

GARNISHMENT OF ALIMONY

In a day of such widespread and extensive alimony decrees, it is abnormal that there are not more authorities upon the questions raised by an attempt on the part of the wife's creditors to garnish future alimony installments. The law is indeed meagre on this subject and such cases as are available seem to be in hopeless conflict. Upon analysis, however, it may be that some guiding principles underlie the apparently paradoxical decisions. Two possible situations, in general, may be presented. First, after a decree for future installments, creditors of the wife may seek to attach the same by garnishment and thus subject the payments to the satisfaction of their claims, whether the installments be payable directly from the husband to the wife, or payable to a trustee, to be paid over to the wife at regular intervals; second, the court issuing the alimony decree, either originally or by supplementary decree, may attempt to prevent assignment or garnishment by a provision against alienation until the money is actually paid over to the wife. These two situations, with the legal problems involved, will be discussed separately.

I.

The general question whether or not alimony is subject to garnishment proceedings will depend in part upon the garnishment statute. Where, as in most states, including Iowa, the statute provides that "property of the defendant in the possession of another, or debts due the defendant may be garnished," alimony decrees for future installments must be brought within the meaning of either "property" or "debts".¹

As to whether alimony may be regarded as a "debt," the attitudes of the courts are interesting, if diversified. In some jurisdictions an action for debt will lie to enforce arrears in alimony on the ground that the alimony decree created a valid and existing

¹ Iowa Code 1924, c. 510, §12101. But see *Malone v. Moore*, 215 N. W. 625 (Iowa, 1927).

While the recent decision in *Malone v. Moore*, *supra*, has started a course of decision in this state which seems to run counter to certain conclusions of this article, it is presented here as a timely study of certain features of an interesting subject.—*Editor*.

debt.² In other jurisdictions, however, this has been denied.³ It has been uniformly denied that alimony is such a debt as to be provable in bankruptcy,⁴ but this may merely reiterate that all debts are not provable in bankruptcy; it is not of much help in determining whether or not alimony is, properly speaking, a debt. Some courts, taking the position that alimony is not to be regarded as a debt, rest the contention upon the ground that, from its very purpose and nature, it represents an equitable distribution of the property of the husband, in which the wife had an interest, and that it was awarded as her apportionment thereof.⁵

On the other hand, courts have frequently spoken of a decree for alimony as creating a valid and subsisting debt.⁶ Thus it represents such a "debt of record" in the wife's favor as to enable her to impeach a conveyance by the husband in fraud of creditors.⁷ It is said that alimony is such a vested right, after a valid decree, that conveyances by the husband in fraud of creditors might be attacked and set aside by the wife in the same manner and to the same extent as by any other creditor.⁸ In *Thayer v. Thayer*, where the plaintiff's wife sought to have the alimony decree put in such form that execution could issue thereon under the New York statute, the court said that "there is no doubt that this amount is due to plaintiff, and that it is in the nature of a judgment debt, for

² *Lancaster v. Lancaster*, 29 Ill. App. 510 (1888); *Stratton v. Stratton*, 77 Me. 373 (1885); *Wagner v. Wagner*, 26 R. I. 27, 57 Atl. 1058 (1904).

³ *Allen v. Allen*, 100 Mass. 373 (1868). *Contra*, *Howard v. Howard*, 15 Mass. 196 (1818).

⁴ *Wetmore v. Markoe*, 196 U. S. 68, 25 Sup. Ct. 172 (1904); *Welty v. Welty*, 195 Ill. 335, 63 N. E. 161 (1902); *Lemert v. Lemert*, 72 Ohio St. 364, 74 N. E. 194 (1905). *Contra*, as to decree not subject to modification, *Arrington v. Arrington*, 131 N. C. 143, 42 S. E. 554 (1902).

⁵ See *Schooley v. Schooley*, dissenting opinion of Salinger, J., 184 Iowa 835, 169 N. W. 56 (1917).

⁶ *Conrad v. Everich*, 50 Ohio St. 476, 35 N. E. 58 (1893); *Picket v. Garrison*, 76 Iowa 347, 41 N. W. 38 (1888); *Walker v. Walker*, 127 Iowa 77, 102 N. W. 435 (1905); *Chase v. Chase*, 105 Mass. 385 (1870); *Thayer v. Thayer*, 145 App. Div. 268, 129 N. Y. Supp. 1035 (1911); *Schooley v. Schooley*, *supra* n. 5; *Keyser v. Keyser*, 193 Iowa 16, 186 N. W. 438 (1922); *Burroughs v. Purple*, 107 Mass. 428 (1871); *Preston v. Williams*, 81 Ill. 176 (1876); *Linton v. Linton*, 54 L. J. Q. B. 529, 15 Q. B. D. 239 (1885).

⁷ *Chase v. Chase*, *supra* n. 6.

⁸ *Walker v. Walker*, *supra* n. 6.

it is a sum which the court has directed defendant to pay.”⁹ The court thereupon declared that an order to docket the decree “did not amount to a new judgment against him (defendant).”

One decision favoring the view that alimony at least for some purposes is to be considered a debt, comes from the Iowa court.¹⁰ Under a statute exempting a head of a family from garnishment for “debt,” it was held that “debt” included a judgment for alimony, and that the defendant, who had subsequently married again, was entitled to such exemption. It required a legislative enactment to avoid the result of this decision.¹¹ There seems to be required some very careful distinction to enable the Iowa court to demonstrate that alimony does not constitute a debt within the meaning of the garnishment statute, when it has been declared to be such within the exemption statute. By the use of the term “debt” in the two statutes, the Iowa legislature may well have intended in the garnishment enactment the very thing which the supreme court declared that it meant in the exemption statute, since subsequent amendment has been confined to the latter.

The court in the Schooley Case, quoting with approval from *Whitcomb v. Whitcomb*,¹² where the wife attempted to enforce a judgment for alimony against the husband’s homestead, said:

“The judgment is but a debt, and the plaintiff is not entitled to precedence, or greater rights than would be the holder of any other judgment.”¹³

Again, the court in the same case declared:

“One against whom a judgment for the payment of money is rendered is universally known and spoken of as a ‘judgment debtor,’ and the claim against him is recognized as a ‘judgment debt.’ It is, to use the language of the cases already cited, a ‘debt of record,’ or, as called by some, a ‘judicial debt of record.’ It is a debt—a binding obligation to pay a stated sum of money, fixed by judicial determination.”¹⁴

In England upon the authority of *Hewitson v. Sherwin*,¹⁵ wherein it was held that an order of a court of chancery for the payment

⁹ 145 App. Div. 268, 269, 129 N. Y. Supp. 1035, 1036 (1911).

¹⁰ *Schooley v. Schooley*, *supra* n. 5.

¹¹ Iowa Code 1924, §11764.

