Marquette Law Review

Volume 47
Issue 2 *Fall 1963*

Article 5

1963

Garnishment: Contingent Interests

Stephen L. Beyer

GARNISHMENT: CONTINGENT INTERESTS

The Supreme Court of Arizona has recently decided a case involving a rather rare fact situation and the interpretation of its garnishment statutes. The case dealt with many questions concerning the proper use of garnishment proceedings, but this analysis will be limited to the matter of contingent interests. The court found that the balance of the purchase price to be paid under an installment land contract at the time of the service of the garnishment writ was an "indebtedness due," and therefore subject to garnishment. *Weir v. Galbraith.*[1]

Judgment had been entered in the principal action on a promissory note for the plaintiff, Galbraith, and against defendant, Weir. In the garnishment action, Galbraith was attempting to satisfy this judgment. Weir had sold real estate to one Rodriquez under a land contract for $20,000, the down payment being $1,000 with the balance to be paid in monthly installments of $250.00. At the time of service of writs of garnishment, most of the payments remained unmatured. The defendant contended that ". . . the writ was not effective to impound installments maturing after the date of service because those installments are contingent and may never become due."[2] The Arizona statutes (along with those of Wisconsin and most other states) require an "indebtedness" which is "due" or "presently owing."[3] The court, without citation of authority, found that such an installment land contract created a definite, fixed, and absolute obligation to pay the purchase price which could not be defeated by the contingency rule. The court stated that:

> The purchase price balance at any time outstanding is presently owing to the seller, although the time for payment is postponed. The installments are not separate and independent debts but are part of an entire debt created at the signing of the contract by the parties.[4]

The arguments submitted in the briefs of counsel in this case indicate that the problem is essentially one of semantics. The appellants felt that the lower court's judgment was erroneous in that it included future installments which were not yet due and payable at the time of service of the writ of garnishment. They also argued that the court had no jurisdiction over funds which became due and payable at a later date. Appellants compared future installment payments to unearned wages under an agreement of employment (which cannot be garnished because they are deemed contingent upon performance of the work by the employee)[5] and, therefore, maintained that they were entirely con-

---

[1] Weir v. Galbraith, 92 Ariz. 279, 376 P. 2d 396 (1962).
[2] *Id.*, 376 P. 2d at 400.
[3] ARIZ. REV. STATS. §12 1574 (1956); see also WIS. STATS. §267.18(4) (1961) construed in Edwards v. Roepke, 74 Wis. 571, 43 N.W. 554 (1889).
[4] Weir v. Galbraith, *supra* note 1, 376 P. 2d at 401.
[5] Foster v. Singer, 69 Wis. 392, 34 N.W. 395 (1887) and many subsequent

tingent until the last installment was due. Appellees also used the word "due" in asserting that the obligation to pay the entire purchase price was a debt unconditionally *due* even though the time for payment had been deferred. Appellants interpreted the word *due* as meaning *presently payable,* while appellees considered it to mean *presently owing* (even if the payment is deferred). The court's decision accepts the latter interpretation of the Arizona statutes.

Disregarding the use of the word "due," the problem of what is a presently owing debt which can be garnished, and what is a contingent debt, still faces the great majority of the practitioners across the country. While this problem is essentially one of local statutory interpretation, one can ascertain a few general principles concerning the prohibitions against the garnishment of contingent interests. "In the absence of statutes to the contrary, a debt which is uncertain and contingent, in the sense that it may never become due and payable, is not subject to garnishment."[6] Only a few states have by statute provided for the garnishment of contingent debts.[7] Wisconsin has provided by statute that a contingent debt is not subject to garnishment, while a presently owing debt with a schedule of deferred payments is.[8] It may be generally stated, that the indebtedness sought to be garnished must be due without contingency at the time of service of the writ of garnishment (or at the date of answer thereto).[9] This being accepted, the specific questions then to be posed are what constitutes such a contingency and is an installment land contract within that category. Subsequent discussion will primarily be geared to the problem as viewed under the Wisconsin and similar statutory interpretations using the *Weir* case only as the sole reported example concerning the attempted garnishment of the proceeds of an installment land contract.

