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West Virginia University College of Law

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THE LAW OF GARNISHMENT IN WEST VIRGINIA
LEO CARLIN*

ARGELY due to a haphazard process of statutory evolution, the specific steps in the development of which lack coordination, the law of attachment and garnishment in this state—particularly the law of garnishment†—has arrived at a degree of complication that requires extended analysis and careful differentiation in order to be reasonably sure of conforming to the statutory requirements in any particular case. In addition to the complications arising from lack of coordination of the various statutory provisions, resulting in application of different methods of procedure to different phases of the remedy, the situation is further confused in some instances by lack of clarity in specific provisions. It is the object of this discussion to attempt in a general way an analysis of the basic statutory provisions, for purposes of differentiation and comparison, and to call attention to some of the problems of interpretation that may arise, but without any attempt to deal with the procedure as a whole.

Any approach to the subject will involve complications in analysis and comparison which, for a definite understanding, will tax the patience of the reader; but it is believed that the discussion

*Professor of Law, West Virginia University.
†The words "garnishment" and "garnishee" occur only in the attachment statutes and are not found in the statutes relating to suggestion proceedings after judgment, the corresponding terms in the latter statutes being "suggestion" and "suggestee". However, a garnishment proceeding in attachment and a suggestion proceeding after judgment have the same fundamental features, the garnishee in attachment and the suggestee having an almost identical status in their respective proceedings. Consequently, the terms "garnishment" and "garnishee" will be used in this discussion, in accord with the usage in many of the decisions, as applying to either an attachment or a suggestion proceeding, as the occasion may require.
may perhaps be most intelligibly undertaken by adopting a sequence based on the historical development and chronological order of enactment of the provisions involved. Roughly in accord with such an approach, the discussion will be distributed among the following topics in the following order: (1) Persons and Things Subject to Garnishment. (2) Garnishment in Attachment Proceedings. (3) General Procedure for Garnishment in a Suggestion Proceeding. (4) Garnishment of Salaries and Wages of Private Employees in a Suggestion Proceeding. (5) Garnishment of Salaries, Wages and Money Due from Public Sources in a Suggestion Proceeding. (6) Garnishment of Funds in the Hands of Public Officers and in Custody of the Law. (7) Conclusion.

**PERSONS AND THINGS SUBJECT TO GARNISHMENT.**

Prior to Acts of 1935, there was no provision in the statutes declaring that the state, its agencies, its political subdivisions, public corporations or public officers could or could not be made garnishees in attachment or otherwise. However, it had been clearly understood, for different reasons in different cases, that none of these entities or persons could be made a garnishee in any garnishment proceeding. The state could not be made a garnishee because the constitution provided, without qualification, that the state could not be made a party defendant in any court of law or equity.\(^2\) Public policy, as understood by the Supreme Court of Appeals, prevented a public corporation or a public officer from being made a garnishee, even with the consent of the corporation or officer.\(^3\) This principle had been carried so far as to prevent the treasurer of a municipality from being made a garnishee, even after he had been ordered to pay the funds in his custody to the defendant in an attachment proceeding.\(^4\) An apparent exception may be noted in the case of a special commissioner of a court, who may be made a garnishee with reference to funds which he has been ordered to disburse.\(^5\) However, such a case may be distinguished from the cases based on public policy. The reason why funds in the custody of a court cannot be garnisheed is not because public policy is opposed thereto, but because such a practice would interfere with

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\(^2\) W. Va., Const. art. VI, § 35.


\(^4\) Ibid.

the jurisdiction of the court. When a court has ordered its officer to disburse the funds, it has relinquished its jurisdiction over them, at least to the extent of permitting them to be the subject of garnishment.⁸

Obviously, it is within the power of the legislature to modify any rule based merely on public policy, and also to provide for garnishment of funds within the custody of the law, at least to the extent that there is no interference with the jurisdiction of a court; but an amendment to the constitution was considered necessary to permit the state and its agencies to be made garnishees.

The first legislative attack on the public policy rule came in 1935,⁷ in the following enactment:

"All officers, clerks, school teachers and employees, of any city, town or county who hold their office by virtue of authority of the legislature, or by virtue of authority from the governor of the state of West Virginia, or by virtue of authority from any city, town, board of education or county, whether by election or by appointment, and who receive compensation for their services from the moneys of such city, town or county shall, for the purposes of attachment, suggestion, garnishment and execution, be deemed to be, and are officers, clerks or employees of such city, town or county, and their wages or salaries shall be subject to attachment, suggestion, garnishment or execution upon any judgment rendered against them, unless otherwise exempt."

It will be noted that this enactment, in order to evade any question of constitutionality, carefully avoids inclusion of any employee of the state or its agencies. As to other public employees, it is clearly intended to cover garnishment, not only in suggestion proceedings after judgment, but also in attachment proceedings before judgment. It in no way undertakes to modify the rule that funds in the custody of a court are exempt from garnishment, and it is definitely confined to garnishment of wages and salaries. Hence it does not abrogate the rule of public policy when the subject of garnishment would be a commercial debt or any claim other than one for wages or salary, or tangible personal property, whoever might be the custodian.

At this same session of the legislature, a constitutional amendment was submitted,⁸ and later adopted, permitting the state, its

⁶ Ibid.
⁸ Id. at c. 23.
subdivisions, etc., to be made garnishees or suggestees in a garnishment proceeding. It reads as follows:

"The state of West Virginia shall never be made a defendant in any court of law or equity, except that the state of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent or employee thereof, may be made a defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

It will be noted that this amendment clearly authorizes the state and its subsidiaries to be made garnishees, both in attachment proceedings, which must be before judgment, and in suggestion proceedings after judgment. However, since the provisions of the amendment are not self-executing, the present scope of its application depends upon the enabling legislation hereinafter discussed.