¹² 52 Iowa 715, 2 N. W. 1000 (1880).

¹³ *Supra* n. 5 at 839, 169 N. W. at 57.

¹⁴ *Ibid.* at 840, 169 N. W. at 58.

¹⁵ L. R. 10 Eq. 53 (1870).

of money constituted a debt, it has been held that payments in arrears of alimony were enforceable against the husband under the Debtors Act of 1869,¹⁶ although the court was not content to call such an obligation a "debt".¹⁷ American courts, in some jurisdictions, have adopted a similar position.¹⁸

Perhaps the best instances of treatment of alimony decrees as debts, are to be found in the cases which hold a decree for alimony within the protection of the "full faith and credit" clause of the Federal Constitution.¹⁹ In *Sistare v. Sistare*, White, C. J., declared:

"Where a decree is rendered for alimony and is made payable in future installments the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments; since, as declared in the *Barber case* 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.'"²⁰

It has also been made clear that the fact that a decree for alimony is subject to modification and alteration from time to time, does not deprive it of the quality and characteristics of a debt of record which will be enforced in the courts of another state.²¹ It is a final judgment nevertheless. So universally established is this principle in the conflict of laws that in the absence of a full faith and credit clause, it has been held that an English decree for ali-

¹⁶ *Linton v. Linton*, *supra* n. 6.

¹⁷ See 2 Bishop, *Marriage and Divorce* (1891), §837, citing *Linton v. Linton* to substantiate a statement in the text that alimony "is not a debt."

¹⁸ *Cf. Daniels v. Lindley*, 44 Iowa 567 (1876).

¹⁹ *Barber v. Barber*, 21 How. 582 (U. S. 1858); *Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682 (1910); *De Rousse v. Williams*, 181 Iowa 379, 164 N. W. 896 (1917); *Schuler v. Schuler*, 209 Ill. 522, 71 N. E. 16 (1904); *Rogers v. Rogers*, 46 Ind. App. 506, 89 N. E. 901 (1909); *Lape v. Miller*, 203 Ky. 742, 263 S. W. 22 (1924); *Patton v. Patton*, 67 Misc. 404, 123 N. Y. Supp. 329 (N. Y. 1910); *Tehsman v. Tehsman*, 93 N. J. Eq. 76, 114 Atl. 320 (1920); *Van Horn v. Van Horn*, 196 App. Div. 472, 188 N. Y. Supp. 98 (1921).

²⁰ 218 U. S. 1, 16, 30 Sup. Ct. 682, 686 (1910).

²¹ *Holton v. Holton*, 153 Minn. 346, 190 N. W. 542 (1922); *Werner v. Pelletier*, 148 App. Div. 137, 131 N. Y. Supp. 1010 (N. Y. 1911); *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125 (1900).

mony will be enforced in Ireland where the wife sued there for payments in arrears.²²

It is thus seen that the mere fact that the alimony decree is subject to modification is not sufficient to deprive it of the attributes of a debt within the theory of the conflict of laws. The further objection might be raised that, at any rate, until future installments have matured, there is no valid and subsisting debt to be garnished. If this objection be not answered by the cases cited above, it might be argued that it is disposed of under the type of statute which provides that a "debt not yet due" may be garnished.²³ If, as the Supreme Court of the United States has declared, a judgment for alimony is, until recalled, "as much a debt of record as any other judgment for money," and "debts not yet due" are subject to garnishment, there is apparently no reason why future installments for alimony could not be held subject to garnishment.

It is not necessary, under such a statute, that a debt be payable or that the amount even be ascertained at the time of garnishment.²⁴ In the Ottumwa Bank Case, it was pointed out that the most that could be conceded to defendants and garnishees under such circumstances, was a continuance until the amount of the indebtedness was ascertained, which would not be necessary in garnishing alimony. In the Rankin Case, it was not even certain that any sum would be due and owing. The interest of the principal defendant, though contingent, was nevertheless subject to garnishment.

Apparently there is some ground for regarding a decree for alimony as creating a "debt," so that it can be brought within the provisions of the garnishment statute. But it is submitted that there is not, or should not be, any magic in the word "debt". Garnishment might well be allowed or denied on other considerations than the mere fastening of the term "debt" upon the obligation owed by the husband to the wife after an alimony decree. The conception represented by the expression "debt" is a variable one, and it, like all legal ideas, is subject to evolution, either re-

²² Nunn v. Nunn, 8 L. R. Ir. 298 (1880).

²³ See Iowa Code 1924, c. 510, §12086. But see *Malone v. Moore*, *supra* n. 1.

²⁴ Rankin v. Smith, 174 Iowa 537, 156 N. W. 756 (1916); Ottumwa Nat. Bank v. Norfolk, 185 Iowa 1334, 172 N. W. 3 (1919).

strictive or expansive. A "debt" in the Roman law certainly had a wider meaning than we attribute to it today. It applied to a varied class of obligations in all of which the obligee was called the debtor or *debitor*.²⁵ Courts should look at the situation and relationships actually created rather than at the name applied to the same.²⁶

A decree for alimony creates a valid claim in favor of one person against another, enforceable in the courts, not only of the state where ordered, but also of sister states and foreign countries as well. It can be satisfied out of the property of the judgment obligee or it may be enforced by contempt proceedings. If a word descriptive of this situation be needed, what better word can be employed than the word "debt"? But whether called, technically, a debt or not, there is reason to hold that it should be subject to all the processes which the law provides for creditors to reach such rights as are advantageous to the principal debtor.

To further indicate the nature of the rights created by a decree for alimony, and the possibilities of subjecting them to garnishment, it must be remembered that there is never any doubt as to the garnishment of a money judgment by a court of law.²⁷ Especially is this free from doubt where, as in Iowa, statutory provisions specifically include judgment debts.²⁸ It has been held that judgment debts of one state cannot be garnished in another,²⁹ and that judgment debts rendered in one county cannot be garnished in another county of the same state.³⁰ The latter qualification, however, does not represent the prevalent holdings on this point, and most certainly is not true in Iowa.³¹

If money judgments of courts of law are generally subject to garnishment, the same might well follow as to money decrees of courts of equity. At one time it was contended that the chancellor's decree could act only *in personam*, that it could not have the

²⁵ See Sohm, *Institutes* (3d ed., 1907) 358.

²⁶ Roscoe Pound, "Mechanical Jurisprudence," 8 Col. L. Rev. 605.

²⁷ *Ochiltree v. Missouri, I. & N. Ry. Co.*, 49 Iowa 150 (1878).

²⁸ Iowa Code 1924, c. 513, §12158.

²⁹ *Wabash R. R. v. Tourville*, 179 U. S. 322, 21 Sup. Ct. 113 (1900).

