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JUDGMENT-PROOF WEALTH

A STUDY OF SOME DEFICIENCIES IN PENNSYLVANIA ATTACHMENT EXECUTIONS

Alfred F. Conard*

Property visibly existing and notoriously owned was the foundation of our early law. Where its shadows fell we drew the outlines of our law of judgment and execution. Property which we would today call intangible was lumped with the tangible, and a ground rent might be sold in like manner with the land itself, on a fieri facias.¹

When wealth in the fugitive forms of bank deposits, corporate stocks, rights to redeem pledges, and miscellaneous things in action arose in the mists, we called them personal property. They were to have no peculiar immunities, and we declared firmly that

"the plaintiff in every judgment . . . may have execution . . . upon the personal estate of the defendant."²

Lest there be any misunderstanding, we specifically stated that stocks, deposits and debts³ should share liability to the creditor's attack.

The trend away from the tangible forms of property known to the forward-looking legislators of 1836 continued and accelerated. In 1880, the percentage of our national wealth represented by bank deposits, cash⁴ surrender values of insurance policies, and stocks and bonds was 16. In 1933 it was 34.

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¹Shollenberger v. Filbert, 44 Pa. 404 (1863), assuming the validity of a sale on execution of a ground rent levied in 1786.

²(Pa.) Act of 1836, June 16, P.L. 755, sec. 19 (12 Purd. St. 2111).

³*Ibid.* at sec. 22 (12 Purd. St. 2113).

The proportion represented by liquid insurance had increased more than forty-fold.⁴ The man of property had become a man of intangible property.

The law, as usual, did not keep up with the facts. A review of it will suggest that the defendant who does not pay may as readily be one who will not as one who can not.

Likely enough, the defendant is comfortably supported by the income of sound Philadelphia mortgages. If so, every one may be security for the bond of a mortgagor long since disappeared, or of a straw mortgagor who has signed ten thousand such mortgages, and now draws a minimum wage from a trust company. The owner of the property today, presumably a responsible person, has not guaranteed or assumed the debt.

What can the plaintiff gain by legal process? According to the prevailing formula of attachment execution,

"If the garnishee owes the judgment debtor nothing, or has in his possession no money or property belonging to the latter, the attachment falls."⁵

If the plaintiff garnishees the straw mortgagor, he will "recover" nothing but judgment, for the straw will not and cannot pay.

Will the plaintiff be any better off if he summons as garnishee the responsible owner who makes the semi-annual interest payments? This mere owner of the land, subject to the encumbrance, "owes the judgment debtor nothing," and "has in his possession no money or property belonging to the latter." With respect to this valuable and extensive form of private wealth, attachment appears ineffective.⁶

It is almost unnecessary to add that a levy upon the bond, warrant and mortgage, if the defendant has generously disclosed their location, will give the plaintiff no additional assistance. A bond or single bill is not subject to execution, and although the sheriff seize it and sell it publicly in the presence of the acquiescing debtor, the title is not divested from him.⁷ Of course a garnishment summoning the bank in whose vault the defendant has his safety deposit box, filled with valuables, is not even plausible with regard to this type of security.⁸

Although the creditor is unfortunate whose debtor possesses only mortgages, he is as well off as if his debtor owned stocks. It is practically impossible,

⁴A. A. Berle and V. J. Pederson, *LIQUID CLAIMS AND NATIONAL WEALTH* (1934).

⁵Fisher, for use, v. McFarland, 110 Pa. Super. 184, 186-7, 167 Atl. 377 (1933).

⁶*Ibid.*

⁷Rhoads v. Magonigal, 2 Pa. 39 (1845); Aarons v. Public Service B. & L. Ass'n, 318 Pa. 113, 115, 178 Atl. 141 (1935).

⁸Williams v. Ricca, 324 Pa. 33, 187 Atl. 722 (1936).

as Professor Amram has shown, to execute upon a corporate share unless the shareholder, the certificate, and the corporation are cozily domiciled in the same jurisdiction.⁹ If the corporation is not subject by the law of its domicil to the Uniform Stock Transfer Act,¹⁰ its shares are absolutely free from execution in any other jurisdiction. The common law that foreign corporate shares are non-attachable is not abrogated by execution statutes not expressly applying to such shares. If, as reasoned in *Christmas v. Biddle*,¹¹ and *Cherkasky v. Pride*,¹² such a share is beyond the jurisdiction of any but the domiciliary state, statutes cannot vary the rule under any circumstances.

If the corporate domicil chooses to embody the share in the certificate under the uniform act, it will become subject to seizure;¹³ but in practice the law is impotent to deal with such readily concealed objects. Even if it is not concealed, the defendant need only put the certificate in his pocket to enjoy a complete immunity.¹⁴ The embodiment of the share in the certificate does nothing to bring the issuing corporation within the state to be summoned as garnishee.

