent to *Economy Leases v. Bierman*, the cases which have appeared in the *New York Law Journal* indicate that its approach is now the prevailing New York rule.[31]

Differences in the scope of garnishment and installment orders in New York have resulted in some debtors being immune from one process, while still answerable under the other. The conflict is due, in part, to the phraseology employed. The words "earnings" and "profits" mark the limits to which Section 684 may be applied, whereas Section 793 speaks of "income, however, or whenever earned or acquired." Since "earnings" have been interpreted to embrace all pecuniary or proprietary benefits that may be included within the remuneration,[32] it is a more comprehensive category than wages. Payments in merchandise[33] or free rent[34] are thus as much as part of earnings as are monetary awards. Although "profits" have been liberally construed to represent any advantage or gain resulting from the investment of capital or the acquisition of money beyond the amount expended,[35] garnishment of these funds is handicapped by the difficulty of determining an exact amount upon which execution may be levied. A far better procedure for their collection is provided by an installment order under Section 793. This section has an even broader range than garnishment since the limits of "income" include not only earnings and profits, but even contributions and gratuities, if regularly received.[36]

A further distinction in the ambit of garnishment and installment orders is inherent in their very nature. Garnishment in its essence is an execution directed against the debtor's debtor, whereas an installment order is a decree binding upon the debtor personally. This dissimilarity in character may effect, in some cases, the defeat of garnishment, while an installment order would still be applicable. Thus employees of the Federal Government are immune from garnishment, because such a process is considered an interference with

31. See WAIT, MANUAL OF SUPPLEMENTARY PROCEEDINGS AND GARNISHEE EXECUTIONS (1937 Supp.) 11. But see Adirondack Furniture Corp. v. Crannell, 167 Misc. 599, 5 N. Y. S. (2d) 840 (County Ct. 1938).

32. William F. Kasting Co. v. Whittle, 174 App. Div. 224, 159 N. Y. Supp. 909 (3d Dep't 1916).

33. Grostein v. Blumenberg Dairy Corp., 139 Misc. 548, 249 N. Y. Supp. 728 (Munic. Ct. 1931) (dairy products); Burns v. Maurer, 72 Misc. 481, 131 N. Y. Supp. 344 (County Ct. 1911).

34. William F. Kasting Co. v. Whittle, 174 App. Div. 224, 159 N. Y. Supp. 909 (3d Dep't 1916).

35. See Brooks Bros. v. Cassebeer, 157 App. Div. 683, 685, 142 N. Y. Supp. 781, 782 (1st Dep't 1913).

36. Bergman v. Buechler, 249 App. Div. 553, 292 N. Y. Supp. 882 (1st Dep't 1937); Bascomb v. Heckscher, (N. Y. City Ct.) N. Y. L. J., April 1, 1936, p. 1643, col. 7. Of course, the court will modify its order, if the contributions cease.

a federal instrumentality.[37] But their wages are not totally free from a creditor's levy. Once paid, the remuneration becomes income, instead of earnings, and, as such, may be subject to orders under Section 793.[38]

Where the employee works for a family corporation, ostensibly at a wage of less than $12.00 per week, the court's power to fix wages for the purposes of garnishment would seem at first inspection to be a sufficient remedy to creditors. But should the family corporation refuse to honor the order, the creditor cannot make his collection without a suit against the employer for the amount owing under the garnishment execution. In this action the previous finding "fixing" the salary is not res judicata, although the employer may have been a party defendant to the garnishment order.[39] The creditor, endeavoring to prove anew the value of the debtor's services, may be met by a court which refuses to imply a contract of employment contrary to the express agreement of the parties.[40] Garnishment, therefore, has not only been ineffective, but has also unreasonably delayed the creditor in his collection. In this situation, the best remedy would be not a garnishment, but an installment order, for in the latter the court would merely direct the debtor to pay sums based upon a reasonable value of his services.[41]

The difficulties encountered by the creditor of a family corporation employee reappear to some degree when the debtor obtains his salary through a drawing account against future commissions. Although Section 684 specifies that all *earnings* in the form of drawing accounts, commissions, or a share of profits are garnishable, the difficulty occurs in determining whether the employer's payments are really earnings. The drawing account is considered within this classification only when it is charged off entirely against later

37. Buchanan v. Alexander, 4 How. 20 (U. S. 1846); see Lichtenstein, *Garnishment of Public Employees* (1936) 3 U. OF CHI. L. REV. 291; (1938) 22 MINN. L. REV. 293. But the H.O.L.C. has been subjected to third party orders. H. & P. Paint Supply Co. v. Ortloff, 159 Misc. 886, 289 N. Y. Supp. 367 (N. Y. City Ct. 1936).

38. Reeves v. Crownshield, 162 Misc. 118, 292 N. Y. Supp. 756 (N. Y. City Ct. 1936), *aff'd*, 274 N. Y. 74, 8 N. E. (2d) 283 (1937); Bool Floral Co. v. Coyne, 158 Misc. 13, 284 N. Y. Supp. 960 (County Ct. 1936); see (1938) 48 YALE L. J. 322; *cf.* Dibner v. Cousminer, 157 Misc. 229, 283 N. Y. Supp. 369 (N. Y. City Ct. 1935); Downing v. DeVito, 161 Misc. 788, 293 N. Y. Supp. 784 (County Ct. 1937) (W.P.A. employees).

39. Diamond v. Schulte Bakers, Inc., 136 Misc. 195, 240 N. Y. Supp. 663 (N. Y. City Ct. 1930). The employer may not appeal an order evaluating the employee's services. Flapan v. Rosenblum, 205 App. Div. 76, 199 N. Y. Supp. 36 (1st Dep't 1923).

40. Francis H. Leggett & Co. v. Feldman, 150 Misc. 24, 268 N. Y. Supp. 340 (N. Y. City Ct. 1934). *Contra:* Wood v. Dock & Mill, 193 App. Div. 236, 184 N. Y. Supp. 225 (4th Dep't 1920); Pfeifer v. Palace Market, Inc., 139 Misc. 295, 248 N. Y. Supp. 402 (Munic. Ct. 1931).

41. Economy Leases v. Bierman, 159 Misc. 367, 286 N. Y. Supp. 732 (N. Y. City Ct. 1936); Zeitlin v. Ballenzweig, 157 Misc. 219, 284 N. Y. Supp. 290 (N. Y. City Ct. 1935). Once rendered, the installment order may be modified when changes in circumstances warrant it. Powell & Titus, Inc. v. Segal, 250 App. Div. 733, 293 N. Y. Supp. 362 (2d Dep't 1937); *cf.* F. E. Compton & Co. v. Williams, 248 App. Div. 545, 290 N. Y. Supp. 984 (4th Dep't 1936).

commissions.[42] When the employee is personally liable for the repayment of any excess drawings, the account is considered to be a loan against possible future commissions rather than earnings.[43] Since the drawings may not be reached, the creditor's remedy is restricted to the commissions. But here again the creditor may be blocked. If the employee is overdrawn when the execution upon commissions is served, any commissions thereafter earned are applicable to the employee's current indebtedness to his employer and until that loan is satisfied, the lien of the garnishment execution does not attach.[44] But does the employer get a prior lien on future commissions for advances made to the debtor after the service of garnishment execution? If each advance were considered as a separate transaction, it would appear that garnishment takes precedence over all later loans.[45] A more reasonable attitude, however, would be to declare that all drawings within the term of the employment contract are part of one transaction, similar to a bank's line of credit, and therefore the employer's priority with respect to future commissions continues until the termination of that contract. Should the courts adopt the latter view, debtors whose drawing accounts exceed commissions could perpetually evade garnishment. Their drawing accounts, as loans, would be immune from garnishment and their commissions would likewise be exempt, because necessary to repay the loans. The creditor can, of course, dodge this predicament by resorting to an installment order. Under Section 793 the employee's drawing account, even though a loan, would be income and, therefore, leviable.