It then must be ascertained what debts are to be deemed contingent. They have been defined as follows: "A contingent claim is one where liability hinges upon some future event, which may or may not occur; it is dependent upon some condition as yet unperformed."[10]

There seems to be general agreement that this "contingency," is a condition rendering the obligation itself uncertain (not merely its payment).[11] Several cases have arisen where the essential dispute revolved

---

cases have held that unearned wages are contingent (see Shepard's Wisconsin Citations).

[6] 38 C.J.S. *Garnishments* §87 (1949).

[7] KAN. REV. STAT. ANN. ch. 60 §946 (1923); MICH. COMP. LAWS §13123(2) (1915); IOWA CODE ANN. §12143 (Whitney 1924).

[8] W's. STATS. §267.18(4), (5) (1961).

[9] Edwards v. Roepke, 74 Wis. 571, 43 N.W. 554 (1889); Vollmer v. Chicago and Northwestern Railroad, 86 Wis. 305, 56 N.W. 919 (1893); Zimek v. Illinois National Casualty Co., 370 Ill. 572, 19 N.E. 2d 620 (1939); for numerous other cases to the same effect see Annot., 134 A.L.R. 862.

[10] Zimek v. Illinois National Casualty Co., *supra* note 9, 19 N.E. 2d at 623 (1939).

[11] "The uncertainty contemplated by the law is one that conditions the obliga-

around an interpretation of the meaning of "contingency" in the garnishment statutes or prior decisions.[12] These controversies have consistently resulted in the courts' pointing out the differences between postponed or future payment and contingent obligations. The possibility that a condition subsequent may defeat the payment of a presently owing obligation has no effect on the availability of garnishment.[13] If the debt has come into existence, a debtor-creditor relationship exists and the time and manner of payment are immaterial for the purpose of garnishment. It is the existence of the liability itself that must not be contingent.[14] A debt, to be "due" as the word is used in the garnishment statutes, need not be presently payable or liquidated, and the fact that the debt may be defeated by a condition subsequent will not put it beyond the reach of garnishment.[15]

Thus there is no problem in determining that in most states, a contingent debt cannot be garnished and a presently owing debt with deferred payments under a contractual agreement is subject to garnishment. The problem, however, is to determine which of these categories an installment land contract falls within. Of the various tests which have been applied to determine if a garnishable, non-contingent, presently owing, due debt exists, the following has found general acceptance:

> The only debts from a garnishee to a defendant which are subject to garnishment under the Alabama statutes are those which may be made the basis of an action of debt or indebitatus assumpsit by the defendant against the garnishee, so that the *test* here is whether at the time of the service of the writ or at some time subsequent thereto, the defendant had or will certainly have in the future such a cause of action against the garnishee.[16]

---

tion itself. The contingency must affect the actual liability of the garnishee." Knudson v. Anderson, 199 Minn. 479, 272 N.W. 376, 377 (1937).

[12] See as examples: National Surety Co. v. Hurley, 31 N.D. 343, 153 N.W. 470 (1915); Molloy v. Prudential Ins. Co. of America, 129 Conn. 251, 27 A. 2d 387 (1942); Balaban v. Willett, 305 Ill. App. 388, 27 N.E. 2d 612 (1940); Calechman v. Great Atlantic and Pacific Tea Co., 120 Conn. 265, 180 A. 450 (1935).

[13] This can be determined by analyzing the difference between WIS. STATS. §267.18(4) (1961) which states, "No person shall be liable as garnishee: . . . (4) By reason of any thing owing him upon a contingency." and (5) which states, ". . . except as above provided judgment may be given for any thing owing, although it has not become due in which case the garnishee shall not be required to pay or deliver it before the time appointed by the contract."