The Uniform Stock Transfer Act does not aid the only practicable form of execution on shares, that is, garnishment, but impedes it. Whereas it might have been possible in its absence effectively to garnishee the corporation in the jurisdiction of its domicil, it is now necessary to seize the share or enjoin its transfer.¹⁵ The difficulty of seizure has been discussed. The requirement of a bill in equity to enjoin transfer of the certificate will usually require a proceeding in a state or county other than that of the attachment, since corporate domicils are so frequently removed from shareholders' domicils. Naturally the separate proceedings in the different jurisdictions must be timed precisely together, in order to prevent the effecting of a transfer by the party last served. The expense of such proceedings will certainly be disproportionate to ordinary collection claims. Even when the corporation garnishee and the debtor are in different counties of the same state, our laws will not permit the process of one county to be served in the other.¹⁶ Before the requirements of the uniform act,

⁹Amram, ATTACHMENT EXECUTION (1936) Phila. Bar Ass'n Sem. Ser. 5-7; see also Note, The Situs of Stock for the Purpose of Attachment (1937) 85 U. of Pa. L. Rev. 522.

¹⁰(Pa.) Act of 1911, May 5, P.L. 126 (15 Purd. St. 301-324.)

1113 Pa. 222 (1850).

¹²10 D. & C. 133 (C.P. 4 Phila. Co., Pa. 1928).

¹³Restatement, Conflict of Laws (1934) Sec. 53.

¹⁴(Pa.) Act of 1836, June 16, P.L. 755, sec. 25 (12 Purd. St. 2117), provides that money shall not be taken from the defendant's person. In fact, the sheriff will not levy on any property which may be, and is, similarly carried.

¹⁵Uniform Stock Transfer Act, (Pa.) Act of 1911, May 5, P.L. 126, sec. 13 (15 Purd. St. 313); *Cherkasky v. Pride*, 10 D. & C. 133, 135 (C.P. 4 Phila. Co., Pa. 1928), cited note 12, *supra*.

¹⁶*Krollick v. Husway*, 29 D. & C. 252 (Pa. 1937); *cf. Eldredge v. Eldredge*, 128 Pa. Super. 284, 194 Atl. 306 (1937).

as interpreted, it was sufficient if the court had jurisdiction of the garnishee, and the chose, for the defendant, if outside the county, could be ignored.¹⁷ The unfortunate complainant might well appeal from the inadequacy of the equitable remedy now required, to the more flexible justice of the law!

The debtor so conservative as to own mortgages evidently presents problems. So does the debtor so daring as to own stocks. What of the ideal defendant — the one with accounts receivable, including bank accounts? If he chooses to remove his property from the clutch of the law, he need only (knowing the exact balance in the account, if in a bank)¹⁸ assign it an instant before the writ is served (and/or be able to prove that he has done so) in order to defeat his creditor. If his intimation that an attachment was on the way was a false herald, he will be spared embarrassment, since he need have given the bank or other obligor no notice of the assignment.¹⁹ The assignment is valid against the attaching creditor even though it would be invalid if questioned by the garnishee for non-compliance with its rules regulating transfer of claims;²⁰ and although the assignor continued after the purported assignment to bill the debtor and receive payments on account.²¹

The vice in this state of the law is mitigated by the fact that the assignment must be for value, and in good faith on the part of the assignee.²² Perhaps, therefore, the hasty assignments which are effected do no worse than prefer one creditor over another; in the absence of perjury, they would seem to offer no escape except when there is a leak in the prothonotary's or sheriff's office,²³ or a well-timed premonition.

Perfectly honest banks and depositors may conspire to create another deceptive situation. A business man establishes a checking account by borrowing from a commercial bank on a demand note. On this account he can draw checks for theater and steamship tickets; his credit is good for all checks in reasonable amounts, and he may permit a credit agency to verify his statement that he maintains a substantial bank balance. The account is not under joint control, and the bank has reserved no right to dishonor checks not in themselves endangering credit. It may be assumed that the unheralded calling of the note,

¹⁷(Pa.) Act of 1845, Mar. 20, P.L. 188, sec. 4 (12 Purd. St. 1335).

¹⁸Eshenbaugh's Estate, 114 Pa. Super. 341, 174 Atl. 809 (1934).

¹⁹Phillips Estate, 205 Pa. 525, 55 Atl. 216 (1903); Jarecki v. Hart, 5 Pa. Super. 422 (1897); Guarantee Trust and Safe Deposit Co. v. Tye, 196 Atl. 618 (Pa. Super. 1938), *dictum*. These cases dealing with debts in general, would seem equally applicable to a bank account.