Although the Connecticut creditor, through the application of installment orders, avoids the entanglements involved in attempting to garnish commissions and unvalued wages, he is not as fortunate in all situations as he would be in New York. There is grave doubt, for example, whether his remedy against debtor seamen is as satisfactory as that provided by New York. Wages of particular sailors, unlike those of any other type of worker, have been expressly exempted from garnishment by the Federal Government.[46] This freedom, however, has been bestowed only upon those seamen

42. Laird v. Carton, 196 N. Y. 169, 89 N. E. 822 (1909); Hollender v. Friedenberg, 60 Misc. 566, 112 N. Y. Supp. 467 (Sup. Ct. 1908). In the absence of an express agreement to the contrary, there is no obligation to repay drawing account advances, if commissions do not equal payments. Kane v. Auto Laks Mfg. Co., 172 N. Y. Supp. 275 (Sup. Ct. 1918).

43. Franklin Simon & Co. v. Pease & Elliman, 238 App. Div. 614, 265 N. Y. Supp. 199 (1st Dep't 1933).

44. National City Bank of N. Y. v. Bon Ray Dance Frocks, 153 Misc. 549, 275 N. Y. Supp. 510 (Munic. Ct. 1934). Bookkeeping devices are futile to camouflage commission payments. Davidow v. John Hancock Mut. Life Ins. Co., 231 App. Div. 300, 246 N. Y. Supp. 512 (2d Dep't 1930).

45. *Cf.* Rosenberg v. Parlay Hats, 144 Misc. 519, 258 N. Y. Supp. 949 (Munic. Ct. 1932).

46. 38 STAT. 1169 (1915), 46 U. S. C. § 601 (1934).

engaged in transoceanic, Great Lakes, and Atlantic-to-Pacific trade.[47] While these fortunate debtors are immune from garnishment process in any state, they, like all other income recipients, may be subjected to an installment order should they become liable to service in New York. The Connecticut provision for installment orders, however, might not be applicable to such debtors, because it is written in terms of "earnings from personal services,"[48] unlike the New York statute where the limits are defined by "income."[49] An installment order payable from a seaman's wages therefore might be denied by Connecticut courts on the ground that this process would be an "arrestment" upon his wages, prohibited by the federal statute.

Not only has the phraseology of the Connecticut statute handicapped the Connecticut creditor, but the restriction on wage garnishment denies him any remedy against a debtor outside the court's jurisdiction, but employed by a corporation doing business within the state. Although New York permits wage garnishment, the same difficulty formerly confronted creditors in that state, through the court's refusal to follow the rule of *Harris v. Balk*.[50] New York in repeated decisions insisted that the situs of a debt for purposes of garnishment was determined by the domicile of the debtor,[51] unless the debt arose out of a contract made or to be performed within New York.[52] An amendment to Section 916 of the Civil Practice Act, however, now allows a levy of attachment on all debts due from non-residents to other non-residents.[53] Thus the wages of a judgment debtor who is employed by a foreign corporation doing business in New York may be garnished, regardless of where the employment contract was drawn or was to be performed. If the debtor is employed outside the state by a foreign corporation not doing business within the state, the inability to obtain juris-

47. 18 STAT. 64 (1874), 46 U. S. C. § 544 (1934). The burden of proof is on the creditor to show that the debtor does not work on an exempt vessel. Migliaccio v. Cappola, 160 Misc. 557, 289 N. Y. Supp. 891 (N. Y. City Ct. 1936). Longshoremen have been held to be within this exemption. Michigan Furniture Co. v. Southern Pacific Co., 158 Misc. 781, 287 N. Y. Supp. 178 (Munic. Ct. 1936). Likewise a pilot. Bloomingdale Bros. v. Butler, 150 Misc. 903, 270 N. Y. Supp. 624 (Sup. Ct. 1934). *Contra:* William Jackson Sons, Inc. v. Hauffman, 159 Misc. 182, 287 N. Y. Supp. 177 (Sup. Ct. 1935).

48. See CONN. GEN. STAT. (Supp. 1937) § 846d.

49. See N. Y. CIV. PRAC. ACT § 793.

50. 198 U. S. 215 (1905).

51. Douglass v. Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938 (1893); Nat. Broadway Bank v. Sampson, 179 N. Y. 213, 71 N. E. 766 (1904); Carpenter v. Farabaugh, 146 Misc. 625, 262 N. Y. Supp. 609 (Munic. Ct. 1933); see Kennedy, *Garnishment of Intangible Debts in New York* (1926) 35 YALE L. J. 689.

52. Where the debtor resided and worked in Pennsylvania for a New York corporation, his wages were held to be garnishable in New York. Morris Plan Co. of Buffalo v. Miller, 102 Misc. 470, 169 N. Y. Supp. 37 (Sup. Ct. 1918).

53. The application of this provision to foreign corporations is limited by N. Y. GEN. CORP. LAW §§ 224, 225. For the history and results of this change, see Legis. (1937) 6 FORDHAM L. REV. 283.

diction through service prevents the issue of a garnishment order.[54] The creditor is not wholly without a remedy, however, where the debtor is within the court's jurisdiction, for in such circumstances an installment order may be obtained.

The New York provisions for third party orders,[55] which have no counterpart in Connecticut, would seem to provide creditors with yet another method for collection from wage earning debtors. Prior to 1935, there was no doubt that third party orders could not reach a debtor's accruing wages, since this procedure was applicable only to those debts due but unpaid when process was served.[56] Section 792 further exempted all wages earned within the sixty days preceding service,[57] thereby rendering this measure practically worthless as a collection device against employee debtors. The 1935 revisions, however, permit third party orders to enjoin the transfer of property acquired by the debtor after service.[58] A hasty glance at the Civil Practice Act would thus seem to reveal that a judgment creditor might now serve the debtor's employer with a third party order enjoining future wage payments; the fund to be transferred when enough had accumulated to satisfy the judgment. The courts, however, have refused so to construe the statute.[59] In order to avoid the obvious injustice of allowing a judgment creditor to acquire all the debtor's earnings by the application of a third party order, it has been held that Section 794 must be read in connection with the other sections of the Civil Practice Act on supplementary proceedings.[60] It has been declared that the limitation of installment orders to ten per cent of the debtor's income would be unnecessary if a judgment creditor could take everything by means of a third party order. Not content with divining that "by no New York statute is it intended that those who work to live [are to] be kept alive by doles while creditors take every cent of their earnings as they accrue,"[61]

54. Penrose & McEniry v. Manogue, 129 Misc. 512, 221 N. Y. Supp. 758 (Sup. Ct. 1927).

55. N. Y. Civ. Prac. Act §§ 794, 795, 796. See note 8, *supra.*

56. *In re* Trustees of Board of Publication & Sabbath School Work, 22 Misc. 645, 50 N. Y. Supp. 171 (Sup. Ct. 1898); Hayward v. Hayward, 178 App. Div. 92, 164 N. Y. Supp. 877 (1st Dep't 1917); Hand v. Ortschreib Bldg. Corp., 136 Misc. 692, 240 N. Y. Supp. 589 (Sup. Ct. 1929), *modified on another ground,* 228 App. Div. 835, 241 N. Y. Supp. 807 (2d Dep't 1930).

