Waiver of Debtors' Exemptions in Pennsylvania

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WAIVER OF DEBTORS' EXEMPTIONS
IN PENNSYLVANIA

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It may be disturbing, but it is nevertheless true, that rules of law, as they are
directed down from judge to judge, are expressions of the moral, economic and
social views of the men who happen at the time to be on the Bench. Sometimes
the attitude of judges who first consider a problem determines the direction of the
law for decades, indeed for a century. So it has been with the law of Pennsylvania
relating to the waiver by a debtor in an executory contract of the benefits of the
exemption laws.

Early in the history of Pennsylvania the legislature passed various laws grant-
ing exemptions to debtors from levy and sale of their property. Early in Pennsyl-
vania creditors exacted from debtors a stipulation in advance to waive the benefits
of the exemption laws.

Early in the decisions of the Supreme Court of Pennsylvania such waivers
were held valid, on the theory that the debtor was free to contract as he chose, and
that if he chose to waive the exemption laws in an executory contract, such a con-
tract was not against public policy.

This view, first taken more than one hundred years ago, has continued to be
the law of Pennsylvania. But it is not in accord with the trend of judicial think-
ing, nor the weight of authority.1

In the majority of states the courts have concluded that when the legislature
expressed a policy of granting debtors some protection from the levy and sale of
their property, a creditor could not deny a debtor these rights by simply including
in an executory contract a waiver of the exemption laws.

If we seek to analyze how these different views were reached, we find that
the Pennsylvania judges spoke of debtors as thoughtless, roguish, thriftless, un-
reliable and dishonest. The sympathy of the Pennsylvania judges was with the
creditor, who is described as honest, patient and intentionally defrauded. Judge
Lewis1a warmly advocates the cause of the creditor. He said:

"Creditors are still recognized as having some rights, and it was
not the intention of the legislature to destroy them by impairing the
obligation of contracts. It frequently happens that the creditor is
more in need of public sympathy than the debtor. When a poor
man is unjustly kept out of money due to him, the distress arising

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1Bowers—Law of Waiver; Williston on Contracts Vol. 6, (Revised Ed.) Sect. 1770.
1aCASE v. DUNMORE 23 Pa. 93 (1854).
from the want of it is often greater than that caused to the other party by its collection. If the suffering was but equal . . . ."

There is no need to go on.

In states which held that a waiver of exemption was invalid, because contrary to the expressed policy of the state, the judges thought of debtors as victims of circumstances which they were powerless to dominate, and thought of creditors as ruthless men, desiring the full satisfaction of their demands without regard to whether the debtor became a pauper and a charge on the community.2

An example of this view is found in Recht v. Kelly 82 Ill. 147 (1876) 47 A.L.R. 301, where the court in holding the agreement to waive the exemption ineffectual said:

"The principle of the cases cited is, that the exemption created by the statute is as much for the benefit of the family of the debtor as for himself, and, for that reason, he cannot, by an executory contract, waive the provisions made by law for their support and maintenance. Such contracts contravene the policy of the law, and hence are inoperative and void. The owner may, if he chooses, sell or otherwise dispose of any property he may have, however much his family may need it, but the law will not aid him in that regard, nor permit him to contract, in advance, his creditor may use the process of the courts to deprive his family of its benefit and use, when an exemption has been created in their favor. Laws enacted from consideration of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement."

Of course, occasionally a Pennsylvania judge spoke favorably of the purposes of the exemption laws, but only in a case where he had determined not to give the debtor the benefits of them.

In Freeman v. Smith 30 Pa. 264 (1858) Judge Thompson said:

"The Act of Assembly of 1849 was kind and beneficent legislation, in favor of the poor and distressed. It put it out of the power of the creditor, often grasping and avaricious, to strip a debtor and his family of their only means of subsistence. It inaugurated a new era; for the first time, the law seemed to treat inability to pay, not as a crime, but as a possible misfortune. It wore rather a benignant smile of encouragement for honest misfortune, than the ancient frown of condemnation upon inability to pay. But its meditated benefits were for the honest poor. Rogues and cheats were not the subjects of its bounty."