²⁰Auto B. & L. Ass'n v. Hall, 117 Pa. Super. 104, 177 Atl. 581 (1935).

²¹Metropolitan Edison Co. v. Stewart Silk Co., Inc., 22 D. & C. 280 (C. P. Northampton Co., Pa. 1934).

²²Golder v. Bogash, 325 Pa. 449, 188 Atl. 837 (1937).

²³A gratuity may promote speed and secrecy. Does this illustrate the maxim that equity will not aid a volunteer?

just in time to dishonor a substantial check for club dues would lose the bank a client, and might even subject it to a suit for malicious injury to credit.²⁴

But let an attachment execution be served, and the note may be called at once, closing the account with a debit balance.²⁵ This is the equitable doctrine of set-off, and is said to follow from the bank's power of calling the note.

No doubt it is understood among banks and business men that no complaint will be made of a calling of the note which prevents paying an existing creditor, but does no injury to credit with prospective ones. The understanding or practice permits calling a note when the payment of a judgment debt is threatened, but will not permit it when a check is presented. The plaintiff may well conclude that the diligence favored by the law is the diligence of debtors, not creditors.

The writer will be the last to suggest that a partnership is a device for escaping creditors; but it offers its hazards in the creditors' steeplechase, if the judgment runs against an individual partner. While the partnership creditor may levy upon and sell the goods and chattels of the firm, the individual creditor has no right against them,²⁶ or against the firm bank account,²⁷ and can at most sell only the defendant's interest in the partnership. Even this power was doubted,²⁸ and one may well ask how a levy can reduce to the sheriff's possession a right which is neither a chattel nor a hereditament, but a right to share in surplus and profits.²⁹ When its validity was established by statute,³⁰ the levy left the creditor almost as far from his destination as when he started, for he has no right to control the firm property; the privilege he has gained is to go into chancery for an accounting.³¹

The dubious levy is now supplanted,³² by the charging order of the uniform

²⁴See Huffcut, LIABILITY OF A BANK TO THE MAKER OF A CHECK FOR THE WRONGFUL DISHONOR THEREOF (1902) 2 Col. L. Rev. 193; Note, Liability of Bank to Drawer for Negligent Dishonor of Check (1930) 30 Col. L. Rev. 126.

²⁵Duffy v. 58th & Chester Ave. B. & L. Ass'n, 325 Pa. 127, 189 Atl. 307 (1937), *aff'g* 122 Pa. Super. 113 (1936); Aarons v. Public Service B. & L. Ass'n, 318 Pa. 113, 178 Atl. 141 (1935), overruling Valiant v. Pleasanton, 108 Pa. Super. 197, 164 Atl. 143 (1932), *aff'd*, 311 Pa. 587, 167 Atl. 330 (1933).

²⁶Uniform Partnership Act, (Pa.) Act of 1915, Mar. 26, P.L. 18, sec. 25 (59 Purd. St. 72).

²⁷Toal v. Beatty, 24 D. & C. 257 (C.P. Montg. Co., Pa. 1935); *cf.* Lightner v. Corbet 24 D. & C. 388 (C.P. Berks Co., Pa. 1935).

²⁸By Justice Gordon, in Richard v. Allen, 117 Pa. 199, 205, 11 Atl. 552 (1887).

²⁹Uniform Partnership Act (Pa.) Act of 1915, Mar. 26, P.L. 18, sec. 26 (59 Purd. St. 73).

³⁰(Pa.) Act of 1873, April 8, P.L. 65, sec. 1.

³¹Richard v. Allen, 117 Pa. 199, 11 Atl. 552 (1887); Crane, PARTNERSHIP (1938) 159-160; (Pa.) Act of 1873, cited note 30, *supra*.

³²The Act of 1873, cited notes 30 and 31, *supra*, was expressly repealed by (Pa.) Act of 1915, Mar. 26, P.L. 18, sec. 45. The repeal would be implied; *semble*, First Nat. Bank v. White, 268 Ill. App. 414 (1932).

act.³³ Since it is an equity proceeding, and normally employs a receiver,³⁴ it probably offers inexpensive and speedy justice with the facility of a corporate reorganization. Although it has been held that the charging order may be obtained on a mere rule to show cause,³⁵ the decision fails to explain how this procedure can give the court jurisdiction over the other partners, so as to prevent their paying him, before the rule is made absolute, the value of his interest, or their recognizing an assignment for value.