57. But *cf.* Collins v. Connelly, 125 Misc. 871, 212 N. Y. Supp. 369 (Sup. Ct. 1925).

58. N. Y. Civ. Prac. Act § 799; see note 26, *supra.*

59. Where granted, third party orders have been limited to ten per cent of the debtor's earnings. Newburger v. Schalit, N. Y. L. J., April 28, 1937, p. 2114, col. 1 (N. Y. City Ct.); Ryan v. Dench, N. Y. L. J., Oct. 22, 1937, p. 1388, col. 3 (N. Y. City Ct.); see Carmody, Manual of New York Practice (1938) 912, n. 14.

60. 6-8-10 Barrow St., Inc. v. Pennefather, 164 Misc. 18, 297 N. Y. Supp. 124 (N. Y. City Ct. 1936); D. L. & W. Coal Co. v. Kenlon, 164 Misc. 32, 297 N. Y. Supp. 126 (N. Y. City Ct. 1937); 1101 Park Ave. Corp. v. Cornell, 133 Misc. 397, 232 N. Y. Supp. 663 (N. Y. City Ct. 1928) *semble.*

61. See D. L. & W. Coal Co. v. Kenlon, 164 Misc. 32, 36, 297 N. Y. Supp. 126, 131, (N. Y. City Ct. 1937).

some courts have proceeded to assert that the words of Section 792 must be interpreted to free such earnings from third party orders.[62] The exemption of "the earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding, when . . . those earnings are necessary for the use of a family wholly or partly supported by his wages," has been stretched to mean that such earnings are exempt from supplementary proceedings for sixty days after their accrual, regardless of when the proceedings were instituted. If this interpretation of Section 792 were carried to its logical conclusion, it would entirely nullify the effect of Section 793. If wages are immune from supplementary proceedings for sixty days after accrual, the installment order, the most effective device for the collection of judgments against wage earners, would be inapplicable to earnings derived from personal services. The court obviously will not extend this reasoning to attempts to procure installment orders, but it could easily have avoided the inconsistency by not endeavoring to expand Section 792 to absurdity. Since the court has discretion in granting third party orders,[63] it could merely have exercised that power and refused such petitions on the ground that an adequate remedy was provided by Section 793.

Crafty debtors have frustrated persistent creditors by assigning future wages to a third party before a creditor could levy upon them.[64] To prevent this type of circumvention, Connecticut has completely prohibited the assignment of any portion of an employee's wages.[65] While New York has moved in the same direction, it has not acted so drastically. Section 46 of the Personal Property Law[66] now provides that wage assignments under $1,000 must specify the transactions out of which they arose, be notarized, and not exceed ten per cent of the debtor's earnings.[67] Since only one assignment

62. See note 60, *supra*. N. Y. CIV. PRAC. ACT § 684 has no application to third party orders. Reliance Investing Co. v. Power, 136 Misc. 694, 240 N. Y. Supp. 585 (Sup. Ct. 1930). It has been stated that § 792 exempts bank accounts from supplementary proceedings where they represent wages earned sixty days before service if the earnings are necessary to support a family wholly or partially dependent on the debtor's labor. WAIT, MANUAL OF SUPPLEMENTARY PROCEEDINGS AND GARNISHEE EXECUTIONS (1936) 366; *cf.* Surace v. Danna, 248 N. Y. 18, 161 N. E. 315 (1928).

63. Conlew v. Thompson, 160 Misc. 551, 289 N. Y. Supp. 862 (N. Y. City Ct. 1936); see N. Y. CIV. PRAC. ACT §§ 794, 796.

64. See COMMITTEE ON STATE LEGISLATION OF THE NEW YORK BAR ASSOCIATION, BULL. 5 (1932) 162. A debtor may also connive to have a fictitious judgment rendered against himself. As long as a garnishment execution or an installment order based upon this collusion is in effect, later valid processes are held in abeyance.

65. CONN. GEN. STAT. (Supp. 1937) § 846d.

66. This provision supersedes any inconsistent parts of N. Y. PERS. PROP. LAW § 42. Egelhof v. Inwood Credit Union, 155 Misc. 790, 281 N. Y. Supp. 639 (Sup. Ct. 1935). An assignment of commissions already earned but to be payable in the future does not fall within the provisions of § 46 of the PERS. PROP. LAW. *In re* Fahys, 18 F. Supp. 529 (S. D. N. Y. 1937).

67. The Attorney-General has suggested that this section does not require the state to accept wage assignments of its employees. OP. ATT'Y-GEN. (1934) 51 ST. DEP'T 247.

is permitted at a time and since garnishment may not be satisfied until previous assignments have been completed,[68] the creditor still lacks complete protection. Where he believes the assignment to be fraudulent, his remedy, except for an installment order or a suit to set aside the assignment, is to serve the employer with garnishment execution. He may then wait until his judgment has been satisfied and sue the garnishee. The employer, thereupon, may be subjected to two payments.[69] He is personally liable to the assignee after notice of the assignment;[70] yet in a suit by a garnisher, whose execution he ignored while paying the previous assignment, the assignment may be set aside as fraudulent or ineffective and he may be ordered to pay all sums garnished from the date of service. Since a valid assignment of wages is quite common, especially through the use of the check-off, now widespread in well unionized industries,[71] the creditor is often forced to resort to an installment order. But these orders are granted only after due regard for prior assignments, the validity of which may not be attacked in this action. Within its discretion therefore, the court may refuse to issue the order. An assignment of wages may thus exclude the creditor from relief under Section 793, even though the assignment is in fact nugatory.

Wages remain immune from garnishment in Connecticut through statute; alimony enjoys the same freedom by judicial interpretation. An estranged wife's income from alimony payments or a separation agreement has been held no more subject to garnishment execution than a husband's allowance to his unalienated wife.[72] New York concurs with Connecticut in holding that such obligations are not debts within the meaning of the garnishment provisions.[73] Although third party orders appear similar to garnishment in this respect and the same treatment would be expected, the courts have eschewed logic for justice. Creditors whose claims were based on the sale of necessaries made after the alimony or separation agreement came into effect have been permitted, at times, to share in the husband's payments via third party orders.[74] Justification for issuance of these decrees was rested

68. See N. Y. PERS. PROP. LAW § 46.

69. *Cf.* Hirschberg v. Chic Dress Co., 72 Misc. 339, 130 N. Y. Supp. 134 (Sup. Ct 1911); Finelbatt v. Giant Laundry, Inc., 145 Misc. 889, 260 N. Y. Supp. 385 (Munic. Ct. 1932).

70. Continental Purchasing Co. v. Van Raalte Co., 251 App. Div. 151, 295 N. Y. Supp. 867 (4th Dep't 1937).

71. See OP. ATT'Y-GEN. (1936) 276. In Connecticut, where wage assignments are invalid, the Attorney-General has suggested that the check-off is not an assignment, but an act of the employer as the employee's agent. *Opinion of Attorney-General* (1938) 6 CONN. L. J. 305.

72. Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826 (1892); Van Valkenburgh v. Bishop, 164 N. Y. Supp. 86 (Sup. Ct. 1917). See ROTHENBERG, NEW YORK LAW OF ALIMONY (1932) 10. Voluntary payments to a separated spouse are not "debts." Brooks Bros. v. Cassebeer, 157 App. Div. 683, 142 N. Y. Supp. 781 (1st Dep't 1913).