[14] In Minnesota as in most states contingent claims are not subject to garnishment. "Contingency" as used in 2 MASON'S MINN. STATUTES §9361(1) (1927) has been held to mean a contingency in the obligation or debt itself and not in its payment. Irwin v. McKechnie, 58 Minn. 145, 59 N.W. 987 (1894); Knudson v. Anderson, 199 Minn. 479, 272 N.W. 376 (1937).

[15] Calechman v. Great Atlantic & Pacific Tea Co., 120 Conn. 265, 180 Atl. 450, 100 A.L.R. 302 (1935); This is also true under the various interpretations of WIS. STATS. §267.18(4), (5) (1961); see WIS. STAT. ANN. §267.18 (1957).

[16] Schaefer v. Post and Flagg, 10 F. Supp. 827 (N.D. Ala. 1935).

Therefore, the most comprehensive test of liability to garnishee process is whether or not the person sought to be charged could have been sued by the defendant. Under such a test, the possibility that a future state of events may arise before the day of payment, which creates a defense to an action in debt, does not render the debt contingent. This test is actually a convenient way to determine if the garnishee defendant possesses funds or credits which the principal defendant has a right to obtain. If he does, they are garnishable.

As previously pointed out, Wisconsin is in complete accord with the general principles stated on this subject. The Wisconsin garnishment statutes[17] are very complete and concise in defining when liability as a garnishee exists. Section 267.17 clearly indicates that even unmatured debts can be garnished: ". . . for all his debts due or to become due to the defendant. . . ." (here "due" must be interpreted to mean "unmatured" rather than "contingent"). This is even more obvious from a reading of section 267.18(5).[18] While this statute is seemingly patent, and easily understood, no cases have arisen in Wisconsin which place a land contract within it, leaving some doubt as to possible interpretations.

In light of the language of section 267.18(5), however, the exact import of section 267.18(4)[19] is not clearly understood. It would seem that the presence of language recognizing presently owing but unmatured claims as garnishable, would require the obvious and proper interpretation of "contingency" in section 267.18(4) as relating to the obligation itself. Without listing all of the Wisconsin cases which have arisen involving attempted garnishment of a possibly contingent debt, it can be stated that any contingencies found were clearly and unmistakably such as to render the obligation itself doubtful.[20] Wisconsin cases state that the debt must be absolutely owing with no question of contingency as to the indebtedness itself.[21] A relatively recent Wisconsin decision[22] found that an unmatured but owing obligation could not be set-off against a matured obligation. The court seemed to imply that it recognized the obvious meaning of sections 267.17 and 267.18(5), but held that it did not apply to set-offs. The court reasoned that to allow a debt not due, although owing, to be set off against one already

---

[17] WIS STATS. §§267.01, 267.17, 267.18 (1961).

[18] ". . . judgment may be given for anything owing, although it has not become due (matured) in which case the garnishee shall not be required to pay or deliver it before the time appointed by the contract."

[19] "No person shall be liable as garnishee . . . . (4) by reason of anything owing by him upon a contingency."

[20] Edwards v. Roepke, 74 Wis. 571, 43 N.W. 554 (1889), Foster v. Singer, 69 Wis. 392, 34 N.W. 395 (1887).

[21] Vollmer v. Chicago and North Western Railroad Co., 86 Wis. 306, 56 N.W. 919 (1853).

[22] Mattek v. Hoffman, 272 Wis. 503, 76 N.W. 2d 300 (1956).

matured would be to change the contract and advance the time of payment of the yet unmatured debt.

It appears that in the midst of this semantic dilemma, the Wisconsin statutes differentiate the concepts of "contingency" and "owing." That is to say, as long as a debt is "owing," it is not "contingent." The fact that the "owing" may cease to exist upon the happening of future events is immaterial as long as it is absolute at the time of service of the writ of garnishment. The contingency of which section 267.18(4) speaks, is a condition precedent to the obligation of the debt itself. Such a construction of these statutes is directly in line with their purpose, namely that of holding the garnishee defendant free from any liability because of the garnishment proceedings for which he may never become actually liable to the principal defendant. The garnishee defendant should not be detrimented by the garnishment proceedings.