Garnishment ought to be the direct and convenient weapon for applying to the defendant's obligation what he is entitled to as a partner, but technical rules obstruct its use. If the partnership account is unsettled, attachment does not lie, because the interest in surplus and profits is not a "debt."³⁶ Where the garnishee proceeded to pay the defendant cash in settlement of the claim of a partnership balance, this sum was not bound by the attachment if a mere compromise of the claim without admitting the existence of a balance.³⁷ In the dickering between the defendant, claiming to be a partner, and the garnishee, denying it, it was the former who was most interested that all offers should be "without prejudice"! It seems from the older decisions that the sheriff must serve his writ in the happy interval between agreement as to the sum due, and payment of it.³⁸

The plaintiff has been taking a shot in the dark in some of the situations so far considered. In the nature of things, he did not know much beyond a rumor about the defendant's stocks, bonds, bank account or partnership; he was subject to the vicissitudes of fact, and we need shed no tears because he met vicissitudes of law as well.

But there are situations in which the ownership of property, and its probable value, are forced into the open. When the defendant is owed money by a company in receivership, the plaintiff is not relegated to guess work. He may examine the records, which tell him on the one hand whether anything is owed the defendant, and on the other, how much the defendant's claim is probably worth. The receiver or personal representative is an officer of the court, charged with the duty of preventing fraud upon creditors.

The fiduciary has no duties, however, to creditors of creditors, and may delay and obstruct them in their attempt to have paid to them what the fiduciary is charged with paying to their defendant. Money in the hands of a fiduciary

³³Uniform Partnership Act, (Pa.) Act of 1915, Mar. 26, P.L. 18, sec. 28 (59 *Purd. St.* 75).

³⁴See *Spitzer v. Buten*, 306 Pa. 556, 160 *Atl.* 444 (1932), and *First National Bank v. White*, 268 *Ill. App.* 414 (1932).

³⁵*Frankil v. Frankil*, 15 *D. & C.* 103 (C.P. 5 *Phila.*, Pa. 1931); *semble*, *Spitzer v. Buten*, 306 Pa. 556, 160 *Atl.* 444 (1932), cited note 34, *supra*.

³⁶*Knerr v. Hoffman*, 65 Pa. 126 (1870); *Horne v. Petty*, 192 Pa. 32, 43 *Atl.* 404 (1899).

³⁷*Ryon v. Wynkoop*, 148 Pa. 188, 23 *Atl.* 1002 (1892).

³⁸*Semble*, *Bank v. Lyons*, 195 Pa. 479, 46 *Atl.* 70 (1900).

of the court is in the care of the law, *custodia legis*, and beyond the compulsion of process. The attachment which summons such a fiduciary as garnishee catches nothing.³⁹

Likewise, where the defendant's chose in action has required suit to reduce it to possession, and the facts are therefore matter of public record, the very fact of suit seems to put the asset beyond the plaintiff's power. In *Horne v. Petty*,⁴⁰ it was held that a claim in suit is not bound by an attachment, unless and until some amount is determined to be justly due the claimant. If payment is made by way of compromise only, without an admission that it is due, it is never bound by the pending attachment execution.⁴¹ Such a compromise, it is safe to say, will never be made by competent counsel, for it would be without consideration. The payment of a sum admitted to be due is not consideration for an agreement to forbear suit on the remainder of the demand.⁴²

An early case recognized that the right of a policy holder against a fire insurance company, after the fire, was not too shadowy a subject for the realistic writ of foreign attachment, although counsel urged strenuously that the value of the goods destroyed had not yet been ascertained.⁴³ In later decisions, it was cited as authority by judges arriving at an opposite result, and the value of land was found to be entirely too vague for an attachment which was admitted to act on the value of personalty.⁴⁴

The disputed character of the claim which disqualifies it for the function of liquidating the owner's obligations is not disproved when the party entitled makes an assignment of it for value;⁴⁵ nor by the entry of judgment, for it may still be appealed. If, on a later trial, it is determined to be six times as valuable as on the first, its insubstantial character is firmly established, and an attachment will be ineffectual.⁴⁶ Nor does it finally become attachable when the sheriff has levied and sold, and has cold cash in his hands, for a beneficent statute then protects the proceeds.⁴⁷

One last form of property which enjoys a curious immunity from the artillery of execution is the bank account held by the entireties. The law starts with the proposition that real estate held by the entireties is subject to the creditors of neither spouse. That is a corollary of the rule that neither husband nor wife

³⁹*Home Mut. Life Ins. Co. v. Goldstein*, 14 D. & C. 168 (C.P. 2 Phila. Co., Pa. 1930); *Gordon v. Kuemmerle*, 19 D. & C. 191 (C.P. 5 Phila. Co., Pa. 1933).

⁴⁰*Horne v. Petty*, 192 Pa. 32, 43 Atl. 404 (1899).