73. Wright v. Wright, 93 Conn. 296, 105 Atl. 684 (1919).

74. Tappe v. Battelle, 140 Misc. 49, 249 N. Y. Supp. 589 (Sup. Ct. 1931). In Emigrant Industrial Savings Bank v. Lehman, 151 Misc. 444, 270 N. Y. Supp. 589

on the ground that they were merely a fulfillment of the avowed purpose of alimony—to provide the estranged wife and her dependents with support. Although third party orders were formerly the only procedure by which deserving creditors could satisfy their judgments, the enactment of Section 793 has provided creditors with an adequate method of recovery.[75] In these cases, therefore, the court should now refuse to issue third party decrees,[76] thus forcing the creditor to resort to the more equitable remedy of installment orders wherein the court must take due regard for the debtor's reasonable requirements and which, unlike the immutable third party order, may be altered upon a showing by either party of a change of circumstances.

Like alimony, funds received under pension and workmen's compensation statutes apparently receive different treatment from other types of income. Connecticut has limited its immunity to workmen's compensation[77] and to "any pension moneys received from the United States, while in the hands of the pensioner."[78] New York, on the other hand, by express authorization has exempted from levy and sale by virtue of an execution all funds from military pensions[79] and workmen's compensation.[80] Not only are these sums free from garnishment and third party orders, but so is all property which may have been purchased solely from this income.[81] It would seem, however, that the exemption applies only during the lifetime of the person to whom the fund was paid; for after the pensioner's death, property purchased with pension money has been levied upon by the decedent's creditors.[82] If the pension is of the lump payment type, the fund itself is totally immune, even

(N. Y. City Ct. 1933), the order was denied on grounds that a court of inferior jurisdiction could not attempt to override the Supreme Court's decree of payments to the wife. Such payments may not be attached. Baskin v. Howe, 225 App. Div. 553, 233 N. Y. Supp. 648 (1st Dep't 1929).

75. Installment orders by a court of inferior jurisdiction do not interfere with the operation of a decree by the Supreme Court. Continental Bank and Trust Co. of N. Y. v. Flather, N. Y. L. J., Nov. 7, 1935, p. 1725, col. 4 (N. Y. City Ct.)

76. Except under circumstances similar to Conlew v. Thompson, 160 Misc. 551, 289 N. Y. Supp. 862 (N. Y. City Ct. 1936) where the third party order enjoining payment to the judgment debtor was allowed to stand only until the debtor submitted to the court's jurisdiction and an application under CIV. PRAC. ACT § 793.

77. CONN. GEN. STAT. (1930) § 5260.

78. CONN. GEN. STAT. (Supp. 1933) § 1672c.

79. N. Y. CIV. PRAC. ACT § 667.

80. N. Y. WORKMEN'S COMP. LAW § 33. These funds are exempt even after payment to the debtor. Surace v. Danna, 248 N. Y. 18, 161 N. E. 315 (1928). Federal and state old age assistance are also exempt. N. Y. PUB. WELFARE LAW § 124(n).

81. Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 23 N. E. 1108 (1890); Benedict v. Higgins, 165 App. Div. 611, 151 N. Y. Supp. 42 (3d Dep't 1915); Vinciguerra v. Busam, 169 Misc. 908, 8 N. Y. S. (2d) 294 (N. Y. City Ct. 1938) (war veteran's bonus of 1936); *cf.* Billings v. Lynch, 161 Misc. 496, 292 N. Y. Supp. 344 (County Ct. 1937). For exemption of income from property purchased with exempt funds, see (1938) 47 YALE L. J. 1408.

82. *In re* Liddle, 35 Misc. 173, 71 N. Y. Supp. 474 (Surr. Ct. 1901); Smith v. Blood, 106 App. Div. 317, 94 N. Y. Supp. 667 (3d Dep't 1905).

after payment to the pensioner's estate.[83] As previously indicated, it cannot be reached either by third party orders or by garnishment, because of express statutory exemption. The fund also lies outside the scope of an installment order, since by definition that provision is inapplicable to lump payments. This obstacle is overcome if the pension is allotted in installments; but the creditor may still be balked in his attempt to obtain an installment order payable solely from such income. While pension and alimony payments are similar in that both are allowances for the maintenance and care of those who have lost their main source of support, a pensioner, unlike an alimony recipient, may successfully ignore the claims of those who advance necessaries in reliance upon his steady income.[84]

The two states differ in their recovery process when the debtor's property is in the possession of another. Connecticut's garnishment, as previously indicated, is usually followed by a scire facias.[85] Controversies over title to the property or the existence of the garnishee's debt to the debtor can be settled only in this later action,[86] in which the garnishee will be protected from any unlawful exposure to double liability.[87] Like a scire facias, the New York third party order cannot be procured until judgment has been rendered against the debtor, but unlike the scire facias action, this proceeding may not be utilized to adjust disputes in title.[88]

83. *In re* Cerello's Estate, 155 Misc. 709, 281 N. Y. Supp. 599 (Surr. Ct. 1935). *In re* Dickerson's Estate, 168 Misc. 54, 5 N. Y. S. (2d) 86 (Surr. Ct. 1938). An otherwise exempt pension may be sequestered or levied upon by a warrant of seizure to pay back alimony or support an abandoned wife. Monck v. Monck, 184 App. Div. 656, 172 N. Y. Supp. 401 (1st Dep't 1918); Hodson v. City Employees' Retirement System, 243 App. Div. 480, 278 N. Y. Supp. 16 (1st Dep't 1935). *Contra:* Riker v. Riker, 160 Misc. 117, 289 N. Y. Supp. 835 (Sup. Ct. 1936) (intent of Act was to make proceeds of Veteran's Bonus Bond payable to veteran only).

84. Ley Realty Corp. v. Foley, 161 Misc. 666, 293 N. Y. Supp. 795 (N. Y. City Ct. 1937) (indebtedness for rent). But where the debtor has another source of income in addition to an exempt pension, the amount of the installment payments are estimated on the basis of his *total* income. Bowes v. Perkins, 169 Misc. 624, 8 N. Y. S. (2d) 525 (Sup. Ct. 1938).

85. See note 9, *supra*.

86. Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 Atl. 884 (1928). But the merits of the plaintiff's claim are not open to question in a scire facias. See Cunningham Lumber Co. v. New York, N. H. & H. R. R., 77 Conn. 628, 630, 60 Atl. 107, 108 (1905).

87. Where the debtor assigned his insurance claims after the defendant was garnished and the assignees collected from the defendant in an action in New York despite the defense of a prior garnishment, the court refused to enforce the garnishment. Crouse v. Phoenix Ins. Co., 56 Conn. 176, 14 Atl. 82 (1888). Where Haiti refused to recognize a Connecticut garnishment and forced the garnishee to pay the debtor in full, scire facias on the garnishment was denied. Parker, Peebles & Knox v. National Fire Ins. Co., 111 Conn. 383, 150 Atl. 313 (1930). But *cf.* Kassover v. Willimantic Trust Co., 122 Conn. 166, 187 Atl. 907 (1936).

88. Kenney v. South Shore Natural Gas & Fuel Co., 201 N. Y. 89, 94 N. E. 606 (1911); Powley v. Dorland Building Co., Inc., 9 N. Y. S. (2d) 860 (2d Dep't 1939). Nor has the court power under Civ. Prac. Act § 796 to direct the judgment debtor to

Few difficulties now arise in construing the exemptions from scire facias or third party orders, since the scope of these immunities has been determined relatively well in the past by statute and judicial interpretation. In Connecticut the major difficulties have originated in the definition of the scope of "indebtedness."[89] It has been held that indebtedness does not occur until there is an existing duty to pay either at present or in the future, but it is not necessary that the obligation be liquidated.[90] The indebtedness of a bank or insurance company continues to exist even though a cashier's check or draft has been delivered to the debtor, since in the absence of an agreement to the contrary, these instruments do not discharge the garnishee's liability to the debtor, but are merely evidences of the debt until they are presented and paid.[91] Should the instruments be negotiable, a transfer by the debtor to a bona fide holder would undoubtedly erase the garnishee's obligation to the debtor, even though the assignment were made subsequent to the service of garnishment.[92]

The chief confusion in immunities from third party orders[93] results from attempts to secure the proceeds of the debtor's insurance where the right to change the beneficiary has been reserved.[94] Two overlapping statutes have exempted the proceeds of insurance from the insured's creditors where the beneficiary is neither the insured[95] nor his estate.[96] Although the Connecticut

turn over property whose title is in dispute. Orloff v. Pester, 143 Misc. 685, 257 N. Y. Supp. 111 (1st Dep't 1932); Schmelzel v. Mackey, 144 Misc. 67, 258 N. Y. Supp. 38 (Sup. Ct. 1932).