The problem still remains as to where the practitioner shall place a land contract under the above construction of the Wisconsin law on garnishments. Are the obligations incurred under such a contract "presently owing" liabilities, and thus subject to garnishment, or are the future, unpaid installments "contingent" upon some condition yet to be performed by the vendor? No reported cases have supplied an answer to this question. However, the few examples which follow are taken from various states for the purpose of shedding some light on the prevalent judicial thinking along related lines.

In 1923, the Supreme Court of Iowa in the case of *Armstrong v. Armstrong*[23] held that where the principal defendant and the garnishee had entered into a contract for the sale of a farm to the garnishee, with title to pass on payment of the purchase price and delivery of a deed evincing good and marketable title, the proceeds of the interim contract for the sale of land were not subject to garnishment. This resulted from a determination by the court that the debt created by such a contract was contingent upon the delivery of a deed by the vendor, showing good and marketable title. In other words, the debt against the vendee was contingent upon the vendor's willingness and ability to perform. The court refused to adopt the theory that the contingency could be erased by the passage of equitable title to the vendee at the time of the signing of the contract. The court stated:

> . . . payment of the consideration could not be enforced against him (the vendee) even if every other requirement of the contract was complied with, until a deed conveying the farm to him, free and clear of all encumbrances except those assumed by him . . . was tendered to him. The indebtedness did not become absolute until that was done.[24]

[23] 196 Iowa 947, 192 N.W. 887 (1923).
[24] Armstrong v. Armstrong, 196 Iowa 947, 192 N.W. 887, 888 (1923).

The Iowa court cited *Becker v. Becker*,[25] a Wisconsin case, to support this holding. The *Becker* case held that the debt for the sale of land does not become absolute until the delivery of the deed. The Wisconsin court stated that the right to the proceeds of the sale do not become absolute in the vendor until his performance, thus making the debt contingent (and under *Edwards v. Roepke*,[26] not subject to garnishment). Other cases in various states have reached a like conclusion on similar facts.[27]

At least one case draws a clear distinction between the proceeds due under an interim land contract and a mortgage.[28] The court therein states:

> In my opinion there is a clear distinction between monies due under a mortgage and those under an agreement of sale. Under a mortgage, the debt becomes an unconditional liability at the time fixed for payment. Under an agreement of sale, the debt at the time fixed for payment is conditioned upon the vendor's being able to make title, and where he has no title, the purchase money never becomes payable.[29]

Here again one is faced with a dilemma. Is one to align the installment land contract with a mortgage due to their similarity as a form of financing real estate transactions? If this is done the technical passage of legal title, which follows delivery of the deed at the outset of the mortgage agreement and following the last payment of an installment land contract, must be disregarded. The alternative is to place great emphasis on the passage of legal title and hold that the installment land contract and the interim land contract must be treated alike because legal title passes in neither until after the attempted garnishment.

A rather unique example of the garnishment of the proceeds of the sale of real estate is presented by the Wisconsin court in *Aschermann v. Hart*.[30] In this case the parents of Charles Hart sold him a hotel property for $33,000, paying $2,000 down and the rest in equal monthly installments. This was done by parol and no deed was executed. Charles became financially embarrassed and agreed with his parents to rescind the contract and return the property in exchange for their promise to pay his debts. The plaintiff sued Charles as principal defendant on a debt, and garnished his parents on the basis of their contractual obligation to pay Charles' debts. The Wisconsin court held that this was a "presently owing" debt, subject to garnishment. The Wisconsin court