⁴¹*Ryon v. Wynkoop*, 148 Pa. 188, 23 Atl. 1002 (1892).

⁴²Restatement, Contracts (1932) sec. 76 (b).

⁴³*Girard Fire and Marine Ins. Co. v. Field & Co.*, 45 Pa. 129 (1863).

⁴⁴*Selheimer v. Elder*, 98 Pa. 154 (1881); *Eaton v. Pittsburgh Terminal Coal Corp.*, 84 F. (2d) 364 (C.C.A. 3rd, 1936).

⁴⁵*Selheimer v. Elder*, cited note 44, *supra*.

⁴⁶*Eaton v. Pittsburgh Terminal Coal Corp.*, cited note 44, *supra*.

⁴⁷(Pa.) Act of 1836, June 16, P.L. 753, sec. 25 (12 Purd St. 2117).

can mortgage or convey it. It is based on the sound policy which creates statutory homestead rights in western states.⁴⁸ Real property, constituting as it usually does in such cases, the residence, gives a protection to the self sufficiency of the individual not unlike the three hundred dollar exemption,⁴⁹ and is just as unavailable for margin calls as for paying off judgments.

The marital bank account presents no functional similarities. Entered in the name of "John *or* Mary Smith," it is subject to the control, not of both, but of either. John has the power and the privilege and probably the practice of using all of it for personal or business purposes, yet it is deaf to the stern call of his liabilities.⁵⁰

Jurists query the existence of law in the absence of sanctions, and Lord Coke observed that execution of judgments is the life of the law.⁵¹ Why then have our courts, as intangible wealth swallows up the domain of ownership, rendered the process directed to choses in action progressively less effective?

It would be possible to show that some of the earlier decisions, which gave a generous scope to attachment, looked at the general sections of the execution laws, laying down the principle that the debtor's personal estate should be subject to process,⁵² while the narrowing opinions directed their attention to the particular sections, such as that allowing execution of a debt, and went into an exegesis of "debt."⁵³ One could demonstrate also that error crept in when the judge confused the cause of action giving rise to the foreign attachment, and the cause of action garnished.⁵⁴ It could be justly said that the early cases recognizing defeat of the attaching creditor by a secret assignment dealt with general assignments for creditors, so that they furthered rather than hindered the object of doing justice among various claimants,⁵⁵ while later cases, favoring assignments to specific creditors, permitted preferences.⁵⁶ There is little to be gained, however, by purporting to expose logical errors in the reasoning of Chief Justice Sharswood. Our time will be better spent in seeking the basic reasons for the decisions made.

⁴⁸See Tiffany, *Real Property* (2d ed. 1920) secs. 247 *et seq.*

⁴⁹(Pa.) Act of 1849, April 9, P.L. 533, sec. 1 (12 Purd. St. 2161).

⁵⁰*Zeit v. Washington National Bank*, 4 D. & C. 746 (C.P. Wash. Co., Pa. 1923).

⁵¹See *Manning's Case*, 8 Coke 94b, 97a (K.B. 1609).

⁵²*Girard F. & M. Ins. Co. v. Field & Co.*, 45 Pa. 129 (1863), citing (Pa.) Act of 1836, June 15, P.L. 551, sec. 44: "A writ of attachment. . . may be issued against the real and personal estate of any person . . ." *Cf.* as to domestic attachment act, cited at note 2, *supra*.

⁵³*Knerr v. Hoffman*, 65 Pa. 126 (1870); *Austin-Nichols Co. v. Union Tr. Co.*, 289 Pa. 341, 137 Atl. 461 (1927).

⁵⁴See, for example, *Selheimer v. Elder*, 98 Pa. 154 (1881), purporting to follow *Carland v. Cunningham*, 37 Pa. 228 (1860).

⁵⁵*Watson v. Bagaley*, 12 Pa. 164 (1849), per Chief Justice Gibson; *Vincent v. Watson*, 18 Pa. 96 (1851).

⁵⁶See cases cited in notes 19, 21, *supra*.

Three discernible conceptions of social policy have influenced decisions obstructing execution by garnishment. First, there is the natural distaste for compensating the plaintiff at the expense of the county poor relief. This can be seen when the court adduces more or less convincing logic against the attachment of accident and death benefits under an employees' association,⁵⁷ or life insurance payable to the debtor's estate and attached during his lifetime.⁵⁸ These situations are now covered by statute so far as the legislature has thought it necessary,⁵⁹ but the principles enunciated in the decisions are remembered to justify practically fraudulent transactions. In *Provident Trust Co. v. Rothman*,⁶⁰ the court applied the general, rather than the specific intent of the legislature to find an exemption for payments under a spendthrift annuity policy. Mr. Justice Kephart has aptly said:⁶¹ "The policy of the law, even where the rights of creditors may be adversely affected, favors the wife to whom the husband has attempted to secure the benefit of insurance upon her life."