³⁰ *McNish v. Burch*, 49 S. D. 215, 207 N. W. 85 (1926); *Scott v. Rohman*, 43 Neb. 618, 62 N. W. 46 (1895).

³¹ *Elson v. Chicago, R. I. & P. R. Co.*, 154 Iowa 96, 134 N. W. 547 (1912). See also *Bumgardner v. Halverstadt*, 115 Kan. 124, 222 Pac. 762 (1924).

same effect as the judgment of a court of law, that it could create no strict "legal" rights, and that it therefore could not create a "debt of record."³² To deny, however, that this notion has long been abandoned is to forget the growth of the powers and effects of decrees of courts of equity for a hundred years. The doctrine of *res adjudicata* applies as fully to chancery decrees as to judgments at law,³³ and "legal rights" are created as validly by courts of equity as by any other tribunal. It was early decided that an equity decree for the payment of money could not be made the ground for a cause of action at law,³⁴ but the principle was soon abandoned and a decree of a colonial court of equity was held to be grounds for a recovery in an action at law in England.³⁵ Professor Cook has pointed out that since *Post v. Neafie*,³⁶ which was a similar holding in America, the line of authorities permitting an action at law on a foreign decree for the payment of money has been unbroken.³⁷ Numerous other instances could be given where decrees of equity courts are accorded the same effect as judgments at law.³⁸ It would seem to follow, then, that decrees of courts of equity for the payment of money might well be held subject to garnishment, and this view has some support.³⁹ An alimony decree being a money decree of a court of equity, at least the door of logic is open to admit of a similar result.

But if alimony is not within the statutory provisions subjecting "debts" to garnishment, apparently there may be reason to subject it to garnishment as property "in the possession of another." The rights that accrue to a wife by virtue of a decree for alimony

³² See Langdell, *Summary of Equity Pleading* (2d ed.) 35, n. 4.

³³ *Pennington v. Gibson*, 16 How. 65 (U. S. 1853). See Black, *Judgments* (2d ed.) 517; see also 2 Freeman, *Judgments* (5th ed.) 1354.

³⁴ *Carpenter v. Thornton*, 3 B. & Ald. 52 (1819).

³⁵ *Henley v. Soper*, 8 B. & C. 16 (1828).

³⁶ 3 Caines 22 (N. Y. 1805).

³⁷ See Walter Wheeler Cook, "Powers of Courts of Equity," 15 Col. L. Rev. 228, 241. See also Wesley N. Hohfeld, "The Relations Between Equity and Law," 11 Mich. L. Rev. 537, 568.

³⁸ *Thrall v. Waller*, 13 Vt. 231 (1841); *Howard v. Howard*, *supra* n. 3; *De Rousse v. Williams*, *supra* n. 19; *O'Hagan v. O'Hagan*, 4 Iowa 509 (1857); *Patton v. Patton*, 67 Misc. 404, 123 N. Y. Supp. 329 (N. Y. 1910). See also Cook, *op. cit.*, at 242-243.

³⁹ *Fifthian v. New York & E. R. Co.*, 31 Pa. St. 114 (1857).

have been generally defined and regarded as "property rights."⁴⁰ The wife has an interest created and protected by the law in the property of the husband. She is further entitled to support from him. The decree for alimony is but a recognition of that interest, or perhaps a substitution of one kind of property interest for another.⁴¹

One of the strongest reasons urged by Salinger, J., dissenting in *Schooley v. Schooley*,⁴² that alimony was not a "debt," was because it should be regarded as a sequestration and division of the property, made on a consideration of the circumstances of the family, citing *Daniels v. Morris*⁴³ in confirmation of his views. Permanent alimony has been said to be a portion of the husband's estate to which the wife is equitably entitled, and alimony periodically paid may be regarded as a portion of his current income or earnings.⁴⁴ The court being authorized to decree to the wife so much of the estate of the husband as it thinks just, or, as in Iowa, as it deems "right,"⁴⁵ it may decree such money sum in lieu thereof as it deems proper, and make the same payable at once or in installments. It is but an assignment of property, under this view. It is vested by the court and appropriated to the wife, and is equivalent to a decree of specific performance.⁴⁶

A decree for installments for life has been held such property interest that it is enforceable against the husband's estate after his death,⁴⁷ and it has been said that such a decree "has the same force and validity as any other judgment, and may be collected in the

⁴⁰ *Van Ness v. Ransom*, 215 N. Y. 557, 109 N. E. 593 (1915); *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123 (1903); *Barber v. Barber*, *supra* n. 19.

⁴¹ *Livingston v. Livingston*, *supra* n. 40; *Mahoney v. Mahoney*, 59 Minn. 347, 61 N. W. 334 (1894).

⁴² *Supra* n. 5.

⁴³ 54 Iowa 369, 6 N. W. 532 (1880).

⁴⁴ *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. 735 (1901).

⁴⁵ Code 1924, §10481.

⁴⁶ *Lyon v. Lyon*, 21 Conn. 135 (1851); *State v. Cook*, 66 Ohio St. 566, 64 N. E. 567 (1902).

⁴⁷ *O'Hagan v. O'Hagan*, *supra* n. 38; *Martin v. Thison's Estate*, 153 Mich. 516, 116 N. W. 1013 (1908); *Gilbert v. Hayward*, 37 R. I. 303, 92 Atl. 625 (1914); *McIlroy v. McIlroy*, 208 Mass. 458, 94 N. E. 696 (1911); *In re Stillwell*, [1916] 1 Ch. 365.

same manner."⁴⁸ In *Livingston v. Livingston*, it was declared that after adjudication, the fruits of an alimony decree constitute rights of property which become vested by the action of the court. They were rights which could not be destroyed by the legislature and were protected by the "due process" clause of the Constitution. The court said:

"The plaintiff, prior to the decree, had a right of support; by her divorce, she lost that right and, in substitution for it, acquired a new right, a judgment requiring the payment to her of a specific sum of money.' That right, as a vested interest, is property which the legislature is powerless to divest her of. If the interest is, as it is claimed, an expectant one, in the sense that the obligation of the defendant was a continuing one to pay alimony in the future, nevertheless, the interest was one fixed by the judgment and was not a mere contingency."⁴⁹

In the light of these theoretical possibilities, it may be well to look at the few cases which have undertaken the specific problem. A few cases have allowed attachment of alimony payments either by garnishment or by a bill in equity.⁵⁰ Still other cases, also few in number, have denied that such payments can be reached.⁵¹ In *Scheffer v. Boy*,⁵² the court could see no reason why alimony could not be garnished, since it must be regarded as of the nature of a debt of record and thus clearly within the statute. *Kelso v. Lovejoy*⁵³ is another authority for the proposition that a sum of money decreed to be paid to a divorced wife by a husband, is a fund belonging to the wife applicable to the payment of her debts, and consequently may be reached in the hands of the husband before

⁴⁸ O'Hagan v. O'Hagan, *supra* n. 38 at 516 (1857).