89. A claim in tort is not a garnishable "debt". Holcomb v. Winchester, 52 Conn. 447 (1885). Neither is property held by police for use as evidence. Bruchal v. Smith, 109 Conn. 316, 146 Atl. 491 (1929). Nor money paid into custody of the court as bail. Lewis v. Hopkins, 96 Conn. 356, 114 Atl. 91 (1921); *cf. In re* Rothschild, 84 App. Div. 196, 82 N. Y. Supp. 558 (1st Dep't 1903).

90. Ransom v. Bidwell, 89 Conn. 137, 93 Atl. 134 (1915); Finch v. Great Amer. Ins. Co., 101 Conn. 332, 125 Atl. 628 (1924); Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 Atl. 884 (1928); *cf.* Sand-Blast File-Sharpening Co. v. Parsons, 54 Conn. 310, 7 Atl. 716 (1886); Heilman v. St. Cloud Restaurant, Inc., 164 Misc. 15, 297 N. Y. Supp. 111 (N. Y. City Ct. 1936).

91. Alexiou v. Bridgeport-Peoples' Savings Bank, 110 Conn. 397, 148 Atl. 374 (1930); Kossover v. Willimantic Trust Co., 122 Conn. 166, 187 Atl. 907 (1936). But *cf.* 2 MORSE, BANKS AND BANKING (6th ed. 1928) § 545.

92. See McCormick v. Warren, 74 Conn. 234, 239, 50 Atl. 740, 741 (1901); Reade v. Indemnity Ins. Co. of North America, 121 Conn. 309, 314, 184 Atl. 646, 648 (1936).

93. The difficulties caused by the doctrine of *In re* Delaney, 256 N. Y. 315, 176 N. E. 407 (1931) that receivers might not be appointed for domestic corporations have been erased by an amendment to N. Y. CIV. PRAC. ACT § 804 expressly providing for the appointment of receivers for such debtors.

94. Of course, creditors may not defeat the beneficiary's interest where the right to change the beneficiary is not reserved. VANCE, INSURANCE (2d ed. 1930) § 162. A comprehensive treatment of creditors' rights in life insurance will be found in Cohen, *Execution Process and Life Insurance* (1939) 39 COL. L. REV. 139.

95. The person whose life is insured, not the contracting party.

96. N. Y. DOM. REL. LAW § 52; N. Y. INS. LAW § 55(a). Section 55(a) impliedly repeals § 52. Chatham Phenix Nat. Bank & Trust Co. v. Crosney, 251 N. Y. 189,

provision for exemption of these funds from garnishment[97] is no less vague than New York's, there appears to be no reported litigation on its construction. But because of the similarity of the provisions, it is expected that Connecticut will follow New York's interpretation. In the latter state the cash surrender value of a policy written in favor of a third party is immune from the insured's creditors or trustee in bankruptcy in the absence of a fraudulent change of beneficiary.[98] Most industrial policies may not be surrendered by creditors, although payable to the insured's estate, since under certain conditions the proceeds may be paid to blood relatives or other persons found to be equitably entitled to them.[99] In either the industrial or the ordinary type of policy, the degree of control retained by the insured in reserving the right to change the beneficiary or to assign the policy is immaterial for purposes of this immunity.[100] Since disability payments under such policies are available for the benefit of the insured, not his beneficiary, they were at one time amenable to a creditor's levy.[101] To remedy this obvious injustice the legislature has exempted such payments from process.[102] When examination has revealed that an unpaid dividend exists, creditors have attempted its seizure as a debt owed by the insurance company to the debtor. Third party orders have not been granted, however, so long as the dividends

167 N. E. 217 (1929). But *cf.* United States Mortgage & Trust Co. v. Ruggles, 137 Misc. 895, 244 N. Y. Supp. 56 (Sup. Ct. 1930), *aff'd*, 258 N. Y. 32, 179 N. E. 250 (1932). The exemption does not apply if the policy is payable to the insured. Lion Credit Union v. Gutman, 148 Misc. 620, 265 N. Y. Supp. 479 (N. Y. City Ct. 1932). Or his estate. Rockwood & Co. v. Trop, 212 App. Div. 883, 208 N. Y. Supp. 459 (2d Dep't 1925). Or his executors. Beigel v. Windschauer, 153 Misc. 389, 274 N. Y. Supp. 850 (N. Y. City Ct. 1934). These statutes, of course, do not exempt the proceeds from the *beneficiary's* creditors. Amberg v. Manhattan Life Ins. Co., 171 N. Y. 314, 63 N. E. 1111 (1902).

97. CONN. GEN. STAT. (Supp. 1933) § 1568c.

98. Maurice v. Travelers' Ins. Co., 121 Misc. 427, 201 N. Y. Supp. 369 (Sup. Ct. 1923); Gershman v. Berliner, 214 App. Div. 196, 211 N. Y. Supp. 881 (1st Dep't 1925). See VANCE, INSURANCE (2d ed. 1930) § 164; Fraenkel, *Creditors' Rights in Life Insurance* (1935) 4 FORDHAM L. REV. 35; Comment (1935) 84 U. OF PA. L. REV. 236. Where a change of beneficiary is made to defraud creditors, the entire proceeds may be levied upon. Stoudt v. Guaranty Trust Co., 150 Misc. 675, 271 N. Y. Supp. 409 (Sup. Ct. 1933). But where premiums are paid in insolvency, only so much of the cash surrender value as is traceable to these premiums are available to the trustee in bankruptcy. *In re* Goodchild, 10 F. Supp. 491 (E. D. N. Y. 1935). For a borderline conveyance held not to be in fraud of creditors, see Bank of United States v. Glickman, 9 N. Y. S. (2d) 349 (Sup. Ct. 1939).

99. Sullivan v. Bock, 157 Misc. 327, 284 N. Y. Supp. 297 (N. Y. City Ct. 1935).

100. *In re* Messinger, 29 F. (2d) 158 (C. C. A. 2d, 1928), *cert. denied*, Reilly v. Messinger, 279 U. S. 855 (1929); 40 West 57th St. Realty Corp. v. Starr, 149 Misc. 470, 267 N. Y. Supp. 740 (Sup. Ct. 1933).

101. Oriole Textile Co. v. Robert Silk & Woolen Co., 147 Misc. 524, 265 N. Y. Supp. 447 (N. Y. City Ct. 1932); Herbach v. Herbach, 148 Misc. 33, 265 N. Y. Supp. 144 (N. Y. City Ct. 1933).