Second, there is the conviction that law has no business meddling in the affairs of two individuals, neither of whom has any desire to stand before the bar. When Justice Sharswood held that the court would not enforce an accounting between defendant and garnishee, he undoubtedly had in mind the undesirability and the futility of an outsider's ordering them to litigate their differences for his benefit. In an age when most property was tangible, and garnishment was an incidental short-cut, the decision responded to the needs of justice. When the defeat of attachment means the nullification of judgment, as it does today, one need not suppose that the farsighted author would have repeated it. But a characteristic opinion of Circuit Judge Buffington, refusing attachment of an unliquidated claim declared, in 1936,

"To allow such a rule would seem to unwisely interfere with the contracting parties from settling their differences by a new contract or some other method out of court."⁶²

Thirdly, in determining the rule to govern a case not covered by settled principles, the court will weigh the inconvenience to the creditor if he is denied the aid of garnishment, against the inconvenience and injustice to the innocent bystander who must be garnishee if the attachment is to be allowed. This was

⁵⁷*Kinsloe v. Davis*, 167 Pa. 519, 31 Atl. 934 (1895).

⁵⁸*Day v. N.E. Life Ins. Co.*, 111 Pa. 507, 4 Atl. 748 (1886).

⁵⁹As to fraternal association benefits, see (Pa.) Act of 1935, July 17, P.L. 1092, sec. 16 (40 Purd. St. 1066); as to insurance payable to members of family, (Pa.) Act of 1923, June 28, P.L. 884, sec. 1 (40 Purd. St. 517), and other acts.

⁶⁰See an unnecessary extension of the immunity of insurance in *Provident Trust Co. v. Rotham*, 321 Pa. 177, 183 Atl. 793 (1936).

⁶¹*Bank v. Alexander*, 280 Pa. 466, 471, 124 Atl. 634 (1924).

⁶²*Eaton v. Pittsburgh Terminal Coal Corp.*, 84 F. (2d) 364, 365 (C.C.A. 3rd, 1936).

the balance which divided the court in *Frazier v. Berg*,⁶³ where the majority of the court held that an attachment might remain outstanding for years, yet impose a lien on all funds coming into the garnishee's hands for the defendant during its pendency. Mr. Justice Kephart, dissenting, protested,

"A garnishee should not be punished because he happens to be served as a garnishee with no funds of defendant in the writ, nor should he be placed in the position of a collection agency for the attaching creditor."⁶⁴

That the law may have a policy of enforcing judgments, peer or paramount to the policy of protecting the fruits of thrift, and the privacy of contract relationships, was almost forgotten when some of the leading cases were decided. Probably there was little need of its assertion. Today, however, the appellate courts of Pennsylvania evidence a keen awareness of the importance of such an objective.

When *Frazier v. Berg*⁶⁵ was decided, Mr. Chief Justice Kephart, dissenting, expressed a widely felt surprise.⁶⁶ If an attachment is served, and remains pending for *two years*, ruled the majority, in an opinion by Mr. Justice Schaffer, whatever the defendant could have demanded of the garnishee during that time became the plaintiff's. Since *Pennsylvania Co. v. Youngman*,⁶⁷ we may strike out *two*, and read *twenty*. A game of blind man's buff was turned overnight into a police dragnet. It was perfectly logical, for it could not be denied that all the property bound by the writ under the decision was property of the defendant in the hands of the garnishee. As far as inconveniencing the bystander is concerned, it entails no greater difficulty than the system of judgment liens does with relation to real property.

The implications of *Frazier v. Berg*⁶⁸ were not fully disclosed until the decision of *Kassow v. Feldman*⁶⁹ in 1937. An insurance policy which provided that the company might make payment to any member of the insured's family was in fact paid to a member, pending an attachment upon his interest. Although the defendant had never had the right to demand payment, the court held that the election to pay defendant made the money belong to the defendant so as to be bound. The court recognized that what is property in fact must be property in law, whether or not it came within the ordinary conception of a "debt" in 1836.

⁶³306 Pa. 317, 159 Atl. 541 (1932).

⁶⁴*Id.* at 332.

⁶⁵306 Pa. 317, 159 Atl. 541 (1932).

⁶⁶*Id.* at 332.

⁶⁷314 Pa. 277, 171 Atl. 594 (1934).

⁶⁸See note 65, *supra*.

⁶⁹125 Pa. Super. 286, 189 Atl. 719 (1936).

