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Alfred M. Isaacs

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DISCOVERY IN AID OF EXECUTION

The most recent report of the United States Treasury Department¹ states that the total number of individual income tax returns for 1951 is over fifty-five billion. Approximately seventy-six percent of these are taxable returns, and approximately twenty-four percent are non-taxable returns. Adjusted gross income reported for 1951 amounted to over \$203,000,000,000.

Adjusted gross income is defined as gross income minus allowable trade and business deductions, expenses of travel and lodging in connection with employment, reimbursed expenses in connection with employment, deductions attributable to rents and royalties, deductions for depreciation and depletion allowable to life tenants and income beneficiaries of property held in trust and allowable losses from sales of property. Should these allowable deductions exceed the gross income, there is an adjusted gross deficit. The amounts of income, profit or loss, tabulated as sources of income and loss comprising adjusted gross income, are the net amounts to be included in the adjusted gross income.

Residents of Pennsylvania filed over four million individual returns for 1951 comprising an adjusted gross income of over \$15,000,000,000. Of this amount over \$12,000,000,000 constituted salaries and wages. The remainder constituted dividends, interest and self-employment tax.²

Under Section 5 of the *Act of 1845*,³ it was provided that the wages of any laborers, or salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer.

In *Morris Box Board Co. v. Rossiter*⁴ it was stated that this exemption is intended for the benefit of the laborer and his family and is grounded in public policy, and he cannot waive it.

As has been pointed out, the greater part of the adjusted gross income is comprised of salaries and wages. What remedy is then available for the judgment creditor in regard to unsatisfied judgments?

Discovery in Aid of Execution

Section 1, of the *Act of 1913*, provides as follows:

"In any case in which a final judgment has been or may here after be recovered in any court of record in this commonwealth, upon which an execution has been issued, and a return made by the sheriff of the proper county to the effect that property cannot be found sufficient to satisfy the said judgment and execution, upon petition of the plaintiff, under oath, setting forth that he believes the defendant has property which should

¹ Preliminary Report, Statistics of Income for 1951, pt. 1, p. 1.

² Table 3, p. 20. Self-employment tax is levied on the statutory net earnings from self-employment at the rate of two and one-fourth percent. Net earnings from self-employment are a combination of the gross income derived by an individual from his trade or business, reduced by business deductions, plus his distributive share of ordinary net income or loss from partnerships of which he is a member.

³ Act of 1845, April 15, P.L. 459, 42 P.S. 886.

⁴ 30 Pa. Super. 23 (1906).

be applied toward the payment of such judgment, the court shall enter an order to the same number and term requiring the judgment debtor to attend, and be examined orally, after being duly sworn or affirmed true answers to make concerning his property, before the court, at such time and place as the court may appoint. The attendance of the debtor for the purposes of such examination may be enforced by said court by subpoena and attachment, as in the case of other witnesses.

"The judgment debtor may be compelled, in the same manner as other witnesses in judicial proceedings, to answer all pertinent questions addressed to him at such examination concerning his property; and he shall not be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said court, except for perjury in giving such testimony.

"The examination shall be taken, reduced to writing, and filed among the records of the case. All expenses of the examination shall be paid by the plaintiff, in the first instance, and shall be taxed as costs and collectible from the defendant, in the same manner as other costs in the case, if it be ascertained thereby that the defendant has property which can be made liable for said judgment."⁵

In *Kingston Nat. Bank v. Noveen*,⁶ it was held that before a judgment creditor can obtain an order for an oral examination, execution must have been filed by the sheriff to the effect that property cannot be found sufficient to satisfy the judgment and execution. A return of *nulla bona*, stating that after due and diligent search no goods or chattels of the defendant can be found, was held insufficient, and a return of *nulla bona* does not entitle the plaintiff to bring a proceeding for discovery.