By Acts of 1939, two articles were added to chapter 38 of the Code. Article 5A relates exclusively to garnishment of salaries and wages of private employees in suggestion proceedings after judgment. Except for placing limitations on the amount of salary and wages which may be the subject of garnishment, its provisions are procedural in character and have not changed prior rules relating to the parties and res in a garnishment proceeding. There is nothing in it which would prohibit the garnishment of salaries or wages of private employees in an attachment proceeding, and

9 State v. Bouchelle, 119 W. Va. 154, 192 S. E. 169 (1937). The garnishee in this case was a state agency in a suggestion proceeding. The arguments of counsel and the reasons assigned by the court against the propriety of the proceeding without enabling legislation apply preeminently to its use against the state or a state agency. Without attempting to review all the difficulties in the way of an attempt to adapt the proceeding to the provisions of existing statutes, the court refers to two obstacles particularly as sufficient to dispose of the case: (1) No provision has been made in the statutes for service of process upon the state. (2) The procedure prescribed in article 5, chapter 38 of the Code is not adaptable to a proceeding against the state as a suggestee. For instance, the provision in that article for rendering judgment against the suggestee could not be applicable to the state. And these objections, of course, would apply equally to the state as a garnishee in an attachment proceeding under article 7, chapter 38 of the Code. However, the same objections would not apply to a political subdivision as defined in sec. 1, art. 5B, c. 38 of the Code, note infra. Long existing statutes have provided for service of process upon political subdivisions and they are not immune from judgments. Wherefore it may be held that the constitutional amendment is sufficiently implemented by the provisions in articles 5 and 7, chapter 38 of the Code, to permit a garnishment proceeding under the procedures therein prescribed against a political subdivision in either an attachment or a garnishment proceeding, as must have been contemplated under W. Va. Acts 1935, c. 110, supra n. 7, since no specific procedure was provided for carrying that enactment into effect.

apparently this remedy is still available under article 7, chapter 38 of the Code. Article 5B\textsuperscript{12} was enacted for the purpose of carrying into effect the constitutional amendment, and expressly repeals chapter 110, Acts of 1935, quoted above.

Unlike article 5A, article 5B is not confined to salaries and wages, but applies to "any money due or to become due . . . to the judgment debtor from the state, a state agency, or any political subdivision of the state",\textsuperscript{13} although most of its provisions are peculiarly applicable to wages and salaries. The term "political subdivision" is so defined\textsuperscript{14} as to include the public agencies (not state agencies) which are necessarily contemplated as garnishees in chapter 110, Acts of 1935, repealed.\textsuperscript{15} Like article 5A, article 5B, with the exception of section 15 discussed later (which relates to money or personal property in the hands of a public officer or in custody of the law, as distinguished from money due or to become due from the state, a state agency or a political subdivision of the state), is confined to garnishment in a suggestion proceeding after judgment and does not include garnishment in an attachment proceeding. Wherefore, since no provision has been made elsewhere, as might have been made under the constitutional amendment, for proceeding against the state or any of its agencies as a garnishee in an attachment proceeding, the state and its agencies under the present statutes are subject to garnishment only in a suggestion proceeding. Although chapter 110, Acts of 1935, permitting garnishment in attachment against the salary and wages of an employee of a political subdivision, has been repealed, the constitutional amendment itself authorizes such a proceeding. Whether such a proceeding is now possible under the constitutional amendment depends upon whether, the amendment as a whole not being self-executing, the procedure prescribed by article 7, chapter 38 of the Code, relating to attachments, is adaptable under any circumstances to garnishment against a political subdivision, a possibility

\textsuperscript{12} W. Va. Acts 1939, c. 66; W. Va. Code (Michie Supp. 1939) c. 38, art 5B.

\textsuperscript{13} Section 2.

\textsuperscript{14} "The term 'political subdivision' shall mean any county, county board of education, municipal corporation, or any other public corporation or governmental unit organized to perform one or more of the functions of local government or to effect a local improvement." W. Va. Code (Michie Supp. 1939) c. 38, art. 5B, § 1.

When the term "'political subdivision" is used in this discussion it will be understood to have the meaning as defined above.

\textsuperscript{15} If such was the sole reason of the repeal, the repeal may have been made without realization of the fact that the repealed statute was broader in its operation than article 5B, permitting garnishment of salaries and wages in an attachment proceeding as well as in a suggestion proceeding.
which must have been contemplated under Acts of 1935, since no procedure was prescribed to carry its provisions into effect.

No provision has ever been made in any statute for a garnishment proceeding against tangible personal property in the custody of the state, its agency or a political subdivision, although the terms of the constitutional amendment are broad enough to authorize such a proceeding, and, even in the absence of the amendment, the legislature, under its power to declare public policy, might have prescribed such a proceeding against a political subdivision when to do so would not have had the effect of making the state a party defendant to an action or suit.

It remains to note under the present topic the provisions of section 15 of article 5B mentioned above, which reads as follows:

"Money and other personal property in the hands of a sheriff, constable, clerk of court, justice of the peace or other public officer who shall hold the same by virtue of his office and which belongs or is owed to any person shall be subject to garnishment and suggestion in the same manner and to the same extent as if held by him as a private individual, except that money or other property which is in custodia legis shall be paid or delivered into the court to abide the result of the suit, unless the court shall otherwise direct. This section does not apply to public property or funds."

The words "garnishment and suggestion" in this section would seem to indicate that, unlike article 5A and the other provisions of article 5B, it is not confined to garnishment in a suggestion proceeding after judgment, but also applies to garnishment in an attachment proceeding. If so, any public officer custodian coming within the terms of the section may be subject to garnishment in an attachment proceeding, although the public agency which he represents is exempt therefrom. In conclusion, it may be said that Acts of 1939 add nothing to the possibilities of garnishment in an attachment proceeding except as provided in section 15 of article 5B; and that article 5B, by repealing chapter 110, Acts of 1939, eliminated the only prior statute authorizing garnishment in attachment against a public agency.

