

Approved: January 16, 1998
date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:30 a.m. on January 15, 1998 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Barone, Brownlee, Donovan, Feleciano, Gooch, Jordan, Ranson, Steffes and Umbarger.

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:
Representative Bob Tomlinson
Elwaine F. Pomeroy

Others attending: See attached list

HB 2294 - Answers to garnishee to include total amount due and amount immediately due

Representative Bob Tomlinson appeared in support of **HB 2294**. Representative Tomlinson stated **HB 2294** is designed to clear up a misunderstanding in the law as it applies to answers filed in garnishment proceedings. Representative Tomlinson stated the present form is not clear or understandable to the average person and, consequently, wrong information can be filed and a garnishee financially damaged. (Attachment 1)

Elwaine F. Pomeroy appeared as an opponent on behalf of the Kansas Credit Attorneys Association and the Kansas Collectors Association, Inc. Mr. Pomeroy stated changing the Answer of Garnishee form may pose more problems than it solves, and he is not aware of there being a widespread problem. The present form clearly states in subsection (1) "in the following manner and amounts" which sets out amounts due and when payable. Mr. Pomeroy further informed the Committee that if there is a change in the form as it appears in Chapter 60, it is also necessary to change a like form in Chapter 61. (Attachment 2)

The Committee inquired as to the possibility of eliminating forms from statute and allowing them to be handled administratively. Mr. Pomeroy responded that such a process could be forthcoming due to the progress in filing certain cases with the courts electronically, but such a process is not available statewide at this time.

Bob Nugent, Revisor of Statutes distributed the case of Washburn v. Andrew in which the Supreme Court stated, "An order of garnishment will not reach credits or indebtedness which remain unmatured and contingent when the garnishee's answer is filed." The Supreme Court has clearly set forth its position in this matter when it states "garnishment will not reach credits or indebtedness which remain unmatured". (Attachment 3)

Upon motion by Senator Feleciano, seconded by Senator Steffes, the Minutes of January 13, 1998 and January 14, 1998 were unanimously approved.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled to be held on Friday, January 16, 1998.

BOB TOMLINSON
REPRESENTATIVE 24TH DISTRICT
STATE CAPITOL
TOPEKA, KS 66612-1504
913 296-7678

5722 BIRCH
ROELAND PARK, KS 66205
913 831-1905



TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: ECONOMIC DEVELOPMENT
GOVERNMENTAL ORGANIZATION & ELECTIONS
INSURANCE

Testimony Before
Senate Commerce Committee
January 15, 1998

HB 2294 is designed to clear up a misunderstanding in the law. It occurs when property, not wages, is garnished. The judgement has been entered and the person holding the property must answer. This simple language just clarifies the relationship between the property holder and the defendant.

Senate Commerce Committee

Date 1-15-98

Attachment #1 thru 1-3

History: L. 1963, ch. 303, 60-717; L. 1969, ch. 284, § 1; L. 1970, ch. 238, § 7; L. 1972, ch. 222, § 2; L. 1978, ch. 227, § 2; L. 1982, ch. 247, § 1; L. 1983, ch. 198, § 1; L. 1988, ch. 212, § 1; L. 1988, ch. 213, § 1; L. 1994, ch. 273, § 2; July 1.

Source or prior law:

(a) L. 1889, ch. 151, § 3; L. 1909, ch. 182, § 231; R.S. 1923, 60-943.

(b) L. 1889, ch. 151, § 3; L. 1909, ch. 182, § 231; R.S. 1923, 60-943.

Revisor's Note:

Review of section, see Kansas Benchbook, Kansas Judicial Council, pp. 54-56.

Cross References to Related Sections:

Order of garnishment under code of civil procedure for limited actions, see 61-2005.

Garnishment of funds held by financial institution, see 60-726.

Research and Practice Aids:

Garnishment ¶ 90 et seq.

C.J.S. Garnishment § 149 et seq.

Am.Jur.2d Attachment and Garnishment § 384.

Gard's Kansas C.C.P. 60-717.

Vernon's Kansas C.C.P.—Fowks, Harvey & Thomas, 60-717.

Vernon's Kansas Forms, C.C.P.—Hatcher § 7.39.

Law Review and Bar Journal References:

"Attachment or Garnishment of Jointly Held Bank Accounts," Clarence Koch, 7 W.L.J. 51, 52, 57 (1967).

Discussion of developments in debtor-creditor law between 1965 and 1969, Robert B. Morton, 18 K.L.R. 351, 381 (1970).

Comparison of prior law concerning service on defendant, Larry R. Mears, 9 W.L.J. 460, 463 (1970).

Garnishment prior to judgment discussed in "Wage Garnishment: Reform of the Law in Kansas," Richard S. Wetzler, 18 K.L.R. 925, 935 (1970).

