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PENNSYLVANIA'S POLICY ON DEFIANT DEBTORS

By

RICHARD H. WAGNER*

In the captivating phrase of one of 1954's outstanding figures, "You just hardly ever see body execution in Pennsylvania any more." And at the Dickinson School of Law Seminar on Creditors' Rights and Remedies in September, no less a figure in legal circles, the Honorable Gerald F. Flood, law teacher, writer and jurist, stated he could not remember when he had seen a warrant of arrest issued on a civil judgment. Almost any practitioner you ask will give a similar reply, like mumbling something about "strong Pennsylvania policy against imprisonment for debt", or "barbaric and senseless remedy", etc.

Remarks such as these cut me deeply. Time and again, as they are repeated, my heart aches for the poor creditor of the able and defiant debtor. An example is the creditor in my first "case" back in 1934. A fellow townsman handed me a claim to "see what can be done about it", a claim for $652 for milk furnished in connection with the operation of a rural restaurant. The defendant had signed a judgment note to obtain further credit, and a few questions disclosed the fact he held a job "on the hill", with the state government that is, from which he received the princely salary, at that time, of $5800 a year. Consequently, there seemed to be so little to the case that I dropped in on the defendant over a weekend, expecting to complete in a moment or two an arrangement satisfactory to all concerned. Things were not as expected. The defendant, a brash individual, disclaimed any intention of paying for the milk. This was a depression he reminded me unnecessarily, and, well, this sort of thing just wasn't done. He concluded with some remark, which at the time, I regarded only as a figure of speech, about turning dogs on bill collectors.

Several days later, having discovered that the handsome premises occupied by the defendant stood in his wife's name and pondering further the man's fine situation in life, I called on him again. To shorten a long and painful story without blunting the point, two enormous and savage dogs bore down as I had barely entered the curtilage. Jumping to the hood and thence to the top of my Model A, I was lucky to escape as I did, without dignity, but with the final conviction that something less hazardous than general practice was for me. How well I remember the indulgent, the bemused response of older practitioners to my agitated queries about putting such a man in jail under the *Act of* 1842.[1]

In the generation since this personal tragicomedy, we have passed the centenary of the act which provided for the arrest of crooked debtors. Other dogs of even meaner debtors have chased poorer creditors over these years, barking their defiance from behind the fence of a supposed law, making a joke of money judgments and a mockery of judicial machinery. Of such cases, it has been said:

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1 Act of 1842, July 12, P.L. 339, 12 P.S. 257.

> "Does this condition prevail because debtors cannot honestly fulfill their judgment obligations? The answer is exactly 'No'. They are not satisfied, even in part, because the judgment debtors have no intention of complying with the solemn judgments of the Courts, and because our existing means of execution affords them numerous and certain means of evasion. . . . Justice demands that fair judgments, honestly arrived at, should be honestly fulfilled. When this is not accomplished, there is an even greater miscarriage of justice than if the judgment had never been rendered, for the prevailing party has expended much time, energy and money, and has been subject to the harassing experience of futile litigation, out of which unfortunate experience arises a general loss of confidence in the courts and in the law. . . . Justice demands that she be rearmed with a process to effectively strike in the cause of those entitled to her vigorous aid."[2] & [3]

Common indeed is the belief that a defiant debtor has little reason to fear loss of liberty. So ingrained has the idea become that it has even affected the thinking of government attorneys, inducing at times a skeptical attitude about resorting to ultimate process to enforce public claims against salary-opulent defaulters cheating their government through the corporate device, as if the very thought of civil arrest was somehow inherently or fundamentally abhorrent. Whence this idea?

In the early days of the law the usual method for enforcing a money judgment was by levy and sale of tangible property of the defendant in his possession with the writ of *fi fa.* When this method was not adequate, resort was frequently had to chancery for discovery of assets subject to *fi fa,* or to reach assets not subject to writ of *fi fa,* or to enlist equity's aid in setting aside fraudulent transfers. By the introduction of garnishment into execution process, as well as the enactment of provisions for discovery in aid of execution and setting aside fraudulent conveyances, these forms of assistance became established as elements of our civil enforcement machinery at law.[4]

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2 Lunn, Modernizing the Process for Enforcement of Judgments, 22 A.B.A.J. 276.

3 We explain to our first year law students that procedure is the "handmaiden" of the substantive law, its prime function being to provide the substantive law with techniques for its enforcement. A judgment has been defined as the "conclusion of the law upon the facts found". "Execution" has been described as the "end and fruit of the law", without which the power to adjudicate would be meaningless. The reader may draw his own conclusions as to how much life there is in these statements if able debtors can get away with defying judgments against them.