**Procedure in Garnishment.**

In order to determine the proper procedure to pursue in a garnishment proceeding, it may, depending upon the nature of the garnishment, be necessary to differentiate and rely upon one or more of four different articles in the Code, exclusive of the pro-
visions in chapter 50 relating to attachment and garnishment in cases before a justice of the peace. The following topics will deal primarily with a comparison of the procedures prescribed by the various articles. Provisions not relevant for purposes of comparison will be ignored.

**Garnishment in Attachment Proceedings.**

The procedure for garnishment in attachment proceedings in courts of record is prescribed in article 7, chapter 38 of the Code.\(^\text{10}\) The venue of the garnishment proceeding is, of course, the same as the venue of the attachment proceeding and the main action or suit, since it would not, prior to judgment, be practicable to divorce the ancillary proceeding from the main proceeding and give it a different venue, regardless of inconvenience to the garnishee. Jurisdiction of the garnishee is obtained by service on him of a copy of the attachment order, with an endorsement thereon designating him as a person indebted or liable to, or having in his possession the effects of, the defendant. A further endorsement, by the clerk, requires the garnishee to answer under oath at the next term of the court in which the action or suit is pending.\(^\text{17}\) Service of the attachment order so endorsed gives the plaintiff a lien upon debts and liabilities due from the garnishee to the defendant and upon personal property of the defendant in the possession or under the control of the garnishee.\(^\text{18}\) Thereafter, the garnishee is essentially a party to the litigation.

The garnishee has the privilege of paying money due the defendant, or of delivering property belonging to the defendant, to the officer having the attachment order, but only if he does so before the return day of the order. If he avails himself of the privilege, he is thereafter discharged from further liability under the attachment and from all liability to the defendant.\(^\text{19}\) In the absence of such payment or delivery to the officer, the garnishee's liability and the disposition which he is required to make of money or property are determined by a court order based on his answer, if not contested by the plaintiff, or, in default of an answer, on proof offered by the plaintiff.\(^\text{20}\) The statute,\(^\text{21}\) which is not entirely

\(^\text{10}\) Sections 15, 24, 25, 26, 27, 28, 29.


\(^\text{18}\) Id. at c. 38, art. 7, § 19.

\(^\text{19}\) Id. at c. 38, art. 7, § 25.

\(^\text{20}\) Id. at c. 38, art. 7, §§ 26 and 27.

\(^\text{21}\) Id. at c. 38, art 7, § 26. This section, as to time, fixes the liability of the garnishee as it appears from his answer "at or after the service of the attachment." Obviously, some limitation must be put upon future extension of the time.
clear in its terms, has been construed as binding the garnishee only for money owed by him to the defendant, or effects of the defendant in his custody, at the time of the answer.\textsuperscript{22} The plaintiff has a right to contest the fullness of the garnishee’s disclosures in his answer or of the delivery made to the levying officer, in which event the garnishee’s liability must be determined by a jury, unless by consent of the parties a jury is waived and the matter is submitted to the court.\textsuperscript{23} An order made against the garnishee has the effect of a judgment and may be enforced in the same manner as any other judgment,\textsuperscript{24} which means, of course, that normally it will be enforced by execution.

**General Procedure for Garnishment in a Suggestion Proceeding.**

The general procedure prescribed for garnishment in a suggestion proceeding in article 5, chapter 38 of the Code,\textsuperscript{25} is largely the same as that prescribed for garnishment in an attachment proceeding, the analogy between the two being very close. Both are ancillary remedies. The garnishment in attachment is in aid of the attachment, which in turn is in aid of the main suit or action. The suggestion proceeding is in aid of an execution, which in turn is in aid of the fruits of the main action, a judgment. The essential differences between the two proceedings arise primarily from the fact that one comes before judgment and the other after judgment.

The function of the suggestion proceeding is enforcement of an execution lien.\textsuperscript{26} The execution, and not the suggestion proceeding, creates the lien. When the execution is issued, it establishes a lien on all the execution debtor’s personal property, whether in his own possession or in the possession of a third party, although a third party is not subject to the consequences of the lien until he has notice, by service of the suggestee process or otherwise,\textsuperscript{27} of the existence of the execution. Hence the purpose of the suggestion proceeding is not to create a lien, but to give the suggestee notice of an execution lien already existing, bind him to its consequences, and furnish the execution creditor with a mechanism to accomplish satisfaction of the lien.\textsuperscript{28} Wherefore, of course, issuance of an

\textsuperscript{22} Ringold v. Suter, 35 W. Va. 186, 13 S. E. 46 (1891).
\textsuperscript{24} Id. at c. 38, art. 7, § 29.
\textsuperscript{25} Sections 10, 11, 12, 13, 14, 15, 16, 17, 18, 19.
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid.
execution is necessarily a prerequisite to institution of the suggestion proceeding.

Like a garnishee in an attachment proceeding, the suggestee essentially becomes a party to the litigation, here entirely ancillary, since the main controversy has terminated; but, as an important consequence of the fact that the suggestion proceeding is instituted after judgment in the main action or suit, it is not necessary, as in the case of garnishment in attachment, that the proceeding be conducted in the same county in which the action or suit was pending. Consequently, the statute provides, presumably for the convenience of the suggestee, that the proceeding shall be instituted in the county in which the suggestee resides; or, if he be a non-resident of the state, in the county in which he may be found. The fact that no specific provision is made as to venue in the case of corporate suggestees has given rise to some complication in application of the statute to corporations, making it necessary to define the status of corporations in terms of residence. In Exchange Bank of Mannington v. Beatty, it was decided that a suggestion proceeding against a resident domestic corporation as suggestee must be instituted in the county of the corporation’s residence, which is the county in which it has its principal office; although a suggestion proceeding against a nonresident domestic corporation as suggestee may be instituted in any county in which the execution debtor might sue the corporation for recovery of the money due or property held.