⁴⁹ *Supra* n. 40 at 383, 66 N. E. at 125.

⁵⁰ Kenge v. Delavall, 1 Vern. 326 (1685); Lillia v. Airey, 1 Ves. Jr. 277 (1791); *Ex parte Bremner*, L. R. 1 P. & D. 254 (1866); Scheffer v. Boy, 5 Pa. Cty. Ct. 158 (1888); Stevenson v. Stevenson, 34 Hun 157 (N. Y. 1884); Kelso v. Lovejoy, 29 Ohio Cir. Ct. 597 (1905), *aff.* in *Lovejoy v. Kelso*, 76 Ohio St. 598, 81 N. E. 1189 (1907).

⁵¹ Fickel v. Granger, 83 Ohio St. 101, 93 N. E. 527 (1910); Kingman v. Carter, 8 Kan. App. 46, 54 Pac. 13 (1898); Andrews v. Whitney, 82 Hun 117, 31 N. Y. Supp. 164 (1894); Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826 (1892); Van Valkenburgh v. Bishop, 164 N. Y. Supp. 86 (App. T. 1917); Wright v. Wright, 93 Conn. 296, 105 Atl. 684 (1919); West v. Washburn, 153 App. Div. 460, 138 N. Y. Supp. 230 (1912).

⁵² *Supra* n. 50.

⁵³ *Ibid.*

being paid over by him, through attachment by garnishment. In *Stevenson v. Stevenson*, a similar holding, the court explained:

“At common law (since the statute of 13 Edward I, permitting lands to be taken on execution) all of a debtor’s property, except necessary wearing apparel, might be taken to pay the claims of creditors. So might all rights of action arising from contract, and also judgments recovered for the wrongs of others.

“The exceptions to this general rule exist solely by virtue of the statutes of exemptions, and no statute has been cited exempting alimony or the separate maintenance of a married woman.”⁵⁴

But the cases denying garnishment do not purport to establish the principle that such can never be maintained. Rather, they impose certain limits to the right to garnish. Some distinctions may be deduced from the facts involved in such holdings. Thus in *Fickel v. Granger*,⁵⁵ it appeared that the debt for which it was sought to appropriate the alimony had been contracted *before* the decree for alimony had been rendered. Examination discloses that this was the situation in *Kingman v. Carter*,⁵⁶ and in *Andrews v. Whitney*.⁵⁷ Indeed in the latter case an attempt was made to ante-date the alimony decree in respect to the debt owed the garnishor, by showing that an agreement had been made between the husband and the wife as to the amount of alimony before the divorce and before the principal debt had been contracted. Hence the decree for alimony was but a continuance of this prior agreement. The argument was so patently fictitious that it was promptly rejected, but the circumstance that the point was explained in the opinion indicates that it was regarded as being of consequence.

In the leading case of *Romaine v. Chauncey*, from which the idea is generally derived that alimony can not be garnished, it appeared that again the sole reason for not allowing garnishment was because the creditor’s claim was one contracted prior to the decree for divorce and alimony. It was pointed out that alimony was intended for the wife’s maintenance, as the husband owed the duty to support her, and the amount decreed by the court for such purpose could not be attached for the satisfaction of a preexisting claim. The opinion continues, however:

“A debt contracted by the wife after the decree, presumably for

⁵⁴ *Supra* n. 50 at 158.

⁵⁵ 83 Ohio St. 101, 93 N. E. 527 (1910).

⁵⁶ 8 Kan. App. 46, 54 Pac. 13 (1898).

⁵⁷ 82 Hun 117, 31 N. Y. Supp. 164 (1894).

her support, and with natural reliance upon the alimony by the creditor as the means of payment, stands upon a very different footing from a debt of the wife contracted prior to or during the marriage, and before its judicial dissolution."⁵⁸

Thus, while these cases do not affirm the power to garnish where the claim of the attaching creditor accrued after the alimony decree, it is obvious that the courts rely strongly upon the fact that the claim accrued prior thereto.

In *Van Valkenburgh v. Bishop*,⁵⁹ where garnishment was denied, the ground, in part at least, was the fact that the alimony was intended for the support of a minor daughter, as well as for the wife. Courts might well refuse to make a subsequent allocation of the respective amounts of an alimony decree as to the support of the wife and of one or more children awarded to her custody. In *Milberger v. Veselsky*,⁶⁰ the court distinguished between alimony for maintenance, and for her share of community property, declaring that while alimony is exempt from seizure to satisfy any of the wife's debts except those contracted *after* the decree, even this exemption does not apply to a payment ordered as the wife's share in a division of community property.

A final distinction may be gleaned from *West v. Washburn*, and, it is submitted, the true rule deduced. The court denied the right of the wife's creditor to reach alimony for the satisfaction of a claim arising out of tort. In the course of the opinion, it was said:

"The authorities are clear that alimony as such cannot be attached in an action against the wife to whom it is awarded *except in an action for such necessities as the husband would be obliged to furnish had the marital relation continued.*"⁶¹

This *dictum* is entirely consistent with the decision in *Romaine v. Chauncey*, *supra*, and seems to be the only theory which is in accord with a thoroughly desirable result in all cases. Since alimony is a sum decreed for the wife's support, there is reason for excluding creditors whose claims accrued before the divorce when she was entitled to support from her husband irrespective of her debts. Since her creditors could not interfere with her support before the divorce, they may not be in a better position afterwards. There are, it can be argued, good grounds for excluding subse-

⁵⁸ 129 N. Y. 566, 569, 29 N. E. 826, 827 (1892).

⁵⁹ *Supra*, n. 51.

⁶⁰ 97 Kan. 433, 437, 155 Pac. 957, 958 (1916).

⁶¹ 153 App. Div. 460, 462, 138 N. Y. Supp. 230, 231 (1912). Italics ours.

quent creditors from attaching her support money, where the claims arose from other than necessary contracts. As has been argued in some of the cases,⁶² public policy could not permit such proceedings, as the same would obstruct the performance of a decree for the enforcement of a duty in which the public is vitally interested. It is a general rule, further, that property dedicated by the law to a particular purpose cannot be diverted from that purpose by garnishee proceedings.⁶³ But where the attaching creditor's claim accrued from supplying the wife with necessaries, the public may be deemed to have an equal interest in seeing that the fund appropriated by the law is applied to the very object for which it was decreed in the first place, and if alimony be regarded as a trust fund, dedicated to a purpose, it is certainly not diverted by permitting garnishment to a creditor who has furnished the necessaries of life. Neither the wife nor the public is injured if the alimony installments are appropriated by attachment to subserve such an end.