"42 U.S.C. § 659 and the Kansas Order of Garnishment," James R. Russell, 48 J.B.A.K. 37, 38, 40, 45, 51, 52 (1979).

"Garnishment in Kansas: A Procedural Paradox," Leon B. Graves, 49 J.B.A.K. 129, 131, 135 (1980).

CASE ANNOTATIONS

Prior law cases, see G.S. 1949, 60-943 and the 1961 Supp. thereto.

1. Mentioned in relation to rights between substituted judgment creditor under 60-2405 and garnisher. *Nelson v. Boula*, 207 K. 771, 773, 486 P.2d 1340.

2. Effect of order of garnishment is to attach credits and indebtedness due from garnishee; judgment held proper. *Washburn v. Andrew*, 209 K. 436, 438, 439, 496 P.2d 1376.

3. Applied with 60-718 and 60-719; debt not garnishable for personal service where advance payments made; absence of fraud. *Harpster v. Reynolds*, 215 K. 327, 332, 524 P.2d 212.

4. Garnishment is extraordinary remedy and statutory procedures must be strictly followed. Mailing order of garnishment to defendant 10 days after issuance held inadequate. *Nelson v. Thornberg*, 504 F.Supp. 199, 202.

5. Money due independent contractor under construction contract not earnings, not within partial exemption provisions

of garnishment statute. *Coward v. Smith*, 6 K.A.2d 863, 864, 636 P.2d 793 (1981).

6. Where garnishee files an answer denying liability, and the 20-day period for contesting the answer has passed, the plaintiff is precluded from testing the sufficiency of the answer. *Kansas Sand & Concrete, Inc. v. Lewis*, 8 K.A.2d 91, 94, 650 P.2d 718 (1982).

7. Garnishee must account for debtor's property in its hands when garnishment order is served and all property coming into its hands until the answer is filed. *Capital Services, Inc. v. Dahlinger Pontiac-Cadillac, Inc.*, 232 K. 419, 421, 657 P.2d 36 (1983).

8. Parent with duty to support not entitled to notice, prior to garnishment, of assignment of support payments to S.R.S. *Whisler v. Whisler*, 9 K.A.2d 624, 627, 628, 684 P.2d 1025 (1984).

9. Cited; special payroll account at bank not subject to garnishment; debtor could not have used money therein to pay creditor. *Capital Serv., Inc. v. Dahlinger Pontiac-Cadillac, Inc.*, 10 K.A.2d 328, 330, 699 P.2d 549 (1985).

10. Cited; ten-day requirement in 60-718(c) not applicable to claim of exemptions from garnishment. *Bartlett cooperative Ass'n v. Patton*, 239 K. 628, 629, 630, 722 P.2d 551 (1986).

11. Creditor's lien from garnishment order served more than 90 days before bankruptcy as prior to bankruptcy trustee's claim examined. *In re Boden*, 61 B.R. 329, 331 (1986).

12. Notice of postjudgment garnishment not required to be served on judgment debtor; notice of garnishee's answer required. *DeKalb Swine Breeders, Inc. v. Woolwine Supply Co.*, 248 K. 673, 677, 809 P.2d 1223 (1991).

13. Monthly payments due judgment debtor from former spouse under divorce property settlement subject to garnishment only as they come due. *Curiel v. Quinn*, 17 K.A.2d 125, 128, 832 P.2d 1206 (1992).

14. Properly garnished wages never exempt; lien not avoidable under bankruptcy code §522(f). *In re Rodriguez*, 140 B.R. 562 (1992).

15. Service upon garnishee defendant using state statute was inadequate to give court personal jurisdiction. *In re American Freight System, Inc.*, 153 B.R. 906, 907 (1992).

16. Cited in holding creditor's garnishment order attaches only to discretionary trust funds paid directly to beneficiary. *Wilcox v. Gentry*, 18 K.A.2d 356, 363, 853 P.2d 74 (1993).

60-718. Answer of garnishee; reply; judgment; limitation when garnishee is public officer. (a) Within 10 days after service upon a garnishee of an order of garnishment issued to attach any property, funds, credits or indebtedness belonging to or owing the defendant, other than earnings, the garnishee shall file a verified answer thereto with the clerk of the court, stating the facts with respect to the demands of the order. The answer of the garnishee shall be sufficient if substantially in the following form, but the garnishee's answer shall contain not less than that prescribed in the form:

ANSWER OF GARNISHEE

State of Kansas

County of _____

_____ being first duly sworn, say that on the _____ day of _____, 19____, I was

served with an order of garnishment in the above entitled action, that I have not delivered to the defendant _____, any money, personal property, goods, chattels, stocks, rights, credits nor evidence of indebtedness belonging to the defendant, other than earnings, since receiving the order of garnishment, and that the following is a true and correct statement:

(1) (Money or indebtedness due) I hold money or am indebted to the defendant, other than for earnings due and owing defendant, as of the date of this answer, in the following manner and amounts: _____

(2) (Personal property in possession) I have possession of personal property, goods, chattels, stocks, rights, credits, or effects of the defendant, as of the date of this answer, described and having an estimated value as follows: _____

(3) (To be answered by garnishee who is an executor or administrator of an estate) I am an _____ (executor or administrator) of the estate of _____ containing funds or property to which defendant is or may become entitled as a _____, (legatee or distributee) and I understand that the order of garnishment shall attach and create a first and prior lien on all such property or funds to which defendant becomes entitled upon distribution of the estate and that I am prohibited from delivering to defendant any such property or funds until further order of the court from which the order of garnishment was issued. The approximate date for distributing the assets of the estate is _____, 19____.

I will hold the above described moneys or other items in my possession, until the further order of the court.

(Signature), Garnishee

Subscribed and sworn to before me this _____ day of _____, 19____.

INSTRUCTIONS TO GARNISHEE

This form is provided for your convenience in furnishing the answer required of you in the order of garnishment. If you do not choose to use this form, your answer, under oath, shall not contain less than that prescribed herein. Your answer must be filed with the clerk of the above-named court within the time prescribed in the order of garnishment.

(b) Within 40 days after service upon a garnishee of an order of garnishment issued for the purpose of attaching any earnings due and owing the defendant, the garnishee shall file an answer thereto with the clerk of the court, stating the facts with respect to the demands of the order. If the defendant is not employed by the garnishee or has terminated employment with the garnishee, the answer is not required to be verified. Otherwise, the answer shall be verified. The answer of the garnishee is declared to be sufficient if substantially in the following form, but the garnishee's answer shall contain not less than that prescribed in the form:

ANSWER OF GARNISHEE

The defendant _____
Terminated employment on _____ (date) Check one

Was never employed _____ _____
(Signature) Garnishee

If one of the above applies, you are not required to complete the remainder of this form and it is not required to be verified. You must return the form within the time prescribed in the order of garnishment.

If neither of the above applies, you must complete the remainder of this form and have it verified.

State of Kansas

County of _____

_____, being first duly sworn, say that on the _____ day of _____, 19____, I was served with an order of garnishment in the above entitled action, that since being served with said order I have delivered to the defendant _____, only that portion of the defendant's earnings authorized to be delivered to the defendant pursuant to the instructions accompanying this form and that the statements in my answer are true and correct.

INSTRUCTIONS TO GARNISHEE

The order of garnishment served upon you has the effect of attaching any pay period or periods which end during the 30-day period beginning on the day you are served with the order of garnishment for that portion of the defendant's earnings (defined as compensation for personal services, whether denominated as wages, salary, commission, bonus or otherwise) which is not exempt from wage garnishment. This form is provided for your convenience in furnishing the answer required of you in the order. It is designed so that you may prepare your answer in conjunction with the preparation of your payroll. Wait until the end of the pay period or periods which end during the 30-day period beginning on the day you are served with the order of garnishment and apply the tests set forth in these instructions to the earnings of the defendant-employee during the 30-day period, completing your answer in accordance with these instructions. If you do not choose to use this form, your answer, under oath, shall not contain less than that prescribed herein. Your answer must be filed with the clerk of the above-named court within the time prescribed in the order of garnishment.

First, furnish the information required by paragraphs (a) through (f) of the form below. Read carefully the "Note to Garnishee" following paragraph (f). Then, if the total amount of the defendant-employee's disposable earnings are not exempt from wage garnishment, complete paragraphs (g), (h), (i) and (j) of the form by computing the amount of defendant-employee's disposable earnings which are to be paid over to the defendant-employee by using the following table:

I. On and after April 1, 1991, if the defendant-employee's disposable earnings are less than
\$127.50 for a Weekly pay period
\$255.00 for a Biweekly pay period
\$276.25 for a Semimonthly pay period
\$552.50 for a Monthly pay period
Pay the defendant-employee as if the employee's pay check were not garnished.

II. On and after April 1, 1991, if the defendant-employee's disposable earnings are
\$127.50 to \$170.00 for a Weekly pay period
pay the defendant-employee \$127.50
\$255.00 to \$340.00 for a Biweekly pay period
pay the defendant-employee \$255.00
\$276.25 to \$368.33 for a Semimonthly pay period
pay the defendant-employee \$276.25
\$552.50 to \$736.67 for a Monthly pay period
pay the defendant-employee \$552.50
Any disposable earnings remaining after payment of the

REMARKS CONCERNING HOUSE BILL 2294

SENATE COMMERCE COMMITTEE

JANUARY 15, 1998

Thank you for giving me the opportunity to appear before your Committee on behalf of the Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas.