But this image was scarcely ever invoked by a Pennsylvania judge for the purpose of ultimately giving the debtor some benefit from the exemption laws.

Why one judge, in considering a problem, should get one image, and another the opposite image, depends of course upon his temperament and experience. But whatever conclusions are reached are always bolstered by well-known rules of law. The Pennsylvania judges grounded their conclusions on the theory that where two parties contract with each other, they should be free to insert any terms to which both agree. But the notion that parties are free to contract with respect to the terms of a contract is unrealistic. It does not fit into the pattern of life. No man would willingly enter into an executory contract in which he waives the benefits of laws intended to protect him and his family from starvation and penury. He agrees in advance to waive the benefits of the exemption law because these are the only terms on which he can borrow money or rent a house.

In Pennsylvania creditors insert waivers of exemption in all notes, bonds, mortgages and leases, and thus successfully nullify the benefits which the exemption laws were intended to give to debtors whose property was subject to levy and sale.

At common law all of a debtor's property was liable to execution for the payment of his debts, and his person was subject to imprisonment. There were no exemptions.

The first Act of Assembly in Pennsylvania, providing for exemptions for debtors, whose property was subject to execution, was the Act of March 26, 1814, which exempted household utensils to the value of $13.00, tools of a workman to the value of $20.00, wearing apparel, two beds and bedding, one cow and a spinning wheel. This was not much, but apparently the legislature thought it was sufficient for a debtor to rehabilitate himself.

Seven years later the legislature added one stove to the list of exempted articles on March 29, and two days later added six sheep to the exempted articles. The generosity of the legislature continued, when on April 10, 1828 a new act was passed which incorporated most of the exemptions set forth in the earlier acts, and added to them two hogs, the wool and cloth from the sheep, as well as feed for all of the exempt animals. In addition the act also exempted a considerable amount of food for the debtor and his family, and Bibles and school books in use in the family. On June 16, 1836, another act was passed which incorporated practically all of the provisions of the Act of 1828.

Then came the Act of April 22, 1846 which extended the exemption to cover all the necessary tools of a tradesman without regard to value, and where the debtor was engaged in agriculture, added a horse and plow and a yoke and oxen.

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2aDebtors' Exemption in Pennsylvania—Pendleton.
The steady stream of legislation from 1814 to 1846 expressed a well-defined governmental attitude towards debtors whose property was subject to execution and sale. The policy of Pennsylvania was that it was better to permit a debtor to retain some of his property so as not to become a public charge, than to permit a creditor to take everything from a debtor and thus render him unable to re-habilitate himself.

But the continued addition of specific new items of exemption led to obvious inequities. Under these acts the debtor’s exemptions varied in amount, depending upon whether he was engaged in a trade or in agriculture, and depending upon whether he owned the specific types of property which were covered by the exemption laws. If he did not own cows, sheep, hogs, spinning wheels, school books, etc., he might have a much smaller exemption than a debtor who owned a number of these exempted articles.

This situation was remedied by the passage of the Act of April 9, 1849, which, in effect, repealed all former acts and became the general exemption law of Pennsylvania applicable to all debts contracted after that date. The Act of 1849 substituted for an exemption of specific articles an exemption in the amount of $300.00 in such property as the debtor might select, not including wearing apparel, Bibles and school books which continued to be exempt.

The General Exemption Act of 1849 was followed by several other acts. The Act of April 17, 1869, Section I, provides that all sewing machines belonging to seamstresses shall be exempt. The following year the exemption was extended to all sewing machines owned by private families.

The Act of May 13, 1876 provides that “all pianos, melodians and organs”, leased or hired by any person residing in the Commonwealth, shall be exempt. A layman might wonder just why musical debtors were shown such rank favoritism. But a lawyer would guess, even if it were not clear from the wording of the act, that the vendors were being protected. Similar acts were passed exempting leased sewing machines, typewriters, soda water apparatus, ice cream containers, electric motors, fans and dynamos, articles deposited in international exhibits. Finally, all household furniture and goods leased or hired were exempt.