The burden is on the judgment creditor to show strict compliance with the statute before he may invoke the supplementary provisions which it provides. The court stated in the case of *Mangan v. Smith*⁷ that the process provided by the act is supplementary to and in aid of the discovery of property subject to execution and that such process is available only after the process by execution is exhausted.

The *Act of 1913* does not pertain to corporations. A separate statutory provision concerning corporations as judgment debtors is the *Act of 1828*⁸ which provides as follows:

"Whenever a judgment may be rendered in any court of record against any private corporation within this Commonwealth, in any civil action, and a writ of fieri facias shall be issued on such judgment, and the sheriff to whom the same may be directed shall make a return *nulla bona* on the same, it shall and may be lawful for the plaintiff in such action to apply by petition and affidavit to the court in which such judgment has been rendered, stating that no property of the defendant

⁵ Act of 1913, May 9, P.L. 197, 12 P.S. §§ 2242, 2243, 2244.

⁶ 77 D. & C. 377, 41 Luz. L. Reg. 409 (1952).

⁷ 71 D. & C. 38 (1950), *Fidelity-Philadelphia Trust Co., Exec., v. Miller*, 29 D. & C. 282 (1937), and *Commonwealth to use, v. Schiff*, 52 D. & C. 515 (1947) are in accord with the case cited.

⁸ Act of 1828, April 14, P.L. 439, 12 P.S. 1331.

can be found on which an execution may be levied, and that the party making the application verily believes that the effects of the corporation are concealed for the purpose of avoiding the payment of their debts, whereupon the said court may issue a citation, directed to the president, secretary, treasurer, or other officers and members of the said corporation, commanding him or them to appear in court on a day certain, and answer such interrogatories as may be put to them touching the effects of the corporation, which citation shall be served by the sheriff, and it shall be the duty of the plaintiff to file interrogatories to be put to such officer or member, at least fifteen days before the return day of such citation, in the office of the prothonotary of such court, and the person or persons to whom the said citation shall be directed shall, on or before the return day thereof, file his or their answers to such interrogatories, upon oath or affirmation, in the office of the prothonotary, and if any person to whom such citation may be directed shall neglect or refuse to file his answer as aforesaid, or shall file answers which in the opinion of the court shall be unsatisfactory, it shall be lawful for the court to issue an attachment for contempt against the person so refusing to answer, or answering unsatisfactorily, and if upon the answers to such interrogatories it shall appear that any effects of the said corporations are in the possession or power of any member of the corporation, or of any other person or persons, it shall and may be lawful for the court to issue an order in the nature of an order of sequestration, which, being served by the sheriff on the person or persons in whose possession or power such effects are alleged to be, shall have the same force and effect as if he or they had been summoned as garnishees in a foreign attachment, and the like proceedings shall thereafter be had against him or them as may be had against such garnishees after judgment rendered against the defendant in a foreign attachment, and any debtor of the said corporation may plead such sequestration, and proceedings against him, in bar of any action brought by the corporation, exactly as the garnishee in a foreign attachment may plead the proceedings in the same, in bar of an action by the defendant in the same."

From the language of this act, it appears that a return *nulla bona* by a sheriff is sufficient for application of this proceeding. There is some confusion in regard to this because it was held in *Borough of Mt. Union v. Kunz*⁹ that this act must be strictly construed, while it was held in *Commercial National Bank and Trust Co. v. American Kid Co.*¹⁰ that a citation to officers of corporations may issue under this act after a writ of *fieri facias* has been returned *nulla bona*.

Another provision provided by statute is the *Act of 1836*¹¹ which provides for a bill of discovery in order to discover defendant's effects. It states as follows:

"It shall be lawful for the plaintiff in any judgment for the recovery of money obtained in any court of this Commonwealth, to have a bill for the discovery of the real and personal estate of the defendant in such judgment.

⁹ 290 Pa. 366, 139 Atl. 118 (1927).

¹⁰ 16 D. & C. 799 (1932).

¹¹ Act of 1836, June 16, P.L. 775, 12 P.S. 2231-2233.

