as having sufficient discretion to evaluate such proof;[16] appellate courts should only interfere where there has been a clear abuse of discretion as where completely irrelevant testimony is the sole basis for the decision of the board.[17] In any event, even if there were some doubt, in an ordinary court, as to the admissibility of the particular hearsay evidence in question here, it is a highly questionable practice for an appellate tribunal to reverse a decision of an administrative board admitting such evidence.

Execution—Installment Satisfaction of Judgment—Imprisonment for Debt—[New York].—The defendant, a federal employee, was ordered to pay a judgment in installments of $20 per month, in accordance with § 793 of the New York Civil Practice Act[1] which provided that "notwithstanding the [garnishment statutes] . . . . the court may order the judgment debtor to pay to the judgment creditor . . . . in installments, such portion of his income, however or whenever earned or acquired, [as may be just] after due regard [has been had] for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the judgment debtor to other creditors. . . . . The court may . . . . modify an order made under this section upon application of either party upon notice to the other." The defendant earned $230 per month, had no children, no financial obligations, aside from $48 per month rent and other living expenses; the whereabouts of his wife was unknown. Upon his refusal to pay, he was adjudged in contempt of court and committed under § 801.[2] On appeal the defendant contended that such commitment was a deprivation of due process and an interference with a federal instrumentality. *Held*, § 793 is not unconstitutional, in absence of a showing that order directing payment was unreasonable, or made without regard to ability to pay. *Reeves v. Crownshield.*[3]

Section 793 was designed primarily to aid creditors.[4] Prior to its enactment, approximately seventy-five per cent of money judgments in New York were never paid.[5]

Dependents v. Hunter, 93 Vt. 483, 108 Atl. 394 (1919) Connolly v. Industrial Accident Com., 73 Cal. 405, 160 Pac. 239 (1916); see Ross, *op. cit. supra* note 13, especially p. 290.

See Ill. Rev. Stat. 1937, c. 148, § 153. The provision is not as liberal and has received no more liberal an interpretation than the statutes in other states: Chicago Packing Co. v. Ind. Board, 282 Ill. 497, 118 N.E. 727 (1918); Chicago and A. R.R. Co. v. Ind. Board, 247 Ill. 336, 113 N.E. 629 (1916).

[16] Freund, Administrative Powers over Persons and Property 169 (1928); 1 Wigmore, *op. cit. supra* note 9, § 4(b) p. 28; see Dickinson, Administrative Justice and the Supremacy of the Law 35 (1927); Henderson, Federal Trade Commission 64 (1924).

[17] See Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 922 (1937).

[1] Cahill's N.Y. C.P.A. § 793 (6th ed., 1931), Laws of 1935, c. 630.

[2] Cahill's N.Y. C.P.A. § 801 (6th ed., 1931), Laws of 1935, c. 630; see § 793 as amended by Laws of 1937, c. 586.

[3] 274 N.Y. 74, 8 N.E. (2d) 283 (1937), annotated 111 A.L.R. 392.

[4] Metropolitan Life Ins. Co. v. Zaroff, 157 Misc. 796, 797, 284 N.Y. Supp. 665, 666 (1936); Reeves v. Crownshield, 274 N.Y. 74, 8 N.E. (2d) 283 (1937).

[5] Compton & Co. v. Williams, 248 App. Div. 545, 547, 290 N.Y. Supp. 984, 986 (1936); Survey of Litigation in New York, Johns Hopkins Univ. Inst. of Law (1931); Levien, The

Garnishment, where available, was often ineffective since the New York garnishment statute grants an exemption of ninety per cent of all wages above $12 per week,[6] and hence court costs or sheriff's fees[7] each time the debtor's wages became payable often consumed the major portion, or all, of the small amount garnished. Another impediment to the collection of a money judgment was the postponement of payment to a second or a third garnishor, since the first garnishment becomes a continuing levy on the debtor's wages until the first creditor is satisfied. A third major impediment was the complete immunity of public employees from garnishment. The garnishment statutes were therefore supplemented[8] by § 793 to effectuate increased collectibility of judgments from debtors, who though in a position to pay, evaded their legal obligations. Court costs or sheriff's fees are minimized since the costs of the order requiring the debtor to pay are the sole expenses involved. The second or third creditor can now, under the flexible provisions of § 793, secure payment out of the exempt portion of the debtor's income which is in excess of his reasonable maintenance requirements without waiting for the satisfaction of the prior garnishment. Furthermore, the sanction of commitment enables the judgment creditor to proceed more effectively against those debtors, as in the instant case, whose incomes are immune to garnishment. In the absence of an express statute to the contrary,[9] considerations of public policy—(1) that the public service and the performance of government employment contracts would otherwise be impaired, especially if the service had not yet been performed, and (2) that the government should not be subjected to the inconvenience that must follow from being made a garnishee—prohibit the garnishment of the compensation of public employees.[10] It has been urged that the continued presence of an order to such a debtor to pay installments of his future earnings runs counter to this policy in that it would subject those earnings to his creditors, thus having presumably the same effect indirectly that a salary garnishment would have directly.[11] However, this objection is not tenable under the provisions of § 793, since the debtor's maintenance requirements are taken into consideration by the court in framing its order and, moreover, none of the usual burdens of being a garnishee are imposed upon the government. Moreover, this interpretation is in accord with the trend of public policy within the last twelve years during which seventeen states have subjected the salaries of public employees to garnishment process.[12]