The first step in starting the proceeding is to file the suggestion and an attested copy of the writ of fieri facias with the clerk of the circuit court of the county in which the proceeding is instituted. The suggestion filed with the clerk serves the same purpose as the endorsement on the attachment order designating the garnishee in attachment. The next step is the issuance of the suggestee process by the clerk. It is conceivable that, by analogy to the attachment procedure, a copy of the execution with an endorsement thereon might have been made to serve the function of process against the suggestee. However, in lieu thereof, the statute requires that a summons shall be served upon the suggestee requiring him to answer at the next term of court under oath as to

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21 Note 26, supra.
the matter stated in the suggestion.\textsuperscript{33} No provision is made for any notice to the execution debtor of pendency of the proceeding.

As in the attachment garnishment proceeding,\textsuperscript{34} the garnishee is given the privilege of delivering the property or paying the money for which he is liable at any time before the return day of the summons, after doing which he is discharged from all liability under the execution or to the judgment debtor.\textsuperscript{35} The section extending this privilege, unlike the attachment section, which requires payment or delivery to the officer having the attachment writ, does not indicate expressly to whom the delivery or payment shall be made. However, this and a following section,\textsuperscript{36} by implication, indicate that the delivery or payment is to be made to the officer serving the summons. As in the case of the attachment procedure, the prospective time for which the suggestee is bound is limited to the time of filing the answer; but in the suggestion proceeding the time is still further limited to the return day of the execution, if it comes before the filing of the answer.\textsuperscript{37} As in the case of an order against a garnishee in attachment, an order against a suggestee has the effect of a judgment and may be enforced in the same manner as any other judgment.\textsuperscript{38}

Other details of the procedure in the suggestion proceeding are substantially the same as those in a garnishment proceeding in attachment discussed in the prior topic.

\textit{Garnishment of Salaries and Wages of Private Employees in a Suggestion Proceeding.}

Article 5A, chapter 38 of the Code, enacted in 1939,\textsuperscript{39} is restricted exclusively to garnishment of salaries and wages of private employees, and no provision is made therein even for the garnishment of salaries and wages except in a suggestion proceeding after judgment. Hence this article does not cover garnishment of salaries or wages in an attachment proceeding, where the remedy is still governed by the provisions of article 7, chapter 38 of the Code. But for the garnishment of salaries and wages in a suggestion proceeding, it provides the exclusive remedy.\textsuperscript{40}

\textsuperscript{33}Ibid.
\textsuperscript{34}W. Va. Rev. Code (1931) c. 38, art. 7, § 25.
\textsuperscript{35}Id. at c. 38, art. 5, § 14.
\textsuperscript{36}Id. at c. 38, art. 5, § 18.
\textsuperscript{37}Id. at c. 38, art. 5, § 15.
\textsuperscript{38}Id. at c. 38, art. 5, § 16.
\textsuperscript{39}W. Va. Acts 1939, c. 67; W. Va. Code (Michie Supp. 1939) c. 38, art. 5A.
\textsuperscript{40}"Salary and wages payable to any person engaged in private employment, whether due and owing or to become due and owing shall be subject to
Unlike prior statutes, this article places a limitation on salaries and wages which may be the subject of garnishment. A uniform exemption of ten dollars per week is prescribed. If the amount of salary or wages exceeds ten dollars per week, then twenty per cent thereof is subject to garnishment, with the limitation that ten dollars per week must always remain exempt.\(^41\)

As under article 5, chapter 38 of the Code, covering garnishment in general on a suggestion after judgment, discussed in the preceding topic, so under the present article issuance of an execution is prerequisite to institution of the suggestion proceeding; but the present article prescribes, as a further prerequisite, that the execution must have been returned wholly or partly unsatisfied,\(^42\) presumably in order to vouch for the necessity of the suggestion proceeding and avoid annoyance to a suggestee and embarrassment to the judgment debtor in cases where the judgment might be satisfied by direct action against the judgment debtor. The suggestee is not served with a summons, as under article 5, but with a second execution, called a "suggestee execution,"\(^43\) the form of which is to be prescribed by the Supreme Court of Appeals.\(^44\)

Although the section\(^45\) describing the lien to be enforced by the suggestion proceeding is not as clear as it might be, owing to the fact that the execution creating the lien is referred to without indicating precisely whether it is the original or the suggestee execution, it seems fairly definite from this and other sections of the article that the lien of the original execution does not, as under article 5, cover salary and wages due from the suggestee; but that the lien enforced under article 5A has its inception upon service of the suggestee execution upon the suggestee, relating, after service, to the time of issuance of the suggestee execution. This being true, service of the suggestee execution does not, as does service of the summons under article 5, merely give the suggestee notice of a prior existing lien created by the original execution, but itself creates the lien and at the same time gives the suggestee no-

\(^{41}\) Id. at c. 38, art. 5A, § 2.

\(^{42}\) Ibid.

\(^{43}\) Ibid. "The term 'suggestee execution' shall mean an execution differing from an ordinary execution upon a judgment only in that it is directed against money due or to become due to the judgment debtor from the suggestee as therein set out."

\(^{44}\) W. Va. Code (Michie Supp. 1939) c. 38, art. 5A, § 11. The form has been prescribed by the Supreme Court of Appeals in volume 121 of the Supreme Court Reports.

\(^{45}\) W. Va. Code (Michie Supp. 1939) c. 38, art. 5A, § 3.
tie thereof. Hence it seems that the suggestee will not, as under article 5, be bound in any way by mere notice, from whatever source, of issuance of the original execution, but that his liability begins with service of the suggestee process.