[25] 112 Wis. 24, 87 N.W. 830 (1901).
[26] 74 Wis. 571, 43 N.W. 554 (1889).
[27] Moreau River State Bank v. Japinga, 37 S.D. 404, 158 N.W. 786 (1916); Cowell v. May, 26 Mont. 163, 66 Pac. 843 (1901).
[28] Barsi v. Farcas, 18 Sask. L.R. 158, 1 D.L.R. 1154 (1924). The Saskatchewan law concerning the prohibition against the garnishment of contingencies is the same as that of Wisconsin and the majority of the United States.
[29] *Id.*, 1 D.L.R. at 1160.
[30] Ascherman v. Hart, 109 Wis. 38, 85 N.W. 121 (1901).

has also held that the proceeds due under a contract for the construction of a building are contingent and not subject to garnishment until the work is completed.[31] There is at least one authority to the effect that where the seller receives the purchase price and thereafter fails to deliver good title by reason of a breach of warranty, he may be charged as the purchaser's garnishee to the extent of the purchase price paid.[32] This type of decision, of course, does not help solve the problem of what can be done in the case of the non-defaulting vendor, as in *Weir v. Galbraith.*[33] The federal courts have also held that a debt must be "presently owing" to be garnishable. In the case of *Smith v. Marker*[34] the court held that where the garnishees agreed to pay the debtor the price of certain land after the period of contest had expired, if the title was vested in the debtor at that time, there could not be garnishment because the period of contest had not yet run and there was a possibility that the debtor would not have title at the requisite time, thus negating the liability. Can it then be said that the debt evinced by the remaining payments of an installment land contract could be negated by discovery of a lack of good title in the vendor, making the future installments contingent upon his delivery of good title?

The Texas court[35] in a case involving a garnishment of the proceeds of the sale of land, indicates by negative inference that if it is provided in the contract that the vendor must deliver an unclouded title, then a potential cloud on the title could create a contingency sufficient to bar garnishment. The court in this case held that there were no clouds on the title in question, but the inference can be drawn from such decision that if there had been, and if the contract had provided for their removal as a condition precedent to payment, then the debt itself would have become contingent and would not have been subject to garnishment. This reasoning also might be said to apply to the installment land contract case where the delivery of a deed showing good and marketable title upon tender of the last payment could be considered to be a condition precedent to the payment of all the prior installments. It must always be born in mind, however, that the price of property sold on credit can be reached by garnishment,[36] if there is no condition precedent yet to be performed by the vendor.

This author's research reveals that there have been no cases reported in any common law jurisdiction involving an attempt to garnishee the

[31] 120 Wis. 303, 97 N.W. 897 (1904). This is also the law in other states; *e.g.*, Acushnet Saw Mills Co. v. St. Pierre, 316 Mass. 621, 55 N.E. 2d 900 (1944).
[32] Fleming v. Pringle, 21 Civ. 229, 51 S.W. 553 (1899).
[33] Weir v. Galbraith, *supra* note 1.
[34] Smith v. Marker, 6 Ind. T. 213, 90 S.W. 611 (1905), *aff'd.*, 154 Fed. 838 (8th Cir. 1907).
[35] Looney v. Pope, 148 S.W. 1170 (Texas 1912).
[36] See Citizen's State Bank v. Carda, 47 S.D. 29, 195 N.W. 828 (1923) for an example of an application of this principle to sale of real estate.

unpaid installments of a land contract prior to *Weir v. Galbraith.*[37] The principles concerning the prohibition against the garnishments of contingent interests, however, are ingrained into the law and the cases are old and numerous which interpret and define these various contingencies. Thus, the inherent characteristics of the installment land contract must be examined to determine if the payment of the individual installments is based upon some condition yet to be performed by the vendor. The installment land contract has just recently come of age. Its use has become much more extensive and its characteristics have been studied to a great extent in recent years. The traditional view is that legal title is in the vendor until tender of the final payment to him by the vendee, at which time the vendor delivers a deed to the vendee. During the time of the installment payments, equitable title lies in the vendee by virtue of the contract.[38]

An installment land contract is not an ordinary contract since it confers possessory rights on the vendee, much akin to the effect of a conveyance.[39] Before the "contingency" question can be answered, it must be ascertained whether or not the installment land contract vendee can be considered to be the legal owner of the land during the time he is making the payments, prior to the delivery of any deed. If the vendee is considered the owner it could be said that there is no condition to be performed as yet by the vendor and thus the debt is not contingent and becomes subject to garnishment.