From a consideration of these authorities and the principles underlying them, it is submitted that installment payments of alimony might well be held subject to garnishment upon the theory that they are either debts or at any rate a species of property which should be amenable to such processes. Qualifying this rule, however, it follows from the nature and purpose of an alimony decree, (1) that it should be garnished only for debts of the wife accruing after the divorce and alimony decree, and (2) that such attachment should be confined to the satisfaction of claims arising out of the supply of necessaries by the creditor to the wife. When confined within these limits, legal theory is not compromised, public policy is not outraged, nor yet are such authorities as are available fundamentally conflicting. It remains to be seen whether any different result should ensue if the decree awarding alimony provides that the installments be paid at regular intervals to a trustee or third party, to be thereupon paid directly to the wife. A provision ordering payments to be made to a bank is probably the most common of these arrangements.

If the bank be regarded as a mere agent, appointed by the court for the purpose of collecting the installments as they accrue, there would seem to be little doubt that it could be garnished, as it would

⁶² Wright v. Wright, *supra* n. 51.

⁶³ Brimblecom v. O'Brien, 69 N. H. 370, 46 Atl. 187 (1898).

have no discretion or power to apply any portion of the funds collected, or to deduct any amount, nor change the terms of its duties, nor exercise any judgment as to the manner of performing its duties.⁶⁴ Under an arrangement of this kind, the relation of creditor and debtor is immediately created when money is paid to the bank for the wife, and consequently the money can be reached by garnishment process.⁶⁵

Nothing is changed by calling the bank, in such cases, a trustee which has received money for the use of the wife, to be presently paid over to her. The equitable estate of a *cestui que trust* can generally be reached by creditors.⁶⁶ In England,⁶⁷ as well as many states,⁶⁸ equitable interests in land may be reached on legal execution. It has been held, further, that it is no objection to taking the *cestui's* interest that it is liable to be defeated or lessened by the happening of a condition subsequent.⁶⁹ An eminent court has allowed a trustee to be garnished where he held the legal title to property but no beneficial interest, although the possession was that of the principal debtor himself,⁷⁰ and it is a uniform rule that the income of a trust, in the absence of restrictions as to alienation, as well as a dry trust, can be reached by creditors.⁷¹

Nor is the situation changed as to the rights and liabilities of the parties if the bank be described by what is called in the statutes

⁶⁴ *Ober v. Seegmiller*, 180 Iowa 462, 160 N. W. 21 (1916); *Anderson v. Taylor*, 131 Iowa 485, 108 N. W. 1051 (1906); *Lingenfelter v. Iowa Tel. Co.*, 132 Iowa 211, 109 N. W. 722 (1906).

⁶⁵ *First Nat. Bank of Davenport v. Davenport etc. R. Co.*, 45 Iowa 120 (1876); *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 124 Wis. 520, 102 N. W. 1068 (1905); *Bluthenthal v. Silverman*, 113 Ga. 102, 38 S. E. 344 (1901). See 8 R. O. L. 88.

⁶⁶ See *Bogert, Trusts*, 442, 443 and cases cited. *Riordan v. Schlicher*, 146 Ala. 615, 41 So. 842 (1906); *Ladd v. Judson*, 174 Ill. 344, 51 N. E. 838 (1898).

⁶⁷ 1 and 2 Vict. c. 110.

⁶⁸ See *Humphrey v. Gerard*, 83 Conn. 346, 355, 77 Atl. 65 (1910).

⁶⁹ *First Nat. Bank of Spartanburg v. Dougan*, 250 Fed. 510 (S. D. Ga. 1918).

⁷⁰ *Avery v. Monroe*, 172 Mass. 132, 51 N. E. 452 (1898). See *J. E. Rood*, "A New Phase in Garnishment Law," 33 Am. L. Rev. 367 (1899).

⁷¹ *Egbert v. DeSolms*, 218 Pa. 207, 67 Atl. 212 (1907); *Bergman v. Lord*, 194 N. Y. 70, 86 N. E. 828 (1909); *Baker v. Keiser*, 75 Md. 332, 23 Atl. 735 (1892). See 28 C. J. 103.

of some states an equitable custodian.⁷² The question is whether the bank has the right to possession of the sums for the purpose of paying them over to the wife. If so, it is liable as garnishee, and the attaching creditor has a lien superior to the rights of the wife.⁷³ Consequently, there seems to be no theory as to the relationship of a collecting medium or trustee upon which the right of the wife's creditor to garnish can be denied. There remains still to be considered the question whether the court decreeing alimony can impose restrictions in the nature of restraints against alienation, which will be effective to prevent the garnishment.

II

Assuming that the trial court, in decreeing alimony, provides for the payment of installments to the wife, but that she shall have no power to assign or alienate the same and shall have no property interest in such installments until they are actually paid over to her, what is the effect upon the right of her creditors to garnish the moneys in the hands of the husband? Obviously, if the provisions against alienation be valid, the creditor has no power to garnish, for such is the very thing that the restraint seeks to prevent. But such provisions in a decree of a court conflict with the legal conception of property, and are offensive to the theory that all property of a debtor, except that exempted by a statute, must be answerable for his debts. The best possible grounds for upholding such provisions, it would seem, lie in the analogy to the spendthrift trust, for it is here only that we can find a similar result which so qualifies the legal notion of property.

The arguments against spendthrift trusts are so well known that it is only necessary to recall that the English courts have uniformly held them bad,⁷⁴ and this unbroken line of authority is followed in a number of the states.⁷⁵ The majority of the states recognize and allow spendthrift trusts. In a few others,

⁷² See Iowa Code 1924, §12100.

⁷³ *Hubbard v. Ellithrope*, 135 Iowa 259, 112 N. W. 796 (1907); *First Nat. Bank v. Riggle*, 195 Iowa 189, 190 N. W. 143 (1922); *Byers v. Byers*, 21 Iowa 268 (1866).

⁷⁴ *Brandon v. Robinson*, 18 Ves. Jr. 429 (1811); *Graves v. Dolphin*, 1 Sim. 66 (1826).