In the matter of venue, the present article does not seem to show the same solicitude for convenience of the suggestee as does article 5. While article 5 provides that the suggestion proceeding shall be in the county of the suggestee's residence, the present article provides that it may be in "the court in which the judgment was recovered or in a court having jurisdiction of the same." It would seem that the phrase "a court having jurisdiction of the same" may call for construction. Grammatically, the word "same" would seem to refer to "judgment", and such may be accepted as the most plausible construction; but to speak of a court's having "jurisdiction of a judgment" is to indulge in a nontechnical and indefinite, if not anomalous, expression. "Jurisdiction of a judgment", in the abstract, without reference to action which the jurisdiction involves, is meaningless. A court may have jurisdiction to entertain an action or suit based upon a judgment; jurisdiction to issue a scire facias to revive it; jurisdiction to issue an execution upon it; or jurisdiction to do other things with reference to it; and no single court may at any time have jurisdiction to do all these things. If the statute is intended to mean jurisdiction to do some specific thing, and not all things, e. g., jurisdiction to issue an execution, why does it not say so? Ungrammatically, the word "same" might be understood as referring to "execution", but such a construction would involve the same objection of indefiniteness as if it referred to "judgment". It hardly could refer to application for the suggestee execution. Jurisdiction to issue the suggestee execution is the very thing which the statute is undertaking to define. The common law cannot fix the venue, because there is no such proceeding at common law. Whether by reason of construction placed upon the statute, or in order to avoid problems of construction, perhaps in most if not all cases the proceeding will be instituted in the court which rendered the judgment. Perhaps such a result was the normal consequence contemplated by the legislature, since the procedure under the present article, as

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40 Ibid. "Upon the return of an execution wholly or partly unsatisfied a judgment creditor may apply to the court in which the judgment was recovered or a court having jurisdiction of the same, without notice to the judgment debtor, for a suggestee execution against any money due or to become due within one year after the issuance of such execution to the judgment debtor as salary or wages arising out of any private employment."
hereinafter appears, seems to have been designed so as not to subject the suggestee to any controversy within the suggestion proceeding and so compel him to go beyond the county of his residence to engage in litigation.

In lieu of the suggestion of indebtedness of the suggestee to the judgment debtor which the execution creditor is required to make under article 5,\textsuperscript{47} the present article provides that he "may apply . . . for a suggestee execution", which shall be issued "If satisfactory proof shall be made, by affidavit or otherwise", that the original execution has been returned wholly or partly unsatisfied, and that the amount of salary or wages exceeds ten dollars per week.\textsuperscript{48} No provision is made as to the form of the application, e. g., whether it may be oral or must be in writing.

No notice to the judgment debtor of the application for the suggestee execution is necessary,\textsuperscript{49} but a copy of the suggestee execution must be served upon him five days before it is served upon the suggestee,\textsuperscript{50} presumably for the same reason that the original execution is required to be returned wholly or party unsatisfied—to give the judgment debtor an opportunity to satisfy the judgment before proceeding against the suggestee. Service of the copy of the suggestee execution upon the judgment debtor may be by registered mail,\textsuperscript{51} but it "shall be served upon the suggestee in the same manner as a summons commencing an action is served."\textsuperscript{52}

In contrast to the suggestee's liability under article 5, which makes him liable only for the amount due at the time of filing his answer or at the return day of the execution, whichever comes first,\textsuperscript{53} under the present article, upon service of the suggestee execution upon the suggestee, "the execution and the expenses thereof shall become a lien and continuing levy upon the salary or wages due or to become due to the judgment debtor within one year after the issuance of the same, unless sooner vacated or modified".\textsuperscript{54} Provision is made for vacation or modification of the suggestee execution,\textsuperscript{55} and also for renewal of an execution which

\textsuperscript{47} W. Va. Rev. Code (1931) c. 38, art. 5, § 10.
\textsuperscript{48} W. Va. Code (Michie Supp. 1939) c. 38, art. 5A, § 3.
\textsuperscript{49} Ibid.
\textsuperscript{50} Id. at c. 38, art. 5A, § 4.
\textsuperscript{51} Ibid.
\textsuperscript{52} Id. at c. 38, art. 5A, § 5.
\textsuperscript{53} W. Va. Rev. Code (1931) c. 38, art. 5, § 15.
\textsuperscript{54} W. Va. Code (Michie Supp. 1939) c. 38, art. 5A, § 3.
\textsuperscript{55} Id. at c. 38, art. 5A, § 6.
shall expire wholly or partly unsatisfied. The renewal covers a period of time similar to that of the original. It retains "the same priority of lien as the original if, and only if, served within thirty days before the expiration of the life of the original".

Unlike the procedure under article 5, where the suggestee is primarily responsive to the court with the privilege of payment or delivery to the officer, under the present article the suggestee is responsive to the officer making the levy or to the judgment creditor, to either of whom he may make payment. No provision is made for filing an answer, as under article 5, or for the suggestee's indicating in any other way the amount for which he is liable. Consequently, of course there is no provision, as in article 5, for a contest of the fullness of the suggestee's disclosures, nor is provision made for the entry of any order fixing the amount of the suggestee's liability. In lieu of such an order, which under article five has the force of a judgment, the judgment creditor is given a right of action against a suggestee who "shall fail or refuse to pay over to the officer serving the execution or to the judgment creditor the required percentage of the indebtedness". No provision is made for a contest within the suggestion proceeding as to the amount of the salary or wages earned by the judgment debtor, as to whether the portion of salary or wages subject to suggestee executions has already been exhausted by prior levies, or as to other matters upon which the suggestee might rely as excusing or qualifying payment by him of the claimed percentage of salary or wages, except the provision for vacating or modifying the suggestee execution hereinbefore noted. In fact, the general scheme of the procedure seems to have been designed with the object of avoiding giving the suggestee the status of a litigant in the suggestion proceeding, a status which he has under article 5, chapter 38 of the Code.

**Garnishment of Salaries, Wages and Money Due from Public Sources in a Suggestion Proceeding.**

Salaries and wages of private employees were subject to garnishment under the general provisions of article 5, chapter 38

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56 Id. at c. 38, art. 5A, § 7. The long life given to the lien under these provisions relieves the judgment creditor from the inconvenience of resorting to successive executions, as under article 5. On the other hand, the judgment creditor is compensated by the fact that, as heretofore noted, at the most only one-fifth of his salary or wages is subject to the lien, making it possible to take from him only in a period of five months an amount which might have been taken from him at one time under article 5.