This procedure can and should operate also as a protection to the debtor. Employ-

---

Collection of Money Judgments, N.Y. Leg. Doc. No. 50F (1934); Cohen, Collection of Money Judgments in New York, 35 Col. L. Rev. 1007, 1196 (1935).

[6] Cahill's N.Y. C.P.A. § 684 (6th ed., 1931).

[7] Cahill's N.Y. C.P.A. § 1558, subd. 7 (6th ed., 1931); Rialto Security Corp. v. Harrison, 119 Misc. 145, 196 N.Y. Supp. 93 (1922).

[8] See note 4, *supra*. *Cf.* The Colombian Institute v. Cregan, 11 N.Y. Civ. Proc. Rep. 87, 3 N.Y. St. Rep. 287 (1886).

[9] See 22 A.L.R. 760 (1922).

[10] Buchanan v. Alexander, 4 How. (U.S.) 20 (1846); see 56 A.L.R. 601, 602 (1927).

[11] McGrew v. McGrew, 38 F. (2d) 541 (Ct. App. Dist. Col. 1930), *cert.* denied, 281 U.S. 739 (1930) (distinguishable from principal case on facts; debtor earning $400 per month ordered to pay $300 per month installments).

[12] Lichtenstein, Garnishment of Public Employees, 3 Univ. Chi. L. Rev. 291 (1936).

ees whose wages are garnished are usually discharged by employers since the inconvenience and the possibilities of liability in becoming a garnishee are great. Debtors are thus rendered destitute or forced to seek discharge in bankruptcy. Under the procedure of § 793, however, the judgment against the employee need not come to the attention of his employer. Furthermore, this device of installment payment, with due regard to the reasonable maintenance requirements of the judgment debtor and his family, is less severe than the garnishment provisions of most states which, although allowing limited exemptions,[13] omit considerations of the living requirements of each individual debtor and his family. Under § 793, upon application of either party, the court may modify its order upon notice to the other party. However, in order effectually to aid the debtor, the statute should be framed or interpreted to give the court discretion in providing for either garnishment or installment payment. The New York interpretation, unfortunately, is to the contrary,[14] although the statute can be so interpreted. The importance of considering the maintenance requirements of the debtor and his dependents is partially recognized in the proposed amendment to the garnishment act of Illinois permitting the court to determine, in accordance with this criterion, the proportion of the debtor's non-exempt earnings to be subjected to garnishment.[15] Section 14(a)(3) of the proposed act, however, imposes a statutory maximum upon the amount which the court can thus exempt. Such limitation of the amendment, it is submitted, will defeat its purpose.

The lack of provision against imprisonment for debt in the New York constitution leaves the due process clause as the only basis for questioning the constitutionality of the statute. Unquestionably, there is no violation of due process in the rendition of the judgment determining his indebtedness; nor is there a violation of due process in a reasonable modification of the procedure used to enforce the judgment. Nor is a statutory subjection of a public employee's salary to the payment of his debts subject to the objection that it is a diminution of his compensation.[16]

In those states[17] which, unlike New York, have constitutional provisions against imprisonment for debt, the decisive element[18] in determining when the prohibition has been abrogated is whether the statute authorizing the commitment of the recalcitrant debtor complies with the intent of the constitutional provision,—to protect the honest

[13] *E.g.*, Ill. Rev. Stats. c. 62, § 14 (State Bar Ass'n ed., 1937) ($20 per week to head of family); Cahill's N.Y. C.P.A. §§ 684, 792 (6th ed., 1931) (ninety per cent of all wages over $12 per week); Montana Rev. Code §§ 9429–9429.1 (1935); Mich. Compiled Laws § 16179 (1930).