⁷⁵ *Hubbard v. Hayes*, 30 Ky. L. Rep. 406, 98 S. W. 1034 (1907); *Hobbs v. Smith*, 15 Ohio St. 419 (1864); *Honaker v. Duff*, 101 Va. 675, 44 S. E. 900 (1903).

as in Iowa, there are grave doubts as to their validity.⁷⁶ The reason for denying such trusts, of course, is that the anomalous theory of property is offensive to public policy, for, as has been aptly said, property available for the purpose of pleasure or profit should also be amenable to the demands of justice.⁷⁷

On the other hand, the chief contention for upholding these trusts is that the settlor, having the power to give or withhold arbitrarily, may give upon such terms as he chooses and may impose such restrictions as he shall at his pleasure, see fit. Thus it has been said in *Nichols v. Eaton*,

"Nor do we see any reason, in the recognized nature or tenure of property and its transfer by will, why a testator who gives, who gives without pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee."⁷⁸

This, then, being one of the principal reasons for upholding such trusts, it is at once apparent that to uphold a decree for alimony with such restraints upon the analogy to spendthrift trusts, would be to incur all the disadvantages of the spendthrift trust without having available any of the reasons for justifying such restraints. It is clear that if, in the present analogy, the

⁷⁶ While the *dicta* in the Iowa cases, since *Meek v. Briggs*, 37 Iowa 610, 54 N. W. 456 (1893), have assumed the validity of the spendthrift trust, it has been pointed out that no decision has squarely so held. See H. C. Horack, "Spendthrift Trusts in Iowa," 4 Iowa Law Review 139. In *Kiffner v. Kiffner*, 185 Iowa 1064, 171 N. W. 590 (1919), it was held that a testator had the right to create a trust fund for the benefit of his son, making the same free from all the son's debts by conferring upon the trustee such power over the fund as he, the testator, might have if he were alive. The trustee had complete discretion to pay any, all or none of the income or principal, if and when he deemed it "wise, prudent and just" for the *cestui*. It is clear that this situation differs from the kind of trust created when the trustee is bound to pay the income, or parts of the principal to the *cestui* at regular intervals, with no discretion on the part of the trustee to withhold, but with a restriction which precludes creditors from reaching such income. If the trust involved in *Kiffner v. Kiffner*, *supra*, is a spendthrift trust, it is clear that it is not analogous to the present situation, in any sense, and will consequently afford no theory upon which to uphold a decree for alimony with a deliberate restraint upon alienation.

⁷⁷ See *Tillinghast v. Bradford*, 5 R. I. 205, 212 (1858). See also *Bogert, Trusts*, 182; H. C. Horack, *op. cit. supra* n. 76.

⁷⁸ 91 U. S. 716, 727 (1875):

husband be regarded as the settlor, the reason for sustaining the same is entirely absent, for he cannot give or withhold at will. He is bound to pay the installments, and the same will be satisfied out of his property if he fails to do so. To regard the court as the settlor is, of course, an equally false analogy for the obvious reason that the court is not "giving" or transferring any property at all; it merely decrees that the husband must pay certain sums for the wife's support and benefit. But there is a still weightier fallacy present here. The court is not, in any sense, in the position of one who can give or transfer to the wife at pleasure or arbitrarily withhold from her such alimony as she may be entitled to receive. The discretion of the court in granting such decrees is purely a judicial discretion, regulated by settled practices of fairness and justice, and in no sense is it a personal discretion in the nature of the discretion of one who gives to his friends or relatives according to the caprice of his fancy. Hence, the reason for upholding spendthrift trusts again fails.

The only other possible application of the analogy is to regard the wife herself as the settlor of the trust. But here the entire theory collapses, for it is universally conceded that one may not create such a trust for his own benefit. He cannot be both the settlor and the *cestui que trust*, for that constitutes a fraud upon his creditors.⁷⁹ In case the restraint upon alienation of the installments was made in a supplementary decree, there is no doubt whatever that, if the wife be regarded as the settlor, the restraint is invalid as to creditors whose claims accrued between the date of the original alimony decree and the supplementary decree, for the fraud upon the creditors is obvious.⁸⁰

The great divergence of authority as to spendthrift trusts is itself evidence that the grounds for supporting them are extremely questionable. If the doctrine underlying them is to be extended, it must certainly appear that the situation to which it is extended invokes the reasons for the doctrine, to at least an appreciable extent. Such is not the case in our present problem. There is, then, apparently little room for the application of the analogy of the spendthrift trust to upholding such a decree for alimony.

⁷⁹ De Rousse v. Williams, 181 Iowa 379, 164 N. W. 896 (1917); Wenzel v. Powder, 100 Md. 36, 59 Atl. 194 (1904); Cunningham v. Bright, 228 Mass. 385, 117 N. E. 909 (1917); Ward v. Marie, 73 N. J. Eq. 510, 68 Atl. 1084 (1907).

⁸⁰ Cf. Brundage v. Chenevorth, 101 Iowa 251, 70 N. W. 211 (1897).

If there are no specific theories, already tested and approved, upon which to rest such restraints as we are considering, the question must be considered, on general principles of law and theories as to powers of courts in rendering judgments and decrees. The most formidable difficulty involved is that a decree of this kind runs afoul of constitutional provisions for the separation of powers of government. Under a complete separation of powers clause like that of the Iowa constitution,⁸¹ it is fundamental in constitutional law that courts are limited, in interpreting statutes, to lending effect only to the terms thereof, and that they may neither enlarge in scope, add to, abridge, amend, nor otherwise change the plain provisions thereof. It would be in excess of jurisdiction and would be unconstitutional and void.⁸² Since the "general jurisdiction" conferred upon district courts by the constitution or statutes of most states⁸³ obviously does not include power to render such a decree,⁸⁴ courts must rely upon the special statutes governing divorce and alimony for such authority.

But the ordinary statute, permitting district courts to make such provision for the wife as is "just", or "right", etc., must be interpreted in the light of the separation of powers clause of the Constitution. Under this restriction courts have been held not to have the power to amend a statute by interpolating or

⁸¹ Iowa Const., Art. III, sec. 1.

⁸² *Denny v. Des Moines Cty.*, 143 Iowa 466, 121 N. W. 1066 (1909); *Chicago, M. & St. P. R. Co. v. Monona Cty.*, 144 Iowa 171, 122 N. W. 820 (1909); *Melody v. Des Moines etc. Ry. Co.*, 161 Iowa 695, 141 N. W. 438 (1913); *Wise v. Palmer*, 165 Iowa 731, 147 N. W. 167 (1914).

⁸³ See Iowa Const., Art. V, sec. 1, 6; see Iowa Code 1924, §10761.