102. N. Y. INS. LAW § 55(b); *cf.* CONN. GEN. STAT. (Supp. 1937) § 846d(b).

are not appropriated to the use of the insured.[103] If the dividends are to be applied for the payments of future premiums, they continue as "proceeds and avails" of the policy inuring to the benefit of the beneficiary, and, accordingly, remain exempt.[104] The only dividends, therefore, upon which a creditor may levy are those which the insured has elected to receive in cash.[105]

In both states, where the proceeds of a life insurance policy are left with an insurance company under a trust or annuity arrangement, the terms of the agreement may immunize the accruing benefits. Connecticut, however, limits this freedom to avails in the possession of domestic insurance company trustees.[106] While New York does not thus restrict its immunity, it does permit a creditor's levy when the judgment was rendered for the sale of necessaries.[107] This exemption applies not only to payments from the principal of the policy, but also to interest and earnings therefrom.[108] Although the proceeds of most insurance policies are free from the claims of the insured's creditors, this provision frees the proceeds from the claims of the *beneficiary's* creditors when the benefits are kept in trust rather than paid outright. In view of the express statutory restriction to insurance company trusts, the immunity in New York cannot be stretched to include so-called "insurance trusts" in which someone other than the insurance company acts as trustee. The Connecticut exemption, however, is merely an extension of the protection already afforded spendthrift trusts, for in Connecticut the income of a spendthrift trust is not liable to the claims of the beneficiary's creditors, nor may it be alienated or assigned by the cestui.[109]

103. *In re* Keil, 88 F. (2d) 7 (C. C. A. 2d, 1937), *cert. denied*, 301 U. S. 708 (1937); Randik Realty Corp. v. Moseyeff, 147 Misc. 618, 263 N. Y. Supp. 440 (N. Y. City Ct. 1933); Robro Realty Corp. v. Lazarus, 161 Misc. 610, 291 N. Y. Supp. 678 (N. Y. City Ct. 1936); *cf.* New York Plumbers' Specialties Co., Inc. v. Stein, 140 Misc. 161, 250 N. Y. Supp. 220 (1st Dep't 1931). But *cf.* 242 West 38th St. Corp. v. Meyrowitz, 162 Misc. 488, 293 N. Y. Supp. 708 (Sup. Ct. 1936), *aff'd*, 248 App. Div. 708, 290 N. Y. Supp. 109 (1st Dep't 1936).

104. *Ibid.*

105. *Cf.* Francis H. Leggett & Co. v. Frank, 161 Misc. 613, 291 N. Y. Supp. 681 (N. Y. City Ct. 1936).

106. CONN. GEN. STAT. (Supp. 1935) § 1569c.

107. N. Y. PERS. PROP. LAW § 15.

108. Such proceeds are exempt from garnishment. Crossman Co. v. Rauch, 263 N. Y. 264, 188 N. E. 748 (1934). And installment orders. Crossman Co. v. Rauch, 248 App. Div. 758, 288 N. Y. Supp. 827 (2d Dep't 1936). Although an insurance trust may be merely a contract (N. Y. BANK. LAW § 131(3) which states who may be trustees makes no provision for life insurance company trustees), if the contract is subject to and governed by the laws of New York, § 15 of the PERS. PROP. LAW will protect beneficiaries in other states. Annis v. Pilkewitz, 287 Mich. 68, 282 N. W. 905 (1938). But *cf.* United States Mortgage & Trust Co. v. Ruggles, 258 N. Y. 32, 179 N. E. 250 (1932). For a treatment of this problem, see GRISWOLD, SPENDTHRIFT TRUSTS (1936) §§ 110-144.

109. Foley v. Hastings, 107 Conn. 9, 139 Atl. 305 (1927); see Bridgeport-City Trust Co. v. Beach, 119 Conn. 131, 141, 174 Atl. 308, 312 (1934); Reilly v. State, 119 Conn.

The Connecticut creditor of a beneficiary of a trust other than the spendthrift or insurance type has two methods for the satisfaction of his claim. He may proceed against the cestui by means of a creditor's bill,[110] or he may garnish the trust income.[111] Neither remedy is restricted merely to judgment creditors, since a judgment may be rendered in the action in which relief is sought.[112] By means of the equity creditor's bill, the future income of the trust may be subjected entirely to the payment of the creditor's claim. But such a suit is an *in personam* action against the beneficiary and may not be instituted by the execution of a garnishment. Unlike the equity proceeding which lays a continuing levy, garnishment catches only the income then due the cestui from the trust.[113] It is useful, therefore, only when the beneficiary is outside the jurisdiction and may not be personally served with process to commence an equity creditor's action.

Although the New York judgment creditor of a trust beneficiary may obtain a remedy from the income of all trusts, not of the insurance nature, he must distinguish between the various classes of trusts. Where the settlor has reserved the trust income for himself,[114] the judgment creditor need not seek the available processes of garnishment or an installment order. A more adequate redress is supplied by an action for discovery and satisfaction.[115] This proceeding is neither limited to ten per cent of the trust income as in garnishment nor to the excess over the reasonable requirements of the debtor as in installment orders, and may be procured notwithstanding the settlor's effort to create a spendthrift trust.[116] The creditor may thereby appropriate the entire trust income, even though the trust was established previous to the claim upon which his judgment rests.[117] Although this action

508, 511, 177 Atl. 528, 529 (1935). For definition of spendthrift trust, see Carter v. Brownell, 95 Conn. 216, 111 Atl. 182 (1920).

110. CONN. GEN. STAT. (1930) § 5723. But such action may not be brought against unassignable trust income, even though the trust is not of the spendthrift type. Parker, Holmes & Co. v. Bushnell, 80 Conn. 233, 67 Atl. 479 (1907).

111. Under CONN. GEN. STAT. (1930) § 5763.

112. It is not necessary that a judgment should have been rendered when a creditor's bill is brought. Huntington v. Jones, 72 Conn. 45, 43 Atl. 564 (1899).

113. Coyne v. Plume, 90 Conn. 293, 97 Atl. 337 (1916).

114. Such trusts are void as against the existing or subsequent creditors of the settlor. N. Y. PERS. PROP. LAW § 34. After the settlor's death, creditors may resort to the trust corpus to the extent that the general estate is insufficient to pay their claims. City Bank Farmers Trust Co. v. Miller, 163 Misc. 459, 297 N. Y. Supp. 88 (Sup. Ct. 1938), *rev'd on another ground*, 278 N. Y. 134, 15 N. E. (2d) 553 (1938).

115. N. Y. CIV. PRAC. ACT § 1189. It is also possible for the creditor to levy on the corpus through a third party order under N. Y. CIV. PRAC. ACT § 796. Liberty Storage & Warehouse Co. v. VanWyck, 165 Misc. 890, 1 N. Y. S. (2d) 149 (N. Y. City Ct. 1938) (settlor reserved the power of appointment by will. See N. Y. REAL PROP. LAW § 152).

116. The income of a spendthrift trust founded for the settlor's own benefit is not exempt from creditors' claims. Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967 (1898).