4 Provision for attachment execution was made in Pennsylvania in the Act of June 6, 1836 P.L. 755, § 35, 12 P.S. 2265; Pa. R.C.P. 3103. Four statutes have been enacted providing for discovery in aid of execution: Act of 1828, P.L. 439, 12 P.S. 1331, providing for oral examination of corporate officers; Act of 1836, P.L. 755, §§ 9 to 15, as amended by the Act of 1844 P.L. 512, § 2, 12 P.S. 2231 to 2238, which provides for a bill of discovery for assets of a judgment debtor; Act of 1874, P.L. 271, § 2, 59 P.S. 381, on examination of members of a partnership association; and the Act of 1913, P.L. 197, 12 P.S. 2242, which provides for proceedings for the examination of an individual judgment debtor. Pennsylvania statutes with respect to fraudulent conveyances include: the Act of 1921, P.L. 1045, 39 P.S. 351; the Act of 1897, P.L. 237, §§ 1 and 2, 12 P.S. 911-912; the Act of 1725, 1 Sm. L. 164, 12 P.S. 252; the Act of 1842, P.L. 339, § 3, 12 P.S. 259; and the Act of 1869, P.L. 8, P.S. 2711, et seq. It is surprising how little use has been made of our statutes regarding discovery in aid of execution, how many lawyers have never even considered them. This may be due in part to the disapproving attitude toward discovery in general in Pennsylvania before the recent adoption of Rules of Civil Procedure on the subject. The Rules, however, relate to pretrial discovery and do not affect the statutes on discovery in aid of execution.

The common law had another device for enforcing money judgments, so-called "body execution", the writ of *capias ad satisfaciendum* commanding the sheriff to take the defendant, safely keep him and have him in court on the return day of the writ. In England, it finally came to lie against any judgment defendant who was not personally privileged against arrest at the commencement of the suit under writ of *capias ad respondendum* and against some who were, such as attorneys. Prior to 1830, imprisonment for debt was not unusual in the United States.[5]

In Pennsylvania, the *Act of* 1836[6] gave the judgment plaintiff the right to execute upon the personal and real estate of the defendant, and, if he have neither, to execute upon the person of the defendant by a writ of *capias ad satisfaciendum.* The former employment of the writ was greatly curtailed, however, even in the early years. Under Section 1 of the *Act of* 1842, the issuance of process *as a matter of course* to affect civil arrest was abolished in ordinary contract cases. The ban covered both the original process of *capias ad respondendum* and the final process of *capias ad satisfaciendum.*[7] As a result of the language of Section 1, a plaintiff could obtain from the prothonotary process to arrest a defendant only in (1) tort cases and (2) contract cases of certain specified categories, that is (a) proceedings as for contempts to enforce civil remedies, (b) actions for fines and penalties, (c) moneys collected by any public officer, (d) misconduct or neglect in office and (e) misconduct or neglect in any professional employment.

Thirteen years after the above provision was enacted, it received its first appellate interpretation in the case of *Scott v. The Jailer,*[8] 1 Grant's Cases 237. By a decree in equity Scott had been directed to deliver certain deeds to the plaintiff and also to pay him a sum of money. The deeds had been delivered, and Scott was in jail because he had failed to pay the sum due, whether from inability or perverseness not appearing. The chief justice, three associates concurring, held that "while the words of the exception (that is, proceedings as for contempts to enforce civil remedies) might, it is true, be construed to embrace such cases", the "general words of the statute embrace decrees in equity, as well as judgments at law, in all cases where the judgment or decree is for the payment of money due on a contract." The court held that, "where there is no evidence of fraud, in disobeying the decree, there is no contempt at all, within the meaning of the exception." Significantly, although this has received scant attention, the opinion pointed out:

> "Where on the contrary, there is evidence of fraud, the act of assembly makes provision for investigating the facts, and prescribes a course of proceeding which excludes imprisonment until the fraud be established."

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5 Mette, The Uses and Limitations of the Writ of Capias ad Satisfaciendum in Pennsylvania, 54 Dick. L. Rev. 195 (1950); Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24-34 (1926).

6 Act of 1836, June 16, P.L. 755, § 19, 12 P.S. 2111.

7 Pennsylvania R. C. P. 1481 completely abolished civil arrest before judgment, except in an action for fines and penalties, upon a writ of ne exeat, or as a punishment for contempt.

8 1 Grant's cases 237.