⁸⁴ "General jurisdiction" can mean but that jurisdiction which courts, under our judicial system, inherited from England, have exercised in the past. See *McQuigan v. Delaware etc. R. Co.*, 129 N. Y. 50, 29 N. E. 235 (1891). For any extraordinary jurisdiction, there must be special statutory authority. *Montesano Lumber Co. v. Portland Iron Works*, 78 Ore. 53, 152 Pac. 244 (1915). Now it is clear that in England prior to 1880, when divorce and alimony were in the exclusive jurisdiction of the ecclesiastical courts of England (see 1 *Bishop, Marriage, Divorce and Separation*, §153), such a decree as the one under consideration was unheard of, as the common law courts would certainly have ignored a decree of the ecclesiastical court exempting from the processes of the common law a judgment for alimony. It was repeatedly asserted that the common law subjected, in the absence of statutory exemption, a man's entire property to the payment of his debts. *Hardisty and Barney*, Comb. 356 (K. B. 1697). See 3 *Bl. Comm.* (Lewis' ed.) 417-418.

adding words to it, even if the court think that the legislature intended to enact the act in its revised form.⁸⁵ In *Fairbanks v. Long*, it was held that a court had no power to exclude infants from the operation of the statute of limitations. The court said:

“ . . . it is sufficient to say that the statute makes no exceptions, and the settled rule is, in respect to the running of the statute of limitations, that the statute will run against all persons, ‘and no exception to the statute can be claimed, unless it is expressly mentioned in the statute,’ and ‘where the statute makes no exception the court can make none on the ground of any inherent equity, or because it may appear to be reasonable that the statute should not run against any party in a given case.’ ”⁸⁶

If the consequences of a statute are evil, as where the court thinks that sufficient authority has not been granted to make decrees which it deems adequate to do justice in a particular situation, the only way to avoid the results of the defective law is by legislative, and not by judicial, action. The courts, under a complete separation of powers clause, do not have the power to inaugurate social or economic reforms.⁸⁷ Thus it was said, in refusing to license a woman to practice law:

“Courts of justice were not intended to be made the instruments of pushing forward measures of popular reform. If it be desirable that those offices which we have borrowed from the English law, and which, from their origin, some centuries ago, down to the present time, have been filled exclusively by men, should also be made accessible to women, then let the change be made, but let it be made by that department of the government to which the constitution has entrusted the power of changing the law.”⁸⁸

Neither can it be maintained that courts of equity have any more power to legislate than courts of law. This is elementary. As was said by the supreme court in *Hedges v. Dixon County*:

“ . . . wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable . . . Courts of equity can no more disregard statutory and con-

⁸⁵ *Holmberg v. Jones*, 7 Idaho 752, 65 Pac. 563 (1901); *State v. West Side St. Ry. Co.*, 146 Mo. 155, 47 S. W. 959 (1898).

⁸⁶ 91 Mo. 628, 636, 4 S. W. 499, 501-2 (1887).

⁸⁷ *Burdick v. Kimball*, 53 Wash. 198, 101 Pac. 845 (1909); *In re Bradwell*, 55 Ill. 535 (1869), *aff. in 16 Wall* 130 (U. S. 1872).

⁸⁸ 55 Ill. 535, 540 (1869).

stitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law . . .⁸⁹

Thus wherever the effect of the judgment of a court or the decree of a court of equity would be to alter or to change the statute involved, or to supply deficiencies in statutory enactments, or to provide a remedy or a relief which the legislature has not provided, the judgment or decree so rendered will be an exercise of legislative power contrary to the Constitution.⁹⁰ In *Hansard v. Green*, there was a suit to enjoin the issuance of certain municipal bonds. The court refused a ruling which, in view of local statutes, would permit a municipal corporation to contract a debt upon an agreement to issue bonds to cover it, on the ground that to so rule would be equivalent to holding that the court had the right and power to say that the contract should be executed, and thus "by judicial decree to usurp a legislative function." In *Kehr v. City*, it was held that courts were powerless to supply omissions in legislation, even though the omissions made the statute unenforceable.

Upon these principles, it is submitted that if in a decree such as we are considering by which alimony installments are placed beyond the reach of creditors of the wife, the court has, in effect, performed a legislative function, the same would seem to constitute an excess of jurisdiction and be not binding upon such creditors in garnishment proceedings. While it may, in particular instances, be a desirable thing in granting decrees for alimony, to declare the same exempt from the claims of creditors under execution or garnishment, it is a proposition which the legislature may desire to consider long and debate freely before enacting into law. This, the courts cannot deny them the privilege of doing by usurpation. If it can be shown, first, that the exemption of property from the processes of the courts is a legislative function, and, second, that such a decree as considered here constitutes an

⁸⁹ 150 U. S. 182, 192, 14 Sup. Ct. 71, 74 (1893). See also *Magniac v. Thomson*, 15 How. 281, 299 (U. S. 1853); see particularly *Rambo v. Bank of Argentine*, 88 Kan. 257, 128 Pac. 182 (1912).

⁹⁰ *Kehr v. City of Columbia*, 136 Mo. App. 322, 116 S. W. 428 (1909); *State v. Summers*, 33 S. D. 40, 144 N. W. 730 (1913); *Albright v. Fisher*, 164 Mo. 56, 64 S. W. 106 (1901); *State v. Circuit Court*, 32 S. D. 573, 143 N. W. 892 (1913); *Hansard v. Green*, 54 Wash. 161, 103 Pac. 40 (1909).

exemption, it follows that the same is unconstitutional, as being a legislative function performed by the judiciary.

At the common law, it seems that there is no exemption from execution. All the property of a debtor, with the exception of certain personal paraphernalia, is accessible to creditors to satisfy their just claims.⁹¹ Only those articles specified by statute can be exempted, and such exempting statutes must be construed so that the legislature's intention will be effected, since they represent the legislature's conception of what the policy of the state should be in this respect.⁹² The apparent exception of the immunity of governmental agencies to garnishment proceedings when indebted to the principal defendant, is due to the rule of public policy which refuses to submit the governmental agency to such process, and not because the debt or property of the principal defendant is exempt from execution.

If the provision restricting alienation of future alimony installments is contained in a supplementary decree, it is clearly invalid as to creditors whose claims accrued before the supplementary decree, but after the original award, for this violates the limitations of the power to create exemptions which even the legislature possesses. It is indisputable that statutes which increase or create new exemptions are invalid and inoperative as to preëxisting debts. They impair the obligation of contracts.⁹³ Thus it follows that if the supplementary decree could include exempting provisions as to preëxisting claims, the court would be accomplishing, by judicial decree, that which the legislature would be impotent, under the Constitution, to effect and in respect to matters which are specifically left, by constitutional provision, to legislatures rather than to courts.

It must be remembered that the purpose underlying all exemptions is the securing to the unfortunate debtor of the means to support himself and his family, the protection of the family, it is

⁹¹ *Seay v. Palmer*, 93 Ala. 381, 9 So. 601 (1891); *In re Brown's Estate*, 123 Calif. 399, 55 Pac. 1055 (1899); *Robinson v. Burke*, 70 N. H. 2, 45 Atl. 713 (1899); *Stevenson v. Stevenson*, 34 Hun 157 (N. Y. 1884).

⁹² See *Hanna v. Bry*, 5 La. Ann. 651 (1850); see also *Kneetle v. Newcomb*, 22 N. Y. 249 (1860).