58 Ibid.

59 See note 55, supra.
of the Code. Hence, presumably, the procedure embodied in article 5A, discussed in the prior topic, was substituted for the procedure embodied in article 5, so far as it covers salaries and wages, either in order to prescribe what the legislature considered a better procedure for garnishment of salaries and wages, or in order to achieve uniformity in the garnishment of salaries and wages in suggestion proceedings as to all employees, whether public or private; or, possibly, for both reasons. But article 5B, the subject of the present topic, was enacted for the purpose of carrying into effect the constitutional amendment and, to the extent that it provides for garnishment of the state and its agencies, creates an entirely new field of garnishment in a suggestion proceeding.

Eliminating provisions dictated by the peculiar status of public employees and garnishees, consideration of which is not necessary for purposes of comparison, it may be said that the general provisions of articles 5A and 5B, prescribing the mechanisms for garnishment of salaries and wages of private and public employees, respectively, are largely similar in character, phraseology and effect. With the exceptions noted below, the provisions heretofore noted as applying to salaries and wages of private employees under article 5A apply with substantially equal effect to salaries and wages of public employees under article 5B. However, there would seem to be enough dissimilarity, some of it apparently unnecessary, in the phraseology, sequence, arrangement, and even the substance, of the provision of the two articles to militate against uniformity, and to cause some confusion in their application unless each article is considered strictly in isolation as applying to its peculiar subject matter.

It will be noted that article 5B, like article 5A, with the exception of section 15 hereinafter discussed, is restricted to garnishment in a suggestion proceeding after judgment and makes no provision for garnishment in an attachment proceeding before judgment. In other words, only where the garnishee is a public officer as defined in section 15, as distinguished from the state, its agency or a political subdivision, is provision made for garnishment in an attachment proceeding. However, article 5B, unlike article 5A, is not confined to garnishment of salaries and wages, but covers "any money due or to become due within one year" after issuance of the suggestee execution, which of course includes salaries and wages.60

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60 W. VA. Code (Michie Supp. 1939) c. 38, art. 5B, § 2.
When more than one suggestee execution is pending against the salary or wages of a private employee, article 5A provides that they shall be satisfied in the order of their priority. There is no provision in that article specifically fixing the order of priority. The statute provides that the suggestee execution, after service, "shall become a lien and continuing levy upon the salary and wages due or to become due to the judgment debtor within one year after the issuance of the same". Apparently, the lien comes into existence upon service of the suggestee execution, but relates back to the time of its issuance, and the order of priority between different executions is intended to be deduced as resulting from the respective times of their issuance. Article 5B, relating to public employees, contains similar provisions as to the inception of the lien and the time period which it covers and, apparently in aid of these provisions, a further provision, not found in article 5A, that the day and hour of the issuance of the suggestee execution shall be entered on the face thereof. However, under article 5B suggestee executions are not to be satisfied in the order of their issuance, but in the order in which they are served upon the suggestee. The only way occurring to the writer in which these apparently inconsistent provisions in article 5B may be harmonized is to assume that, as to liens other than suggestee execution liens the priority of a suggestee execution is to be determined by the time of its issuance, but that as between different suggestee executions the priority is to be determined by the time of service on the suggestee. Why some of these matters should be left to deduction in the one article and are made specific in the other, and why different rules of priority, if such is the intention, should be prescribed in the two articles, is not clear to the writer.

Superimposed upon the provisions noted in the preceding paragraph fixing the inception of the suggestee execution lien, apparently for convenience of the suggestee in the case of public employees, is a further provision in article 5B, nothing similar to which is found in article 5A: "Such an execution shall not become a lien against salary or wages payable by the state or a state agency with-

\[61\] Ibid. at c. 38, art. 5A, § 3.
\[62\] Ibid.
\[63\] W. Va. Code (Michie Supp. 1939) c. 38, art. 5B, § 2.
\[64\] Ibid.
\[65\] Ibid. "Where more than one suggestee execution shall have been issued pursuant to the provisions of this section against the same judgment debtor, they shall be satisfied in the order of priority in which they are served upon the state, state agency or political subdivision from which such money is due or shall become due."
in ten days after the service thereof or payable by a political subdivision within five days after the service thereof.\textsuperscript{68}

Under article 5A, relating to private employees, the contents of the suggestee execution are not specifically prescribed, the form of the execution being left to regulation by the Supreme Court of Appeals.\textsuperscript{69} Under article 5B, relating to public employees, there is a similar provision authorizing the court to prescribe the form of the execution.\textsuperscript{68} and, in addition thereto, the following provision: "A suggestee execution against salary or wages shall contain the name of the judgment debtor and the bureau, office, department, institution or subdivision thereof of the state or political subdivision of the state, as the case may be, of which he is an officer or employee."\textsuperscript{69}

Under article 5A, relating to private employees, the suggestee execution "shall be served upon the suggestee in the same manner as a summons commencing an action is served."\textsuperscript{70} Under article 5B, relating to public employees and creditors, if the suggestee is the state or a state agency, service may be made by mail,\textsuperscript{71} but there is no provision, as there is in the case of service of a copy of the suggestee execution upon the judgment debtor,\textsuperscript{72} that the mail shall be registered mail. If the suggestee is a political subdivision of the state, "service by mail shall not be sufficient or binding,"\textsuperscript{73} but no other mode of service is indicated. Does this mean that service in such a case shall be in the same manner in which a summons commencing an action is served, as under article 5A?

Under article 5A, relating to private employees, the suggestee is required to make payment to the officer serving the suggestee execution or to the judgment creditor,\textsuperscript{74} and no provision is made for payment to a court or the clerk thereof. Under article 5B, relating to public employees and creditors, payment is required to be made "to the court or clerk of the court who issued the execution or to the officer presenting the same,"\textsuperscript{76} and no provision is made for payment to the judgment creditor, as under article 5A.