The provision to which the court alluded was Section 2 of the same *Act of* 1842. This neglected section, after stating expressly that it covers cases in which a person cannot be arrested under Section 1, in other words ordinary contract cases, provides that a plaintiff who has obtained a judgment[9] may apply, not to the prothonotary as a matter of course but to any judge of the court in which the suit was brought, for a warrant to arrest the defendant. Sections 2 and 3[10] set forth the special circumstances on the bases of which the judge shall issue the warrant:

> (1) There must be satisfactory evidence that there is a debt or demand due, and its nature and amount as near as may be. Obviously this presents no difficulties where the claim has been reduced to judgment.
>
> (2) The demand must be such that the defendant could not be arrested under the provisions of Section 1.
>
> (3) One of a number of "particulars", five in all being described in the act, must be shown to the satisfaction of the judge. The third of these relates to a defendant who has "rights of action, or some interest in any public or corporate stock, *money or evidence of debt, which he unjustly refuses to apply* to the payment of any such judgment or judgments which shall have been rendered against him" in favor of the plaintiff. [Emphasis added.]

The form of the warrant is prescribed in Section 4,[11] and provision is made in Sections 5 and 6[12] that the defendant when arrested shall be brought before the judge who issued the warrant and given the opportunity to "controvert any of the acts or circumstances" on which the warrant was issued. In case of an adjournment of the hearing, the judge may take a bond, with or without surety, for the appearance of the defendant at the adjourned hearing.[13]

The act does not permit the defendant to be put in jail for mere non payment of a judgment. He may be committed under the provisions of Section 8[14] only where the judge is satisfied that he has done or is about to do any one of the acts specified in Section 3. Even so, the defendant may obtain immediate relief from commitment or liability to commitment by (a) paying the debt with costs, or (b) giving security that the judgment will be paid within sixty days, or (c) entering into a bond conditioned that he will apply within thirty days for the benefit of the insolvency laws found in Sections 9 and 11.[15]

Sections 13 to 16 inclusive of the *Act of* 1842,[16] made provisions for taking the benefit of the insolvency provisions of the *Act of* 1836.[17] And Sections 4, 16

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9 The act also authorized issuance of a warrant of arrest where the plaintiff has "commenced a suit", but we are concerned only with execution process.
10 12 P.S. 258, 259.
11 12 P.S. 260.
12 12 P.S. 261, 262.
13 Section 22 of the Act of 1842 contemplates discovery in combination with the hearing. It also grants immunity to witnesses, and states no one may be excused from testifying.
14 12 P.S. 264.
15 12 P.S. 265, 267.
16 39 P.S. 286 to 289.
17 Act of 1836, June 16, P.L. 729, 39 P.S. 244.

and 17 of the same *Act of* 1836[18] provided for the discharge of the defendant from custody, under certain conditions, upon assignment for the benefit of creditors. These provisions have been superseded by the *Act of* 1901 and the *Act of* 1911[19] which provide that a defendant who has made an assignment for the benefit of creditors may present his petition for a rule to show cause why he should not be discharged from arrest, etc.

A later "insolvent law", the *Act of* 1915,[20] was enacted to provide for cases where the defendant has no assets to assign. The procedure basically is similar to that under the *Act of* 1901. Under the *Act of* 1915 provision is made for the defendant's discharge from arrest, but not from the effect of the judgment, if the court is satisfied that "defendant is without means or property with which to pay the judgment and that he has not secreted or assigned property. . . ."

Where does our government worker fit into this procedure? And what about the mysterious corporation president who hasn't a thing in the world except a job paying a lush salary? When they defy their honest judgment creditors, shall it not be said that they have "money or evidence of debt" which they "unjustly refuse to apply"? And can it be said that they are "without means or property with which to pay the judgment"? Where is the law that lets them hoot instead of pay?

Express prohibitions against imprisonment for debt appear in the constitutions of many states. Since their purpose generally has been to protect poor debtors from futile imprisonment, some courts have held that such provisions abolish only old procedures at law for imprisonment and that the power to punish for contempt is retained as a modern counterpart of the creditors' bill. In Pennsylvania, as previously stated, the Supreme Court has held the limitations on imprisonment apply equally to money decrees in equity and judgments at law.[21] Pennsylvania's constitutional provision on the subject is far from a general limitation. Set forth in Article I, Section 16, in substantially the same language as in the Constitution of 1776, it states:

> "The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of creditors in such manner as shall be prescribed by law."