[14] Metropolitan Life Ins. Co. v. Zaroff, 157 Misc. 796, 284 N.Y. Supp. 665 (1936); Economy Leases v. Bierman, 159 Misc. 367, 286 N.Y. Supp. 732 (1936). However, see Cahill's N.Y. Municipal Court Code § 81 (b) (c), as amended by Laws of 1935, c. 828 (applying only to municipal court of New York City).

[15] Report on Proposed Amendment to the Garnishment Act, 19 Chicago Bar Record 17 (1937).

[16] Hanson v. Hodge, 92 Wash. 425, 431, 159 Pac. 388, 390 (1916).

[17] See Index Digest of State Constitutions (N.Y. St. Const. Convention Comm. 1915) (Columbia University) 759–760.

[18] Myers v. Superior Ct., 46 Cal. App. 206, 189 Pac. 109 (1920); People v. La Mothe, 331 Ill. 351, 163 N.E. 6 (1928); Leonard v. State, 170 Ark. 41, 278 S.W. 654 (1926); *Ex parte* Oswald, 76 Cal App. 347, 244 Pac. 940 (1926).

debtor who is unable to comply with the decree.[19] Where the constitutional provision excepts cases of fraud, the debtor who is able, but refuses to pay, has been deemed outside this constitutional protection.[20] If the debtor's non-compliance with a decree under a statute similar to § 793 is due to his honest inability to pay and is not a wilful refusal, his imprisonment would then, and only then, be in violation of the constitutional prohibition of imprisonment for debt.

In harmony with the increasing proportion of persons whose property consists of wages and salaries[21] is the growing trend toward the use of installment payments to satisfy judgment creditors. Similar methods are found in Massachusetts,[22] England,[23] and Nova Scotia,[24] and during the World War, Congress used this device in the temporary Soldiers' and Sailors' Civil Relief Act.[25] An analogous feature is the provision for payment by installments included in alimony decrees, generally with due regard to ability to pay.

Income Tax—Corporations—Interest Deduction and Hybrid Securities—[Federal]. —During the year 1929 the respondent corporation had "guaranteed stock" outstanding, which had been issued pursuant to the authority of the General Assembly of Virginia.[1] The guaranteed dividends on this issue are made payable whether earned or not, out of the general assets as well as out of the earnings. The holders share in the profits in excess of the guaranteed return on a parity with the common shareholders, and like the common shareholders have full voting privileges. The "guaranteed stock" is made a first lien as to principal and "interest" on all the defendant's assets, taking priority over both secured and unsecured creditors in case of default.

During 1929 the corporation paid to the holders of the "guaranteed stock" $34,835, the amount of the guaranteed dividend. The corporation also paid to these holders the sum of $25,213, the amount necessary to bring the payment up to 12% the rate at which dividends were paid to the holders of common stock. The corporations claimed both items as deductions for "interest paid" in computing its net income. The Board of Tax Appeals[2] disallowed the $25,213 deduction, holding that it occupied the status of an ordinary dividend, but allowed the $34,835. The action of the Board in allowing the $34,835 deduction was challenged by the Commissioner, and the sole question presented on appeal was whether the $34,835 is interest on indebtedness which is an authorized deduction in computing net income, or dividends on stock

[19] 3 Freeman, Executions pp. 2394–6 (3d ed. 1900); *Ex parte* Clarke, 20 N.J. Law 648 (1846); 41 Harv. L. Rev. 786 (1928); 37 Yale L. J. 509 (1928).

[20] Strode v. Broadwall, 36 Ill. 419 (1865); *In re* Jonas Concklin, 5 Ohio C.C. 78, 3 Ohio C. Dec. 40 (1890); *Ex parte* Clarke, 20 N.J. Law 648 (1846).

[21] 1 Recent Social Trends in the United States (Report of the President's Research Committee on Social Trends) c. VI (1933).

[22] Mass. Gen. Laws c. 224, § 16 (Ter. ed. 1932); see Ginsburg, The New Poor Debtor Law, 8 Boston U. L. Rev. 23 (1928).

[23] 32 & 33 Vict., c. 62, § 5 (2) (1869).

[24] Nova Scotia Rev. Stats., c. 232, § 29 (1923).

[25] 40 Stat. 440, 442 (§ 204) (1918), 50 U.S.C.A. 178 (1928).

[1] Va. L., 1855–1856, c. 130, 109; Va. L., 1865–1866, c. 210, 332–333.

[2] 33 B.T.A. 895 (1936).