117. Dillon v. Spilo, 250 App. Div. 543, 294 N. Y. Supp. 876 (1st Dep't 1937), *aff'd*, 275 N. Y. 275, 9 N. E. (2d) 864 (1937).

has been utilized most in upsetting trusts contrived to defraud creditors, proof of the debtor's purpose is unnecessary. Creditors of beneficiaries whose trusts have been set up by third parties, however, must look elsewhere for their recovery, since such trusts are expressly exempt from levy.[118]

Where a trust has been conceived for the benefit of someone other than the settlor,[119] the beneficiary's creditor may choose either of two paths of recoupment—a garnishment execution[120] or a judgment creditor's bill in equity.[121] While these two approaches are not coterminous, they are concurrent, enabling the creditor to resort to the one from which he may most adequately attain reparation.[122] Section 684 authorizes garnishment only when the funds are "due and owing" or to "become due and owing" to the debtor. The income of a discretionary trust has been held to fall within this requirement, since the award necessarily precedes the actual delivery of the income to the beneficiary. Throughout this interval, however brief, the money is "due and owing" to the debtor and therefore, may be levied upon by a garnishment execution.[123]

Although the statutory provision for a creditor's bill mentions only revenue from real estate, it is equally applicable to all types of trust income.[124] Like garnishment, this recovery is limited in amount.[125] Instead of a restriction to ten per cent of the receipts, the equity action is confined to the surplus income beyond the sum necessary for the education and support of the beneficiary in accordance with his station in life, previous education and habits, and means of support. Equity will not dismiss this proceeding merely because there is a remedy at law under Section 684, since garnishment is inadequate where its execution will require a lengthy period for the complete

118. N. Y. Civ. Prac. Act § 1196.

119. All such trusts have "spendthrift" characteristics. See N. Y. Pers. Prop. Law § 15 and N. Y. Real Prop. Law § 103. Where the settlor has reserved the power of revocation "he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned." N. Y. Real Prop. Law § 145. This section applies to personalty as well. Syracuse Trust Co. v. Fuller, 140 Misc. 918, 252 N. Y. Supp. 90 (Sup. Ct. 1930).

120. N. Y. Civ. Prac. Act § 684.

121. N. Y. Real Prop. Law § 98.

122. Heppenstall v. Bandouine, 73 Misc. 118, 132 N. Y. Supp. 511 (1st Dep't 1911). For a general treatment of creditors' rights in trust income, see Griswold, Spendthrift Trusts (1936) §§ 331–393.

123. Hamilton v. Drogo, 241 N. Y. 401, 150 N. E. 496 (1926), (1926) 26 Col. L. Rev. 776.

124. Jenks v. Title Guarantee & Trust Co., 170 App. Div. 830, 156 N. Y. Supp. 478 (1st Dep't 1915); Spellman v. Sullivan, 43 F. (2d) 762 (S. D. N. Y. 1930). And is available for the satisfaction of back alimony. Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169 (1896).

125. But the Federal Government may satisfy an income tax lien against trust income without regard for N. Y. Civ. Prac. Act § 684 or N. Y. Real Prop. Law § 98. *In re* Rosenberg's Will, 269 N. Y. 247, 199 N. E. 206 (1935), (1935) 44 Yale L. J. 1116, (1935) 48 Harv. L. Rev. 1441.

satisfaction of the judgment.[126] The drawback to a creditor's bill is that it places upon the creditor the burden of alleging and proving that a surplus exists.[127] The creditor will probably ignore this device unless either the trust income has been previously garnished or so huge a surplus exists that the benefits he will derive from the prompter discharge of his judgment will outweigh the detriments involved.

While the words of the trust instrument are important to determine the settlor's intent, they do not affect the creditor's relief. Since the grantor could not exempt his property during his lifetime, it is fruitless for him to make his bequest in such terms as "nor shall any creditor or other person have the right or power to subject the income to legal or equitable process."[128] Equally futile are settlors' attempts to thwart possible future creditors of the beneficiary by providing that the income shall be *applied for the use* of the beneficiary. No distinction is drawn between this trust and one in which the income is to be paid directly to the cestui.[129] Where the beneficiaries are alternative or joint, the creditor of one may levy only upon the portion of the receipts which is appropriated for the debtor. If the alternative or joint cestuis are the debtor and/or his dependents, however, the rights of the creditor are the same as if the trust were completely for the benefit of the debtor. Nothing has been added by the express provision, since the beneficiary's dependents could have demanded a share of the income even though the terms of the bequest made no direction for their support.[130]

Ordinarily when the creditor finds that another more vigilant associate has already subjected income to garnishment, he seeks an installment order. But he may not procure such a decree against a trust beneficiary. Section 792, which exempts from supplementary proceedings "the seizure of, or other interference with, any property . . . held in trust for a judgment debtor, where the trust has been created by . . . a person other than the judgment debtor," was held in *Kaplan v. Peyser*[131] to apply to trust income even after payment. Although this decision was unanimous, logical consistency might have forced the court to regard trust receipts as no different from other income; that an installment order to debtors to be paid from trust revenue is no more an interference with the trust than an installment order to a federal employee to be paid from earnings is an interference with a federal instrumentality. Apparently, the potential unfairness of installment orders

126. Heppenstall v. Bandouine, 73 Misc. 118, 132 N. Y. Supp. 511 (1st Dep't 1911).

127. Keeney v. Morse, 71 App. Div. 104, 75 N. Y. Supp. 728 (1st Dep't 1902); Rowe v. Farmers' Loan & Trust Co., 132 Misc. 651, 230 N. Y. Supp. 382 (Sup. Ct. 1928).

128. Sand v. Beach, 270 N. Y. 281, 200 N. E. 821 (1936).

129. *Ibid.*

130. See Sand v. Beach, 270 N. Y. 281, 285, 200 N. E. 821, 823 (1936); RESTATEMENT, TRUSTS (1935) § 157.

131. 273 N. Y. 147, 7 N. E. (2d) 21 (1937), *rev'g*, 247 App. Div. 660, 288 N. Y. Supp. 651 (2d Dep't 1936). But some lower courts had previously adhered to this doctrine. Barlow v. Beach, N. Y. L. J., Nov. 20, 1935, p. 1958, col. 2 (N. Y. City Ct.); Avon Park Realty Corp. v. Matthew, N. Y. L. J., Feb. 5, 1936, p. 655, col. 4 (Sup. Ct.).

when utilized against trust income motivated the distinction. The ex parte nature of supplementary proceedings provides adequate protection to wage earning debtors, since it is relatively easy for the court to determine his actual wage or a reasonable value thereof; it is wholly inappropriate, however, for ascertaining the yield of an involved and uncertain trust. This protection is afforded both by garnishment where a definite percentage of the trust income, regardless of amount, may be levied upon, and by an equity creditor's suit, where the trustee must be a party. In the latter process, the presence of the trustee, who has accurate knowledge of the character and potential income of the trust, shields the debtor from any injustice which may be perpetrated by an excessive levy. The court in *Kaplan v. Peyser* therefore implied that a creditor's levy must be restricted to these two more equitable devices.[132]

Having acquired the desired process, whether a garnishment execution, installment order, or a third party order, the creditor is not assured of automatic payment. Recipients, recalcitrant to the court's order or acting in outright disobedience, may further impede the creditor's collection. As previously indicated, the Connecticut creditor may be forced to sue the garnishee on a scire facias.[133] In New York, however, if the garnishee fails to acknowledge the garnishment, the creditor's only recourse is to wait until a substantial sum has accumulated under the execution and then sue the garnishee for that aggregate. All that may be exacted in this litigation is the amount that the garnishee should have paid between the institution of garnishment and the commencement of the present action.[134] Should the nonpaying garnishee become a bankrupt before the creditor's collection suit, the garnisher, having no preferred claim against the garnishee, would occupy the same position as any other creditor, sharing pro rata in the bankrupt's assets. Another risk which the creditor must assume is the possibility of the debtor's going into bankruptcy before the garnishment has been satisfied. Although the mere adjudication of bankruptcy operates as neither a discharge nor an automatic halt to the garnishment,[135] the debtor may secure a stay-order coincident to the filing of his petition. Pending discharge, the garnishee continues making the required deductions from salary.[136] The fund which

132. *Cf. In re* Ungrich, 201 N. Y. 415, 94 N. E. 999 (1911); Judis v. Martin, 218 App. Div. 402, 218 N. Y. Supp. 423 (1st Dep't 1926), *appeal dismissed*, 244 N. Y. 605, 155 N. E. 916 (1927).