Nothing in this language bars the imprisonment of an able debtor who, with no justification, defies his creditors and the judgments of the courts. But it has been said that the salaried dead beat can take refuge behind the *Act of* 1845[22] on the theory that it excludes from consideration, for purposes of judgment enforcement, any wages or salaries of the judgment defendant. Actually it does nothing of the kind. In Section 5 it provides that "the wages of any laborers, or the salary

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18 39 P.S. 244, 256, 257.
19 Act of 1901, June 4, P.L. 404; Act of 1911, June 9, P.L. 728, 39 P.S. 4, 5, 7, 100.
20 Act of 1915, June 1, P.L. 704, 39 P.S. 9 to 12.
21 See n. 8, supra.
22 Act of 1845, April 15, P.L. 459, 42 P.S. 886.

of any person in public or private employment shall not be liable to attachment in the hands of the employer."

In the first place it will be noticed that the ban is only against attachment in the hands of the employer. Granted that the purpose of the act is to protect the employee and his or her family and not merely to save employers from being turned into brawling collection agencies, the courts have taken the view the act should not be carried beyond its objectives, and in *Commonwealth ex rel Deutsch v. Deutsch,*[23] it is remarked in a footnote to the opinion that the exemption of wages from execution has not been considered sacrosanct and of greater importance than all other considerations of public policy. It is not suggested that the *Act of* 1845 would permit attachment of the salary of a defiant debtor, but it seems very clear that this act does not override the strong public policy in favor of the payment of just debts and obedience of the judgments of courts. For a judgment debtor to argue that it shuts the eyes of the judge to any salary he is receiving in determining whether he has "money" which he unjustly refuses to apply, or "means" with which to pay, appears perfectly ridiculous. In *Petition of Young,*[24] a case under the *Act of* 1915 involving the question, whether the debtor had "means", the court gave consideration to whether "wages received by defendant are sufficient to maintain his home". How can the amount of a judgment defendant's earnings, over and beyond his own and his family's requirements for comfortable living, be rightly ignored in any case? In this appeal, the court stated, "Imprisonment for civil debt is abhorrent to the law of this Commonwealth", but when a person, who has been shown to have the ability to pay refuses to do so, such imprisonment as follows is not "for civil debt" but for disobedience of an order with which he is able to comply, and there is nothing abhorrent about that. Where it appears, therefore, at the hearing under the *Act of* 1842 that the judgment defendant has means in any form, including earnings, which he unjustly refuses to apply to the payment of the judgment, why should he not be committed upon his failure to pay or to enter into some satisfactory arrangement for payment? If the plaintiff or the judge is reluctant to bring the defendant into the hearing in the first instance with a warrant of arrest, there should be no question of the court's power to issue a less severe process at this point than that which the act authorizes. It is fundamental that the courts under our Constitution have inherent rights and powers which do not depend solely upon express constitutional or legislative grants and that they may do all things necessary for the administration of justice within the scope of their jurisdiction. Judge Maxey, later Chief Justice of the Supreme Court of Pennsylvania, recognized this principle in *In re Surcharge of County Commissioners.*[25]

From an examination of the source of the law, therefore, one must conclude that Pennsylvania's policy with respect to the defiant debtors is neither soft nor

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[23] 347 Pa. 66, 31 A.2d 526 (1943).
[24] 327 Pa. 267, 271, 192 Atl. 911 (1937).
[25] 12 D. & C. 471 (1929); see also Commonwealth v. Brownmiller, 141 Pa. Super. 107, 112, 14 A.2d 907 (1940).

undiscerning. Rather, it seems that the framers of the statutes from a century ago had more foresight and common sense than has appeared in the application of the statutes. When one considers how the proportion of wealth represented by earnings has increased over the years, and how greatly the status of the wage earner has been improved through collective bargaining, social legislation and progress in the modern economy, it is all the more wonder that these subtleties in our execution law have received such scant attention. Taking note how far ethics have lagged behind material progress and the extent to which calculating cheats use the corporate device and other techniques to hide out from their harassed creditors, it is hard to understand Pennsylvania's seeming reluctance to use civil arrest in aid of execution. In this respect we have fallen behind the times while other states, including some of our immediate neighbors, have long since drawn the very important distinction between futile imprisonment of the poor debtor and bringing into line the recalcitrant dead beat.[26] Some legislative refurbishing of execution procedure, with attention to so-called installment execution and the placing of a burden on the defendant to show that he has honestly endeavored to satisfy the judgment, is over due. In the meantime, however, our basic law on the subject, although in need of revision, could be a very useful antique, more practical than some of this silly talk about "barbarous treatment" and returning to the days of Dickens.

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26 Matter of Reeves v. Crownshield, 274 N.Y. 74, 8 N. E.2d 283 (1937); see also, Partial Payment, Annotated Laws of Massachusetts, c. 224, § 16 and Arrest, Ohio General Code, § 2333.11.