3 12 PS 2161.
4 12 PS 2167
5 12 PS 2168
8 Act of April 22, 1927, P.L. 351.
10 Act of April 20, 1876, P.L. 43.
11 Act of June 2, 1933, P.L. 1417.
This is the state of the law of exemptions in Pennsylvania today. A debtor may claim $300 in property or cash, plus wearing apparel, Bibles, school books and sewing machines and other leased property specified in the acts.

During the period that Pennsylvania was passing acts granting exemptions, other states were engaged in carrying out similar purposes. In some of them exemptions were more generous; in others, more meager. In some of the western states, like California and Idaho, the exemptions go as high as $10,000.00, whereas in some counties in Delaware the total exemption is as low as $50.00. All of the exemptions in Pennsylvania, as well as in the other states, are statutory and express the social and economic views of the legislature towards debtors.

After these laws were passed creditors very naturally sought to obtain waivers of the exemption laws from their debtors. In most states such waivers, given in executory contracts at the time of incurring the debt, were considered void as being against public policy and an attempt by a creditor to nullify the sovereign wishes of the state.

But in Pennsylvania it was early held that a debtor could waive an exemption and that the waiver was valid. One of the earliest cases decided under the Act of 1836, involved a written waiver of exemption in a lease. The goods distrained were in a bedroom and consisted of liquor. The court very summarily dismissed the tenant’s claim for exemption and said:

"Something was said about the defendant’s having distrained on goods that were exempted by law. That, however, could not be; for the exemption being a privilege conceded by the Act of Assembly, for the special benefit of the lessee or tenant alone, he had a right to waive it; and he did so expressly in this instance by a clause in the lease to that effect."

Nor did the court find any difficulty in the fact that some of the liquor was used for paying the men who made the levy. This bit of opportunism was according to the court "a benefit instead of an injury" to the tenant.

The Act of 1849 came before the Supreme Court in 1852 in Hammer v. Freese where the question involved was whether a debtor could have $300.00 in cash instead of in property. In refusing him the exemption in cash Chief Justice Black said:

"There are sound reasons why he should take the goods or take nothing. The law was made for the benefit of the families of debtors rather than for the debtors themselves; and a family stripped of every comfort might not be much the better of $300 in the pocket of a thriftless father."

But, alas, these words were to cause great consternation six years later when a debtor claimed his $300.00 exemption in liquor!

12 McKinney v. Reader, 6 Watts 34 (1837).
The image which Chief Justice Black had of the debtor was not a happy, nor indeed a sympathetic one, and compelled Justice Woodward in Hanley v. O'Donald 30 Pa. 261 (1858) to plead "for a humane construction" of the Chief Justice's words. Justice Woodward said:

"The court had in mind the image of a spendthrift husband and father, who, if permitted to convert the property set apart, might deprive his family of the comforts and benefits which the law intended to secure to them."

It was necessary for Justice Woodward to take this position because in his case the exempted articles were liquor and liquor casks. He therefore cries in anguish:

"Now the more specific the form in which the debtor should be compelled to retain such articles, the worse for his family. Only by conversion could they be made to enure to the benefit of those who were peculiarly the objects of the law's bounty. To tell a liquor dealer he may keep $300 worth of his stock exempt from levy and sale, but that by conversion he forfeits the benefits of the exemption, is not doing very much for his family—is, in effect, denying them altogether the benefits of the statute."

In the following year an amendment was passed, 12a amending the Act of 1849 permitting the exemption in money. 12b

Another position taken by the Supreme Court was that the exemption law did not apply to mechanics' liens, 13 pledges 14 and mortgages. 15

The last case is a particularly harsh ruling in view of the fact that the Act of 1849 states that the exemptions shall not apply to purchase money mortgages. By the application of the doctrine of maxim expressio unius est exclusio alterius one would have supposed that when the legislature excluded “purchase money mortgages” it meant to include all other mortgages. 16