\textsuperscript{68} W. VA. Code (Michie Supp. 1939) c. 38, art. 5B, § 3.
\textsuperscript{69} See note 44, supra.
\textsuperscript{69} W. VA. Code (Michie Supp. 1939) c. 38, art. 5B, § 14.
\textsuperscript{69} Id. at c. 38, art. 5B, § 3.
\textsuperscript{70} Id. at c. 38, art. 5A, § 5, note 52, supra.
\textsuperscript{71} Id. at c. 38, art. 5B, § 5.
\textsuperscript{72} Id. at c. 38, art. 5A, § 5, and art. 5B, § 4.
\textsuperscript{73} Id. at c. 38, art. 5B, § 5.
\textsuperscript{74} Id. at c. 38, art. 5A, § 5.
\textsuperscript{75} Id. at c. 38, art. 5B, § 9.
As under article 5A, so under article 5B no provision is made for fixing the liability of a suggestee or an officer or agent of a suggestee by any proceeding within the suggestion proceeding. A public officer who makes an improper payment, or who fails or refuses to make a proper payment, is made personally liable, but only in the event that he acts in bad faith.76 There is no provision as to how the liability shall be imposed, but presumably it is intended that the judgment debtor or the judgment creditor, as the case may be, shall have a right of action by reason thereof against the officer. The judgment creditor is given a right of action against a political subdivision which fails or refuses to make proper payment as a suggestee.77 No judgment is permitted against the state as a suggestee, "but a judgment creditor may bring an action against the proper officer for a declaratory judgment establishing" sums payable under the suggestee execution.78 No provision is made as to how such a judgment shall be enforced—whether it establishes a personal liability against the officer which may be enforced by execution, or whether it shall be enforced by mandamus against the officer as to public funds in his custody.

As under article 5A,79 so under article 5B the suggestee execution is subject to the exemptions prescribed in article 8, chapter 38 of the Code. In addition thereto, article 5B prescribes the following exemptions:

"Money due to any lawful beneficiary thereof from any workmen's compensation, unemployment compensation, pension or retirement, or public assistance or relief fund or system, shall not be subject to suggestion under this article.

"Public obligations, whether in the form of bonds, notes, certificates of indebtedness, or otherwise, and whether negotiable or non-negotiable, shall not be subject to suggestion under this article."80

There may be other provisions in articles 5A and 5B presenting problems worthy of discussion, but, as heretofore indicated, the primary object of this discussion is to make a comparison of procedures, and it is believed that the foregoing observations have called attention to most of the provisions deserving consideration in this respect.

76 Ibid.
77 Ibid.
78 Ibid.
79 W. VA. CODE (Michie Supp. 1939) c. 38, art. 5A, § 9.
80 Id. at c. 38, art. 5B, § 12.
Garnishment of Funds in the Hands of Public Officers and in Custody of the Law.

Provision for garnishment of money and personal property in the hands of a public officer is made in section 15, article 5B, chapter 38 of the Code. This section, already quoted in the first topic of this discussion, for convenience is quoted here again.

"Money and other personal property in the hands of a sheriff, constable, clerk of court, justice of the peace or other public officer who shall hold the same by virtue of his office and which belongs or is owed to any person shall be subject to garnishment and suggestion in the same manner and to the same extent as if held by him as a private individual, except that money or other property which is in custodia legis shall be paid or delivered into the court to abide the result of the suit, unless the court shall otherwise direct. This section does not apply to public property or funds."

In the absence of careful differentiation, the effects of the provisions of this section and of the provisions of other sections of the article in which it occurs may be confused. In other sections of the article, the state, its agency or a political subdivision of the state, is the suggestee, and officers are mentioned and dealt with merely as agents of such suggestees; e.g., as representatives of suggestees for the purpose of service of process, making payment, etc. But under the present section, the officer himself is the suggestee.

It will be noted that this section is not restricted to salaries and wages, as under article 5A, nor to money due or to become due (including salaries and wages), as under the other sections of article 5B; but covers money owing generally (not money to become due) and also personal property. Furthermore, as heretofore noted, this section seems, by virtue of the phrase "garnishment and suggestion" not only to cover garnishment in a suggestion proceeding after judgment, but also garnishment in an attachment proceeding.

No method of procedure under this section is prescribed, except the general provision that the money or property "shall be subject to garnishment and suggestion in the same manner and to the same extent as if held by him as a private individual." If there is a possibility, which seems remote, that a public officer under any circumstances may hold money by virtue of his office which is owing to a judgment debtor as salary or wages of a private employee, then in such a case a suggestion proceeding against the officer would follow the procedure prescribed by article 5A. The
procedure prescribed by article 5B would not seem to be applicable, because it all seems to be confined to instances where the state, its agency or a political subdivision, and not an officer, is the suggestee. Wherefore, it would seem that in a suggestion proceeding under the present section the procedure to be followed is that prescribed in article 5, chapter 38 of the Code, prescribing generally the procedure to be pursued in a suggestion proceeding. If the garnishment is in an attachment proceeding, the procedure of course must be that prescribed by article 7, chapter 38 of the Code.

The provision in this section relating to “custodia legis” would seem to call for construction. What is meant by custody of the law? What court and what suit are those mentioned in the statute? Is the court the one under whose jurisdiction the garnishment or suggestion proceeding is pending, or a court of which the garnishee or suggestee is an officer or agent? In some sense, money or property held by any of the officers enumerated in the section “by virtue of his office” is in custody of the law. Custody of the law may, but does not necessarily, mean custody or jurisdiction of a court. However, if the money or property is supposed to be in custody of the law by virtue of an action or suit pending in the court mentioned in the statute, as seems probable, then it will be necessary to give some such restricted meaning to the phrase. Such a construction should have the virtue of indicating the court into which the money or property is to be paid or delivered “to abide the result of the suit.” If custody of the law means custody or jurisdiction of a court through its officer or agent, then it is logical to assume that the court indicated by the statute is the one whose officer or agent has custody of the res, and that the provision was inserted in the statute to prevent encroachment upon its jurisdiction without its consent, which would only be given by its own order.\(^\text{81}\)

**CONCLUSION.**

From the melange of statutory enactments now wholly or partly in force, the following conclusions may be stated. Prior to Acts of 1935, except before justices of the peace, the law of garnishment was regulated by only two general enactments—article 7, chapter 38 of the Code, providing for garnishment in an attachment proceeding; and article 5, chapter 38, providing for garnishment

\(^{81}\) Possibly this provision, in order to prevent encroachment upon the jurisdiction of a court without its consent, contemplates some such distinction as is made in Boylan v. Hines, 62 W. Va. 485, 59 S. E. 503 (1907), cited in note 5, supra.
in a suggestion proceeding after judgment. Under neither of these articles was it possible to garnishee the state, its agency, a political subdivision, a public corporation, or a public officer; or to reach funds or property under the direct jurisdiction of a court.