⁹³ *Willard v. Sturm*, 96 Iowa 555, 65 N. W. 847 (1896); *Edwards v. Kearzey*, 96 U. S. 595 (1877).

urged, being the main consideration.⁹⁴ In view of this purpose, it is significant that the creditor whose claims arose before a supplementary decree restraining alienation must be deemed to have relied upon the future installments, and yet it is said that exempt property is something upon which creditors cannot be regarded as having relied when credit was extended. It is obvious that to defeat such a creditor by denying him the right to garnish is counter to all theory underlying exemptions, and, in addition, is accomplishing an end which has been uniformly held to be beyond legislative power.

In *Re Brown's Estate* an attempt was made to increase the exemption allowed by statute by an appeal to the court. In sustaining a ruling of the court below refusing to act in the premises, it was said:

"Exemptions are the creatures of statutes and exceptions to the general rule. No property is exempt unless made so by express provision of law. No assumed legislative policy can justify the courts in adding to the statutory list of exemptions. Legislators are presumed to understand the force and effect of the language which is used and to have contemplated all circumstances which would make it desirable that other property not in the lists of exemptions should be added thereto."⁹⁵

It only remains to investigate the question whether or not an alimony decree restraining alienation of future installments can be fairly construed to constitute an addition to the exemptions allowed by statute. Exemption has been defined as the "right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor or a distress for rent,"⁹⁶ and an essential feature of exemption is that it shall be permanently exempt in the debtor's hands from seizure by his creditors under judicial process.⁹⁷ The very object of exemptions, as pointed out above, is to preserve for the debtor what, in the absence thereof at the common law, would be reached by the processes of the courts. This, then, is precisely and in terms what an alimony decree restraining alienation of future installments brings

⁹⁴ See *Schooley v. Schooley*, 184 Iowa 835, 169 N. W. 56 (1917); *Griffin v. Sutherland*, 14 Barb. 456 (N. Y. 1852), particularly at p. 459; *Grant v. Phoenix-Jellico Coal Co.*, 155 Ky. 585, 159 S. W. 1161 (1913).

⁹⁵ 123 Calif. 399, 401, 55 Pac. 1055 (1899).

⁹⁶ 1 Bouvier, Law Dictionary (Rawle's 3d Rev.) 1152.

⁹⁷ *In re Burnett*, 201 Fed. 162 (E. D. Tenn. 1912).

about, for it has been determined above that in the absence of such a decree, the installments could be reached by garnishment. This thing which the alienation provisions in a decree attempt to accomplish is literally identical with the definition of an exemption, namely, to create "a right . . . to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or a distress for rent." To argue that such a decree does not create an exemption, because it is not such a right given by statute, is, of course, to beg the question because it assumes the very point in issue. The validity of such a contention rests upon a conclusion of law which was the precise thing that the separation of powers clause of the Constitution sought to prohibit. The court by such a decree produces the identical effect, so far as the garnishing creditor is concerned, as a statutory exemption. If this is not performing a function which has immemorially pertained to the legislative department of government, it is difficult, if not impossible, to conceive how courts could ever perform such a function.

In effect, to hold that the furnishing of provisions restricting alienation in an alimony decree is not a legislative function, is equivalent to maintaining that nothing can be a legislative function when performed by any other agency than the legislature. The nature of such a contention, of course, is apparent from the fact that, if such an argument be sound, the separation of powers clause is nullified, with the result that courts have unlimited power to avoid, amend or abrogate all legislative enactments at their pleasure.

It must be plain, further, that if courts in decreeing alimony have power to make it exempt from court processes, there is no conceivable reason to prevent them from making similar arbitrary provisions with respect to every decree in which property interests of the litigants are adjudicated. This follows from a consideration of the theory that alimony is as much a property interest as any other property right.⁹⁸ Thus not only might the separation of powers clause be violated, but every constitutional safeguard in the nature of limitations upon legislative action could be as well transcended, and courts exercise more and broader legislative power than legislatures themselves.

But one point remains to be mentioned. Is a decree for alimony

⁹⁸ *Audubon v. Shufeldt*, *supra* n. 44; *Mahoney v. Mahoney*, 59 Minn. 347, 61 N. W. 334 (1894).

with provisions as to future alienation such as we have been considering open to collateral attack? In other words, could a subsequent garnishing creditor plead and show the want of power of the court which decreed the alimony to incorporate such provisions therein? Since the real question involved is one of jurisdiction, it seems clear that the decree could be attacked collaterally. It is elementary, of course, that if a court, in rendering judgment, lacks either jurisdiction of subject matter or jurisdiction of parties, the judgment is void and can be collaterally attacked.⁹⁹ It is sometimes said, however, that if the court has jurisdiction of both parties and subject matter, its judgment cannot be attacked in a collateral proceeding.¹⁰⁰ But this statement must be qualified with the provision, that the judgment is equally invalid, if the court, having power to act in the premises, exceeds the powers which it has derived from the authority which created it, and pronounces a judgment which it had no authority to make.¹⁰¹

“The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment or decree, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its judgment or decree the law or statute which is applicable to it.”¹⁰²

In summarizing, it appears, first, that the proposition that alimony cannot be garnished, is questionable on principle. Alimony, payable in future installments, would seem to be subject to garnishment under the ordinary garnishment statutes, and under a statute which subjects “debts not yet due” to such processes. Second, while the foregoing is, in general, the governing principle, it must be qualified by certain exceptions, which, when examined restrict the garnishment of alimony to situations where the creditor’s claims were contracted after the decree for alimony, where the claim was contracted for necessities furnished the wife after

⁹⁹ 1 Freeman, Judgments (5th ed.) 668.

¹⁰⁰ Cf. *ibid.* pp. 641-642.

¹⁰¹ See *Ex parte Reed*, 100 U. S. 13 (1879), particularly at p. 23; *Baldwin v. Foster*, 157 Calif. 643, 108 Pac. 714 (1910); *Ritchie v. Sayers*, 100 Fed. 520 (1900); *Armstrong v. Obucino*, 300 Ill. 140, 133 N. E. 58 (1921).

¹⁰² *Armstrong v. Obucino*, *supra* n. 101 at 143, 133 N. E. at 59. See also 1 Freeman, Judgments (5th ed.) 733.

the decree for alimony, and where there are no dependent minors relying upon the future installments for support.

On principle and by analogy, it seems that specific provisions contained in the alimony decree that the same shall not be alienated or assigned by the wife prior to their actually being paid over to her, are of no force to change the above conclusions. Such provisions amount to legislation in that they extend the exemptions of debtors under execution, and are thus unconstitutional as being in excess of jurisdiction. The theory of the spendthrift trust is not available, it seems, to support such provisions for the reason that the grounds upon which such trusts are upheld are entirely wanting. The provisions, thus being beyond the power and authority of a court to make, the same may be attacked collaterally in garnishment proceedings and should be a sufficient reason for the court's overruling a motion to discharge the garnishee on the grounds that the money he is bound to pay is protected by the provisions against alienation in the alimony decree.

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