A significant decision carrying the law even further in this direction was *Morris Resnik B. & L. Ass'n v. Barnes*.⁷⁰ Where an attachment was made on shares of stock having a withdrawal value on the holder's election, the plaintiff was held entitled to receive that value, without an election by the shareholder. The necessity of an election was not permitted to obscure the essential nature of the stock as property of the defendant in the hands of the garnishee.

While the profession awaits a legislative housecleaning⁷¹ on the subject of attachment execution, the pot of gold may be latent in the application of these recent cases. If the defendant owns a good mortgage with a straw mortgagor (the situation considered earlier in this study), *Kassow v. Feldman*⁷² may help him. Compare the real owner, who makes payments of interest, to the insurance company under the facility of payment clause; neither has a specific duty to pay the defendant, but if either elects to pay the defendant, he appropriates money to him; and if an attachment is pending, the amount so appropriated must be paid under the writ. This view of the problem does not seem to have been specifically considered in *Fisher v. MacFarland*⁷³ where a similar fact situation was before the court; and if considered was necessarily without the additional light cast on the subject by *Kassow v. Feldman*.

Going back to the case in which the defendant owns stock in a foreign corporation, *Frazier v. Berg* may offer an effective approach. Neither the doctrine that a share is at the corporation's domicile, nor the requirements of the stock transfer act require service at the domicile in order to garnish *dividends* which become payable during the pendency of the attachment. They are mere debts,⁷⁴ garnishable wherever the corporation does business, and the defendant can be sued.⁷⁵ Attachment will be far more practicable economically if it may be so issued. As long as the attachment lies, the dividends will be payable into the writ, unless the share itself is fraudulently transferred. It will always be desirable to prevent the transfer; but the difficulty will be vastly reduced when the injunction or seizure is not a condition precedent to the validity of the attachment, and when it may be handled, in a greater proportion of cases, in the same county with the garnishment.

Where the property sought is a bank account, its essential mobility can not be affected by judicial decision. But the cases of *Frazier v. Berg*⁷⁶ and *Pennsyl-*

⁷⁰108 Pa. Super. 218, 164 Atl. 358 (1933).

⁷¹Recommended by Philip W. Amram (1936) Phila. Bar Ass'n Sem. Ser. 11.

⁷²125 Pa. Super. 286, 189 Atl. 719 (1936).

⁷³110 Pa. Super. 184, 167 Atl. 377 (1933).

⁷⁴Fletcher, *Cyclopedia of Private Corporations* (1931) sec. 5322.

⁷⁵If the defendant is *not* subject to the jurisdiction of the court, of course the court has no jurisdiction of the dividend of a foreign corporate share. *Restatement, Conflict of Laws* (1934) Sec. 108.

⁷⁶306 Pa. 317, 159 Atl. 541 (1932).

*vania Co. v Youngman*⁷⁷ suggest that a good deal might accumulate under the writ before it is removed. In the cases where the plaintiff is met with the set-off of a loan made by the garnishee bank to the defendant, and there is reason to doubt to what extent the bank actually curtailed the defendant's credit, the principle of *Kassow v. Feldman* may become applicable. The question will not be, "What had the bank power to do with relation to the defendant's account?", but "What *did* it do?" If the note was called on the afternoon of the attachment, but renewed the next morning, the bank did not in fact appropriate the defendant's demandable deposit, and it was bound by the writ.

Where a partnership is summoned as garnishee on attachment against one partner, and there is no admitted balance due, *Frazier v. Berg* offers a means of realization. The creditor may wait until the partners choose to draw, and claim the sum which then becomes due. This solution had already been reached a year before the *Frazier* case.⁷⁸

The principle of *Frazier v. Berg* has been ingeniously applied to an interest in distribution of a fund in the hands of a receiver. It is said that an attachment against a trustee in bankruptcy is invalid; but instead of quashing the writ, Judge Alessandroni turned the tables on the defendant, and stayed action until leave of the bankruptcy court had validated the service.⁷⁹ The claim having become subject to the writ while it was pending, was bound.

The same treatment, combined with the principle of *Kassow v. Feldman*⁸⁰ offers a successful attack on the choses of the defendant which are in course of suit or settlement. Where the execution defendant owns a disputed claim, the plaintiff may serve his garnishment, and let it lie until the claim ceases to be disputed. If a direct payment is made in settlement in the meantime, the court should hold, as in the case cited, that the amount paid was necessarily admitted to be due at the moment of payment, even if at no earlier time.