By chapter 110, Acts of 1935, repealed by article 5B, chapter 38 of the Code, it was made possible to garnishee, either in an attachment proceeding or in a suggestion proceeding after judgment, the wages and salaries of public employees other than employees of the state or its agency. Since no procedure was prescribed in this enactment, the procedure to be pursued was necessarily that prescribed in article 7, chapter 38 of the Code, if the garnishment was in an attachment proceeding; and the procedure prescribed in article 5, chapter 38, if the garnishment was in a suggestion proceeding.

In article 5B, chapter 38 of the Code, enacted in 1939 in pursuance of the constitutional amendment, provision is made for garnishment in a suggestion proceeding of any money (including salary and wages) due or to become due within a limited time to a judgment debtor from the state, a state agency or a political subdivision of the state, and the procedure therefor is prescribed in detail; but, as against such a garnishee, no provision is made for any garnishment whatever in an attachment proceeding, nor for any garnishment in a suggestion proceeding except as to money due or to become due. Wherefore, since the constitutional amendment, permitting garnishment against any of these entities, in either an attachment or a suggestion proceeding, clearly is not self-executing and has not been implemented by statute, except as in article 5B, with reference to the state and its agencies, there is no possibility of any garnishment proceeding against the state or its agencies except in a suggestion proceeding for money due or to become due to a judgment debtor as provided in article 5B. As to garnishment proceedings against a political subdivision, the possibilities may be broader.

Although chapter 110, Acts of 1935, permitting garnishment proceedings against the wages or salary of an employee of a political subdivision in either an attachment or a suggestion proceeding, has been repealed, the constitutional amendment, as noted above, authorizes such proceedings, not only against salaries and wages due, but also against any money due from a political subdivision or personal property in its custody. While no statute has ever been enacted which will serve the purpose of implementing the con-
stitutional amendment as to the state and its agencies except article 5B, articles 5 and 7, chapter 38 of the Code not being adequate for such a purpose, it may be possible that the procedures prescribed in articles 5 and 7 will be held sufficient to implement the amendment for purposes of proceeding in either an attachment or a suggestion proceeding against a political subdivision as a garnishee, and with reference to either money or property. However, in weighing such a possibility, consideration should be given to the fact that, as to garnishment in a suggestion proceeding against money due or to become due from a public source, any possible resort to article 5 may have been superseded by the remedy prescribed in article 5B, although there is no provision in article 5B, as there is in article 5A, that an exclusive remedy is prescribed by the article.

For garnishment of salaries and wages of private employees in a suggestion proceeding after judgment, article 5A, chapter 38 of the Code prescribes the exclusive procedure, but there is nothing in this article which prohibits the garnishment of such salaries and wages in an attachment proceeding under article 7, chapter 38 of the Code, as has been done before the enactment of article 5A, and presumably such remedy is still available.

As heretofore noted, section 15, article 5B, chapter 38 of the Code, relating to the garnishment of money or personal property in the hands of a public officer in either an attachment or a suggestion proceeding, prescribes no procedure therefor. Since the procedures prescribed in articles 5A and 5B are applicable only when a private employer, the state, a state agency or a political subdivision, and not a public officer, is the garnishee, there seems to be little possibility that either of these procedures may be employed against a public officer garnishee under the section afore-said. Wherefore it seems that, under this section, if the garnishment is in an attachment proceeding, the procedure must be as prescribed in article 7, chapter 38 of the Code; and if the garnishment is in a suggestion proceeding, the procedure must be that prescribed in article 5, chapter 38.

It has not been the intention to involve in this discussion the provisions of chapter 50 of the Code, relating to garnishment in attachments and suggestions on judgments before justices of the

82 See note 9, supra.
83 W. VA. CODE (Michie Supp. 1939) c. 38, art. 5A, § 2.
84 Ibid.
peace. It may be noted, however, that the procedure prescribed in article 5A, chapter 38, for garnishment of salaries and wages of private employees must be pursued in suggestion proceedings before justices, because this article prescribes the exclusive procedure for such purposes in whatever court; and that the procedure prescribed in article 5B likewise must be pursued in suggestion proceedings before justices, at least so far as it applies to money due from the state or its agencies, because no other procedure has been provided for carrying into effect the constitutional amendment.

It would seem that something could be done by way of clarifying, harmonizing, and coordinating the various statutes dealing with the different phases of garnishment in this state. Perhaps the greatest confusion in administration of the statutes will result from the fact that different procedures, varying widely in detail, are prescribed for garnishment in suggestion proceedings after judgment. In most instances, if not all, there is no possibility of electing between the different procedures as applied to any given case. For example, if the proceeding is against the salary or wages of a private employee, the exclusive procedure is that prescribed in article 5A, chapter 38 of the Code; if the money due from the suggestee to the judgment debtor represents a mere commercial debt owing in a private capacity, the procedure must be that provided in article 5, chapter 38 of the Code; and if the proceeding is against salary, wages or other money due from the state or its agency, the procedure must be as prescribed in article 5B, chapter 38 of the Code. Not only may the details of the different procedures be confused in applying the remedy selected, but selection of the remedy itself may involve a process of search, comparison and elimination. There would seem to be no reason why the broader details of the different procedures should not be more uniform; e. g., provisions relating to the venue of the proceeding, the nature of the suggestee process, the nature and inception of the lien, etc. If one procedure is better than the others, and amalgamation is not expedient, uniformity may be aided by adopting the basic features of the better procedure and making the others conform thereto as nearly as practicable.