133. See note 85, *supra*.

134. Decorative Furniture Frame Corp. v. Strand Art Period Furniture Co., Inc., 144 Misc. 1, 257 N. Y. Supp. 631 (Munic. Ct. 1932). The creditor may not enforce execution by court orders or contempt. Kahn v. Coles, 115 N. Y. Supp. 885 (Sup. Ct. 1909); Keve v. Columbia Kid Hair Curlers Mfg. Co., 161 App. Div. 918, 145 N. Y. Supp. 1072 (1st Dep't 1914).

135. *Cf. In re* Loftus, 16 F. Supp. 711 (W. D. N. Y. 1936).

136. *In re* Van Buren, 164 Fed. 883 (S. D. N. Y. 1908); *In re* Beck, 238 Fed. 653 (S. D. N. Y. 1915); *cf. In re* Brecher, 19 F. Supp. 283 (S. D. N. Y. 1937) (suggestion that the state court should similarly modify a bankrupt's installment order).

thus accumulates passes to either the debtor or creditor depending on whether a discharge is granted or denied. A discharge frees the bankrupt's earnings from all garnishment payments subsequent to the date of bankruptcy adjudication, even though the state court does not modify its order accordingly.[137]

The enforcement of third party and installment orders lies not in further suit, but in the summary process of contempt.[138] The debtor may purge himself of his contempt by paying a fine whose size is limited to the creditor's actual loss—the default at the time of the hearing.[139] As in all contempts, the failure to meet the fine subjects the debtor to imprisonment, which is not a violation of the prohibition against imprisonment for debt.[140]

Although the bankruptcy of the debtor does not seriously affect the creditor who has procured a third party order,[141] it may defeat the collection of an installment order.[142] The discharge from bankruptcy also discharges the debtor's obligation to complete installment payments subsequent to the federal court's stay-order.[143] While previous judgments may be discharged in bankruptcy, a contempt may not.[144] Even after the discharge, therefore, the state court may fine the debtor for contempt for failure to make installment payments which were due prior to the institution of bankruptcy.[145] While ordinary debtors may avoid future garnishment or installment payments by going into voluntary bankruptcy, a trust beneficiary is not so fortunate.

137. Brenen v. Dahlstrom Metallic Door Co., 189 App. Div. 685, 178 N. Y. Supp. 846 (1st Dep't 1919); Weinstein v. Strubble, 142 Misc. 575, 255 N. Y. Supp. 354 (Munic. Ct. 1932).

138. N. Y. Civ. Prac. Act § 801.

139. Williamson v. Drogaris, 248 App. Div. 627, 288 N. Y. Supp. 179 (2d Dep't 1936); Barnard v. Barnard, 251 App. Div. 745, 296 N. Y. Supp. 155 (2d Dep't 1937).

140. Reeves v. Crownshield, 274 N. Y. 74, 8 N. E. (2d) 283 (1937), (1937) 37 Col. L. Rev. 1216, (1938) 5 U. of Chi. L. Rev. 305, (1938) 22 Minn. L. Rev. 424.

141. Where the debtor becomes bankrupt subsequent to service upon a third party for appearance in supplementary proceedings, but prior to the issuance of an order, the creditor acquires no lien superior to the rights of the bankruptcy trustee. *In re* Neptune Avenue, 165 Misc. 309, 299 N. Y. Supp. 736 (Sup. Ct. 1937).

142. 52 Stat. 875, 11 U. S. C. A. § 107 (Supp. 1938) discharges all liens arising within four months prior to the time of filing a petition in bankruptcy. But by N. Y. Civ. Prac. Act §§ 807, 808 the title of a supplementary proceeding receiver relates back to the institution of the proceeding. It is possible, therefore, for the creditor to obtain a preference by commencing supplementary proceedings with the service of a subpoena under N. Y. Civ. Prac. Act § 774 and then waiting four months before taking the next step—the appointment of a receiver. This technique of perfecting a "secret" lien was successful in *In re* Unity Cleaners & Dyers, 24 F. Supp. 562 (S. D. N. Y. 1938).

143. S. S. & B. Live Poultry Corp. v. Fleischer, 165 Misc. 175, 300 N. Y. Supp. 617 (N. Y. City Ct. 1937).

144. *In re* Koronsky, 170 Fed. 719 (C. C. A. 2d, 1909); *In re* Thomashefsky, 51 F. (2d) 1040 (C. C. A. 2d, 1931).

145. *In re* Morris Plan Co., 164 Misc. 712, 299 N. Y. Supp. 475 (N. Y. City Ct. 1937); Rosevine Realty Corp. v. Stich, 164 Misc. 339, 298 N. Y. Supp. 758 (N. Y. City Ct. 1937), (1938) 51 Harv. L. Rev. 547.

Cestui que trust debtors who sought bankruptcy to evade creditors have found, much to their dismay, that future attachable trust income is an asset to be weighed in determining insolvency.[146] When they have been declared bankrupt, their trust income, as a product of an asset in existence at the date of adjudication, is unaffected. Even after discharge, therefore, their trustee in bankruptcy, who has all the rights of a judgment creditor,[147] may levy upon their trusts receipts to pay off creditors.[148] Thus, while creditors of a trust beneficiary may be handicapped because installment orders are denied to them, they are, in result, compensated through their ability to enforce payment even after the debtor's bankruptcy, when they can no longer obtain a judgment.

From this survey it seems justifiable to conclude that the New York provisions for garnishment and supplemental proceedings, despite their complexity, result in a system of creditor relief superior to that in Connecticut. Relief is available in New York in some situations in which it is lacking in Connecticut; and even in situations which are provided for in Connecticut, the greater complexity of the New York provisions, though raising problems in the application of the statutes, leads to more comprehensive and flexible creditor relief than that given by the Connecticut law, since debtors exempt under one provision may often be caught by another. Moreover, this flexibility does not lead to any real injustice to the debtor. Even when deprived of exemption, he is provided with adequate protection by the very nature of the levies, which preserve to him a fair proportion of his income, according either to a fixed percentage or to his reasonable needs. Further, considering the comparative scarcity of higher court precedents, the decisions show a remarkable lack of conflict in working out the relation of the different remedies. The courts have done much to dispel the confusion originally resulting from the complexity of the statutory provisions; and have woven the complementary sections into a pattern which supplies to the allied problems of creditor relief and debtor protection a solution which seems at once more complete and more equitable than that afforded by the more rigid Connecticut system.

146. Syracuse Engineering Co., Inc. v. Haight, 97 F. (2d) 573 (C. C. A. 2d, 1938). Sums accumulating under a garnishment based on a collusive judgment have been held an asset in bankruptcy. *In re* Adler, 79 F. (2d) 840 (C. C. A. 2d, 1935).

147. 52 STAT. 879, 11 U. S. C. A. § 110c (Supp. 1938), formerly 30 STAT. 557 (1898), as amended by 32 STAT. 799 (1903) and 36 STAT. 840 (1910), 11 U. S. C. § 75a(2) (1934).

148. The trustee may levy against trust income under N. Y. CIV. PRAC. ACT § 684. *In re* Irving Trust Co., 267 N. Y. 102, 195 N. E. 811 (1935); *In re* Poskanzer, 101 Misc. 100, 166 N. Y. Supp. 811 (Sup. Ct. 1917), *aff'd*, 181 App. Div. 915, 167 N. Y. Supp. 1122 (3d Dep't 1917). Or he may reach the surplus income under N. Y. REAL PROP. LAW § 98. *In re* Morris, 204 Fed. 770 (C. C. A. 2d, 1913); Jenks v. Title Guarantee & Trust Co., 170 App. Div. 830, 156 N. Y. Supp. 478 (1st Dep't 1915).