With few exceptions 17 the Act of 1849 continued to be strictly construed, 18

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12 Act of April 8, 1859, P.L. 425.
13 Laucks' Appeal 24 Pa. 426 (1855).
14 Hawley v. Hampton 160 Pa. 18 (1894).
15 Gangwere's Appeal 36 Pa. 466 (1860).
16 But see Hildebrand's Appeal 39 Pa. 133 (1861).
17 Meitler's Appeal 73 Pa. 368 (1873) where a wife was permitted to claim the exemption in her husband's absence.
18 Gilleland et al. v. Rhoads 34 Pa. 187 (1859); McCreary's Appeal 74 Pa. 194 (1873); Imhoff's Appeal 119 Pa. 350 (1888) where Judge Sterrett said: "As already intimated, the benefits of the exemption acts are intended for unfortunate but honest debtors, not for the protection of dishonest persons." In Strouse's Executor v. Becker 38 Pa. 190 (1861) Judge Woodward said: "It was an enactment for the honest poor, not for the roguish." Kyle and Dunlap's Appeal 45 Pa. 353 (1863); Judge Woodward said: "He is not compelled to accept the bounty of the statute"; Appeal of Overseers of the Poor of White Deer Township 95 Pa. 191 (1880); Line's Appeal 2 Grant 197 (1859); Eberhart's Appeal 39 Pa. 509 (1861); Diehl v. Holben 39 Pa. 213 (1861); Marks' Appeal 34 Pa. 36 (1859); Chicot's Appeal 101 Pa. 22 (1882); Sutman v. Hogsett 70 Pa. Superior Ct. 180 (1918); Rogers v. Waterman 25 Pa. 182 (1853); Harlan v. Haines 122 Pa. 48 (1889).
although occasionally a judge realized that the court had swung too far to the right, but that it was too late to swing back.

In Bowman v. Smiley 31 Pa. 225 (1858) the court said:

"Notwithstanding the doubts which have sometimes been expressed, it is now generally conceded that the statutory privilege of the exemption of a portion of his property from Levy and Sale, under execution, is one which a debtor may waive."

In Mitchell v. Coates 47 Pa. 202 (1864) Judge Agnew refused to give effect to a waiver of "all right to the benefit of any laws now made or hereafter to be made, exempting personal property from levy and sale for arrears of rent." The conclusion was reached on an incredibly technical point which a later case refused to follow.¹⁰

In O'Nail v. Craig 56 Pa. 161 (1867) the court said:

"Had it been determined, immediately after the passage of the Act of April 9th, 1849, that debtor could not deprive himself of that exemption from execution of a portion of his property allowed by the statute, by any agreement made at the time the debt was created, the object of the legislature would doubtless have been better secured. But it having been ruled that the exemption is a mere personal privilege which the debtor can at any time waive, and that a waiver once made cannot be retracted, the whole force of the statute is eluded by simply a change in the form of the contract."

In spite of this nostalgic view, most Pennsylvania judges continued to interpret the exemptions acts strictly and believed that stipulations in advance to waive the exemption were entirely right and proper.

But an entirely different view was taken in connection with the Act of April 15, 1845, which provided that the wages of laborers should not be liable to attachment in the hands of the employer. In Firmstone v. Mack 49 Pa. 387 (1865) Judge Woodward refused to follow the interpretations of the Exemption Act of 1849, and determined that the exemption under the Act of 1845 of wages of laborers in the hands of the employer could not be waived. He said:

"That he may waive this option under the Act of 1849, not only results out of the nature of the thing, but has been expressly declared in many cases, in some, however, with regrets expressed that we did not set out with a different construction and hold the privilege or option indefeasible. If it were res integra; if, with the experience and observation we have had, we were now for the first to pass upon the question whether debtors could waive their rights under the Act of 1849 or widows theirs under the Act of 14th April, 1851, we would be very likely to deny it altogether, and to stick to the statutes as they are written."

"We think, on the whole, that our duty will be best performed by declaring the agreement to waive the proviso void, . . . ."19a

But even he predicated his conclusion not on the need of the debtor, but on the convenience of his employer. He said:

"The legislature having said that justices shall not attach wages, we will say they shall not, though a particular debtor has said they may. It is to be observed that the garnishee has rights in the premises, and he is under the Act of Assembly, but is not a party to the agreement which his labourer makes with a creditor. Why should he be annoyed and subjected to costs, his work hindered, and his hands deprived of their daily bread by an agreement between others to which he was not a party, and of which he had no notice?"