The Wisconsin statutes provide that every interest in lands is a legal right.[40] A land contract obviously comes within the purview of section 231.03 because it is an immediate grant of rents and profits along with the possession of land.[41] The estate of the vendee can therefore be treated as a legal one. The Wisconsin court has referred to the installment land contract as a "presently executed sale."[42] This is greatly different from an interim land contract which confers no title on the vendee and yet remains to be performed. The Wisconsin court has held

---

[37] Weir v. Galbraith, *supra* note 1.

[38] See Krakow v. Willie, 125 Wis. 284, 103 N.W. 1121 (1905), describing these traditional views.

[39] See Freimann v. Cumming, 185 Wis. 88, 90, 91, 200 N.W. 662, 663 (1924).

[40] "Uses and trusts, except as authorized and modified in this chapter, are abolished; and every estate and interest in lands shall be deemed a *legal* right, cognizable as such in the courts of law, except when otherwise provided in these statutes." WIS STATS. §231.01 (1961). "Every person, who, by virtue of any grant, assignment or devise, now is or hereafter shall be entitled to the actual possession of lands and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein of the same quality and duration and subject to the same conditions as his beneficial interest." WIS. STATS. §231.03 (1961); See also, comment by Oliver S. Rundell which states, ". . . provided that any person entitled to the possession of land should have a legal estate corresponding to his beneficial interest." WIS. STAT. ANN. §84 (1957).

[41] Krakow v. Willie, *supra* note 38.

[42] State Bank of La Crosse v. Beinfang, 133 Wis. 431, 113 N.W. 726 (1907).

by virtue of *Harley v. Harley*,[43] that for all practical purposes, the land contract vendee has legal title at least by the time he completes his payments, implying that the deed only evinces the title and does not convey it. If this is to be the interpretation then there can be no condition yet actively to be performed by the vendor so as to create a contingency.

The vendee of the installment land contract is recognized as the legal owner for many other purposes. A pledge of the vendee's interest as the security for a debt constitutes a real estate mortgage.[44] The vendee's interest is not subject to a claim of dower by the wife of the deceased vendor.[45] The vendee has been allowed to bring an action in trover for the removal of timber from the land sold under the land contract.[46] The vendee's estate is subject to judgment liens against him.[47] The vendee is recognized as the owner for tax exemption purposes.[48] As seen from the above authority, at least the Wisconsin court seems to recognize the legal character of the vendee's estate. This makes the installment land contract an executed sale with no condition precedent to performance remaining after the signing of the contract itself. It can therefore be argued that the Wisconsin court would align an installment contract with a mortgage, allowing the vendee to become a garnishee as was done in *Weir v. Galbraith*. Wisconsin would apparently agree with *Barsi v. Farcas*[49] and differentiate between an installment land contract and an interim contract for the sale of land, making the proceeds of the former garnishable and the latter not.

STEPHEN L. BEYER

---

[43] Harley v. Harley, 140 Wis. 282, 122 N.W. 761 (1909).
[44] Security State Bank v. Monona Golf Club, 213 Wis. 581, 252 N.W. 287 (1934).
[45] Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W. 2d 881 (1956).
[46] Martin v. Schofield, 41 Wis. 167 (1876).
[47] Van Camp v. Peerenboom, 14 Wis. 65 (1861).
[48] Ritchie v. Green Bay, 215 Wis. 433, 254 N.W. 113 (1934).
[49] 1 D.L.R. 1154 (1924).