The organizations I represent are concerned with HB 2294, and fear that it would lead to more confusion rather than clarifying the current law. For instance, how would a financial institution answer a garnishment when that institution had issued a certificate of deposit that becomes due on June 1, 1998, but the garnishment is served on January 15, 1998?

I remember that in law school, there was a saying something to the effect that "bad cases make bad law". We are concerned that this legislation, while designed to correct an isolated instance, would create more problems, especially when we are not aware of problems with the wording of the present statute.

Elwaine F. Pomeroy

Senate Commerce Committee

Date 1-15-98

Attachment # 2

No. 46,374

MARGARET A. WASHBURN, *Appellant*, v. JERRY L. ANDREW, *Garnishee-Appellee*, and HOWARD WASHBURN, *Defendant*.

(496 P. 2d 1367)

SYLLABUS BY THE COURT

1. **GARNISHMENT—Order of Garnishment—Effect.** The effect of an order of garnishment is to attach those credits and indebtedness due from the garnishee to the defendant at the time of service of the order and those becoming due between the time of serving the order of garnishment and the time of filing the answer of the garnishee. (K. S. A. 60-717 [c] as amended.)
2. **SAME—What Garnishment Order Will Not Reach.** An order of garnishment will not reach credits or indebtedness which remain unmatured and contingent when the garnishee's answer is filed.
3. **SAME—Judgment for Garnishee Proper.** The record of garnishment proceeding is examined and it is held judgment in favor of the garnishee was proper.

Appeal from Wyandotte district court, division No. 2; WILLIAM J. BURNS, judge. Opinion filed May 6, 1972. Affirmed.

John H. Fields, of Carson, Mahoney and Fields, of Kansas City, argued the cause, and Charles D. Kugler, of the same firm, was with him on the brief for the appellant.

Edward H. Powers, of Kansas City, argued the cause and was on the brief for the garnishee-appellee.

The opinion of the court was delivered by

FROMME, J.: This is a garnishment proceeding brought to recover on a prior judgment for alimony and child support in the amount of \$8,014. The prior judgment was affirmed by this court in *Washburn v. Washburn*, 204 Kan. 160, 460 P. 2d 503.

A previous attempt to collect this judgment by a sale of property on execution resulted in contested litigation which has reached this court and is this day decided. The opinion in that appeal is titled and appears as *Jackson & Scherer, Inc. v. Washburn*, 209 Kan. 321, 496 P. 2d 1358. The present garnishment proceeding is a sequel to that case and we suggest the factual background of that case be kept in mind. The property sought to be sold to satisfy the judgment in that case is the same property which gave rise to the credits or indebtedness sought to be reached by garnishment in this case. The property consists of a residential property at 1718 North 79th Street in Kansas City, Kansas. An equity was

acquired in the property by Howard Washburn, the judgment debtor in the divorce action.

The holder of legal title to the property was Jackson & Scherer, Inc. The Brotherhood State Bank of Kansas City, Kansas, held a first mortgage on the property. The money was used for construction purposes. Jackson & Scherer, Inc. had granted to Howard Washburn, the judgment debtor, an option to purchase the property. Substantial payments on the contract price had been made by Washburn under the option contract. This particular form of contract (Form 319A "Option Agreement—Flat Payment") is no stranger to this court. See *Letzig v. Rupert, Executor*, 209 Kan. 143, 495 P. 2d 955, and cases cited therein. When a substantial portion of the contracted amount has been paid under this particular form of option contract the party to whom the option was given acquires an equitable interest in the property. (*Stevens v. McDowell*, 151 Kan. 316, 98 P. 2d 410.)

Before the present garnishment proceeding was initiated a sale of this property, including the equitable interest of Howard Washburn, was negotiated by Jackson & Scherer, Inc. The sale was evidenced by a written contract between Howard Washburn and Jerry L. Andrew whereby Andrew agreed to purchase the property. Washburn was designated in and signed the contract as the seller. The purchaser Andrew agreed to pay the seller the difference in cash between the sale price (\$54,000) and an outstanding mortgage (\$41,300) upon proof of merchantable title and delivery of a warranty deed. The contract was dated January 27, 1970.

The garnishment order served on Jerry L. Andrew sought to reach any amount due Howard Washburn under this contract. The order was served on February 25, 1970. The garnishee Andrew filed an answer on March 4, 1970, alleging no indebtedness was due to Washburn. In reply the judgment creditor, Margaret A. (Washburn) Castagna, filed and served upon the garnishee a notice as follows:

"Please take notice that the plaintiff in the above entitled action elects to take issue on your answer as garnishee herein to the garnishment summons, and will maintain you to be liable as garnishee."

Such a notice was provided for under our former statute, G. S. 1949, 60-948, but that statute has been repealed. The statute in effect when the present garnishment proceeding was initiated was

Senate Commerce Committee

Date 1-15-78

Attachment # 3