In order fairly to analyze the Pennsylvania decisions, permitting the waiver of exemptions under the Act of 1849, let us examine the specific reasoning of one of the judges. In Case v. Dunmore 23 Pa. 93 (1854) Judge Lewis said:

"But where at the time of contracting the debt he agrees to waive the benefit of the exemption, and this forms the ground of the credit given to him, the injustice of permitting him to violate his contract and thus to defraud his creditor, is too palpable to need illustration, or to require the aid of precedents to discountenance it. Notwithstanding the benevolent provisions of the statute in favor of unfortunate and thoughtless debtors, it was far from the intention of the legislature to deprive the free citizens of the state of the right, upon due deliberation, to make their own contracts in their own way, in regard to securing the payment of debts honestly due. . . . Everyone should bear his own burthen. The statute which exempts debtors from the operation of this principle did not take away from them the right to waive the privilege thus conferred whenever their consciences or their necessities prompted the waiver."

Judge Lewis' arguments do not stand up well upon a close analysis.

He assumes that the waiver of exemption is the ground on which credit is extended to the debtor. But if this factor influences the transaction, it is certainly not controlling, for in the majority of states where a waiver of exemptions is not considered valid, credit is extended as freely as in Pennsylvania.

Judge Lewis characterizes debtors as thoughtless. It is true that many are thoughtless; some are rascals. But for every thoughtless debtor, there is an honest victim of circumstances. Although strong men may view the debtor with disdain, it cannot be denied that many debtors find themselves in an unfortunate financial situation because of circumstances or inherited characteristics over which they have little control. Judge Lewis' fundamental reason is that "it was far

19a Waiver of exemption of proceeds of group insurance held to be against public policy: BURKHARD v. HEILMAN 19 D & C 503 (1933); HOLLANDER v. KRESSMAN 143 Pa. Superior Ct. 32 (1940).
from the intention of the legislatures to deprive the free citizens of the state of the right, upon due deliberation, to make their own contracts in their own way in regard to securing the payment of debts honestly due."

This reasoning is cynically unrealistic. There may be situations in which two contracting parties stand at arm's length, each with the full power to accept or refuse all of the provisions of an executory contract. But that situation does not obtain in the large majority of contracts in which waivers of exemptions are included. These waivers customarily appear in notes, bonds, mortgages and leases. The terms of the contract are dictated by the creditor. The contract is a printed document. The borrower or tenant has no printed contract to offer the creditor or landlord, cannot assert his wishes or make the contract in his own way. He has no choice. He does not accept the contract including a waiver of the exemption law as Judge Lewis thinks "upon due deliberation", but under duress.

It is impractical to assume that a man going to a bank to borrow money on a mortgage is a free contracting party. All printed mortgages used in Pennsylvania for loans to individual mortgagors contain waivers of exemption. If a mortgagor sought to eliminate the phraseology with respect to waivers from the mortgage, he would find very quickly that the bank would not agree and would not take the mortgage. He would be met with a similar response wherever he went, and he would ultimately have to give the mortgage with the waivers of exemption in it.

Nor would a lease fare otherwise. It is common knowledge, although courts are slow to take notice of it, that lessees of property, particularly in big cities, have no choice whatever in the terms of the lease. Many years ago a young law student came to Pittsburgh and read the lease which was given to him to sign for an apartment in a building in Pittsburgh. The lease contained a number of clauses, such as waiver of exemptions, release from liability on the part of the landlord for many types of negligence, and a number of other provisions which no intelligent lessee would willingly accept. He therefore crossed out the provisions which were clearly efforts on the part of the landlord to change the law of Pennsylvania, and signed the lease with these corrections. The landlord courteously but firmly refused to accept the lease unless it was signed in its original form. He notified the young tenant that he would meet with the same response wherever he went in the city of Pittsburgh.