With regard to bank accounts by the entireties, where in fact the defendant co-tenant has power and privilege of using the whole account for his own purposes, perhaps the rule of *Morris Resnik B. & L. Ass'n v. Barnes*⁸¹ may be applied. That case showed in effect that if the debtor can, by a particular form of demand, rightfully obtain the property from the garnishee, the writ has the effect of just such a demand. As applied to the bank account "by the entireties," it would often be possible to show that the defendant had a privilege

⁷⁷314 Pa. 277, 171 Atl. 594 (1934).

⁷⁸Rankin v. Culver, 303 Pa. 401, 154 Atl. 701 (1931).

⁷⁹Gordon v. Kuemmerle, 19 D. & C. 191 (C.P. 5 Phila. Co., Pa. 1933).

⁸⁰125 Pa. Super. 286, 189 Atl. 719 (1936).

⁸¹108 Pa. Super. 218, 164 Atl. 358 (1933).

and power to draw on the account to pay the debt. That privilege and power should be equally available to the plaintiff.⁸²

The effectiveness of the proposed solutions which depend on the continuing force of an attachment depends on the alacrity with which the lien of attachment can and will be removed. Mr. Chief Justice Kephart has protested the need of some protection for the garnishee;⁸³ he should not be made an unwilling collection agency for the plaintiff, nor so fettered that he cannot indulge in further business relations with his customer. Obviously a bank should be permitted to have removed an attachment which would prevent its accepting an account.⁸⁴ One who is receiving goods or services in instalments and paying for them accordingly, should not be deprived of further performances by a waylaying of the payments.⁸⁵ Nor should a creditor's demand on a garnishee who has promised the defendant board oblige him to pay the plaintiff the cash value of it.⁸⁶ The majority in the *Frazier* case agreed with the principle of these decisions, but thought it was not too much to burden the garnishee with removing the attachment in the proper case. It has apparently been assumed that as soon as the garnishee proceeds to the disposal of the attachment, it will be removed in due course.⁸⁷

In at least one situation, an exception has appeared. Where the garnishee has no proprietary interest in further dealings with the defendant, the writ will be continued in order to make its lien effective; it was so held where the garnishee was a trustee in bankruptcy, and the assent of the bankruptcy court was necessary to validate the attachment.⁸⁸ A garnishee against whom the execution debtor has a negligence claim, if garnishment is at all applicable to such a case, should be equally disqualified to allege an interest in having the attachment discontinued; he has no valuable expectation of further relations with the claimant! There would have been no reason to permit the trustee who was garnished in *Pennsylvania Co. v. Youngman*⁸⁹ to remove the attachment rather than waiting for the future interest to become a present one, and there was no indication there that the garnishee could have forced the proceeding to a premature judgment unfavorable to the plaintiff. Nor was the result unjust in *Frazier v. Berg*⁹⁰

⁸²Cf. Restatement, Property (1936) Secs. 166 and 167, subjecting to creditors all that a debtor might convey; and U.S. Bankruptcy Act of 1898, Sec. 70 (a) (5), 11 U.S.C.A. 110 (a) (a) (1937), same as to all property which bankrupt might by any means have transferred.

⁸³*Frazier v. Berg*, 306 Pa. 317, 332, 159 Atl. 541 (1932), dissenting opinion of Mr. Justice Kephart.

⁸⁴This point was the principal concern of Mr. Justice Kephart, cited in preceding note.

⁸⁵See *Meyer v. Pianti*, 109 Pa. Super. 313, 167 Atl. 374 (1933).

⁸⁶*Peebles v. Meeds*, 96 Pa. 150 (1880).

⁸⁷See *Amram*, *supra* note 71, at 8, suggesting modes for disposing of the lien.

⁸⁸*Gordon v. Kuemmerle*, 19 D. & C. 191 (C.P. 5 Phila. Co., Pa. 1933).

⁸⁹314 Pa. 277, 171 Atl. 594 (1930).

⁹⁰306 Pa. 317, 159 Atl. 541 (1932).

as the majority recognized, to the garnishee before it, whose agency relationship to the defendant was already subsisting at the moment of service. No case known to the writer has gone to the point of holding that a pure windfall, after the service of the writ, and not the result of an existing course of dealing, was subjected to the process.

That our century-old attachment process is overdue for a rethinking and a rewriting is already established by the common knowledge of the profession, and the authoritative studies of Professor Amram.⁹¹ It is reassuring to see that we need not wait so long. The parade of opinions limiting the effectiveness of process has largely ceased in the appellate courts; they are alert to the urgency of making execution effective. With equal alertness at the bar, progress need not wait on the legislature. When it is remembered how fast the tax collectors must run to keep their place in the race with fleeing wealth, we need not be surprised if the pursuit of property in another field requires an unceasing flexibility and growth in the law.

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⁹¹Cited note 71, *supra*.