Where is the man or woman who would have the temerity to suggest changing the terms of an insurance contract? You take it as the company has formulated it or you leave it. The image of a free contracting party is not accurate. It is not enough to say—you need not take out insurance. Many people desire its benefits and they will accept conditions and provisions which they do not approve because they are the only terms on which the benefits can be obtained. The image of a free contracting party is a fiction and rules of law based on the theory of a free contracting party are unreal factually and dangerous socially.
Department stores, telegraph companies, telephone companies, gas and electric companies offer the public printed contracts which the public must take. It would be folly to assert that men contract freely with such companies, or indeed with any organized industry or service. Few contracts with the government of the United States can be changed by the other contracting party. These contracts with hundreds of specific terms that have been adopted after long study cannot be changed. You take them or leave them. Similarly, for more than one hundred years in Pennsylvania, debtors have taken bonds, mortgages, notes and leases with waivers of exemption in them, and the notion that these provisions are freely accepted "after due deliberation" shows either an unfamiliarity with the transactions of the market place, or a deliberate avoidance of the real facts.

The problem can no longer be viewed simply as a question of contract between two parties willing and able to contract. The pressure of modern thought has shifted the emphasis of the law from the security of contract to the individual social interest.\textsuperscript{20} Exemptions and waiver are social problems, and the question is one of the effect of the law on the individual.

Do we want exemptions from levy and sale in Pennsylvania or not? If we think all of a debtor's property should be available for execution and sale for the payment of his debts, let the legislature repeal all of the exemption laws. If, on the other hand, it is the social policy of the state to guarantee to a debtor, whose property is subject to execution, the right to retain some of his property for the stability of his home and family, then obviously debtors should not be asked to waive the benefits of the exemption laws at the time of incurring the debt. To permit this practice is to nullify the beneficial purposes for which the statutes were passed. To permit it on the ground that the debtor freely contracts is jesuitical.

Consider the plight of a man whose furniture is being hauled out on the street and exposed to the curious eyes of his neighbors and sold on the auctioneer's block. Will any man in his senses, who can avoid this pathetic display by claiming an exemption, waive it? Why then should a man, at the time of borrowing or renting a house, stipulate that he will waive his exemption unless he is being forced into that position?

The concern of the law is to carry out in an even-handed way the social policies adopted by the legislature. Where exemption laws are on the statute books, courts should not announce rules which give every creditor the opportunity to nullify them, and thus completely change the policy and will of the people.

As long as the courts of Pennsylvania consider a waiver of exemption valid, creditors may fairly include such a waiver in all contracts. In fact a lawyer whom the writer knew was in the habit of adding to bonds, mortgages and notes a

waiver of every law passed by the legislature for the benefit of debtors as soon as it was passed, and also included a waiver of all future laws which might be passed by the legislature giving exemptions or other protection to debtors.

The legislature has at long last decided to protect itself. The Deficiency Judgment Act of 1941 specifically provides that its benefits cannot be waived, and this provision will no doubt appear in all future acts passed for the benefit of debtors and mortgagors.

But the old acts remain, battered by the attacks of a century. The time has now come when either the legislature or the courts should study the problem of exemptions in order to find a formula which will draw the line fairly between debtor and creditor. The problem is a social one. Our Supreme Court recently said that the exemption law was an example of a "statute passed for the protection of individuals or classes of individuals not intimately bound up with the common welfare and which may therefore be waived by the parties."

It is a little difficult to share this view of an exemption law. Is not the common welfare helped by exemption laws, as well as the individual debtor? If there were no exemption law and a doctor was deprived of all his property, he would become a charge upon his community, so that the waiver of an exemption law is intimately bound up with the common welfare, and squarely in contravention of the broad public policy sought to be achieved by the exemption laws.

The time has come when "oppressive contracts", such as those requiring waiver of exemption laws, should be taken out of the realm of contract law, and viewed in their relation to the common welfare. Viewed from this angle, the theory of a debtor "after due deliberation" freely contracting to waive the benefits of the exemption laws must be discarded. The law will command the respect of men and women only so far as it shows a vigorous understanding of the practical struggles of men and women in the world today.

Judge Woodward once said "It is as hard to argue against a statute as to kick against the pricks." But the judges in Pennsylvania have for more than one hundred years argued against the exemptions statutes with scarcely a prick from anyone except the mild reproach that their decisions were contrary to the weight of authority.

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22Williston on Contracts Vol. 6 Revised Edition Sec. 1770.
23Hildebrand's Appeal 39 Pa. 133 (1861).