"Such bill may be filed against the defendant in the judgment, and against any person having possession of such real or personal estate, or who may owe, or be accountable for the same or may have knowledge of the same and shall be filed in the Court of Common Pleas of the county in which such judgment may be; or if the person of whom discovery may be sought shall reside out of such county, such bill may be filed in the Court of Common Pleas of the county where such person shall reside.

"Each bill shall set forth: (1) The recovery of a judgment and the amount actually due thereon; (2) That there is reason to believe that the defendant in such judgment has real or personal estate, where with the same may be satisfied; (3) That such real estate has been conveyed, transferred or concealed, or that by reason of concealment, or fraudulent transfer or encumbrance thereof, the complainant is prevented from having execution of his judgment; (4) If such bill shall be filed against any person other than the defendant in such judgment, it shall set forth also that such person has possession or knowledge of such real or personal estate, or that he can make discovery of such facts as will enable the plaintiff to have satisfaction of his judgment."

The basic problem which confronts a Pennsylvania attorney is the fact that there are these three separate statutes which pertain to the same subject. Each has different requirements and different standards which are to be met. These statutes are in need of revision in order to cope with the present problems of satisfying unpaid judgments. They should be combined, resulting in greater ease of application and uniformity in their procedural requirements.

Thought should be given to and comparisons made between the present Pennsylvania statutes and the operative provisions of statutes of other jurisdictions.

*Ohio*¹²

"When an execution against the property of a judgment debtor, or of one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a judgment of a justice of the peace has been filed, is returned unsatisfied, in whole or in part, the judgment creditor shall be entitled to an order from a probate judge, or a judge of the court of common pleas in the county to which the execution was issued requiring such debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place within the county to be specified in the order.

"After the issuance of an execution against property, and on proof by the affidavit of the judgment creditor, or otherwise, to the satisfaction of a judge of the court of common pleas, or a probate judge, of the county in which the debtor is found, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge, by order, may require the debtor to appear at a time and place in such county to answer concerning it. Such proceedings thereupon may be had for the application of the property of the debtor

¹² General Code, §§ 2333.09-2333.19.

toward the satisfaction of the judgment, as are prescribed by sections 2333.09 to 2333.27, inclusive, of the Revised Code.

"Instead of the order mentioned in section 2333.10 of the Revised Code requiring the attendance of the judgment debtor, the judge may issue a warrant requiring the sheriff to arrest and bring such debtor before him, upon proof to his satisfaction or by affidavit of the judgment creditor that there is danger of the debtor's leaving the state, or concealing himself, to avoid such examination. Such warrant can be issued only by a judge of the court of common pleas, or the probate judge, of a county in which the debtor is found, and the sheriff can execute it only within that county. In executing the warrant, the sheriff shall deliver to the debtor a copy thereof and of the testimony on which it was issued.

"When brought before the judge as provided in section 2333.11, the judgment debtor shall be examined on oath, and other witnesses may be examined on either side. In the examination, if it appears that there is danger of such debtor's leaving the state, or that he has property which he unjustly refuses to apply to the judgment, he may be ordered to enter into a bond, with surety, in such sum as the judge prescribes that he will attend before the judge or referee for examination, from time to time, as directed. In default of entering into such bond, he may be committed to the jail of a county, by warrant of the judge, as for contempt.

"After the return of an execution against the property of a judgment debtor, or of one of several debtors in the same judgment, and upon proof in writing, by affidavit or otherwise, to the satisfaction of the judge, that a person or corporation has property of such judgment debtor, or is indebted to him, the judge, by an order, may require such person or corporation, or any officer or member of the corporation, to appear at a specified time and place in the county wherein such person or corporation is served with the order and answer concerning it. From the time of its service, property, money, or credits in the hands, or under the control of the person or corporation so served, belonging to the judgment debtor, or due from him to such person or corporation, shall be bound, and made liable to the judgment creditor therefor.

"On filing of affidavit by judgment creditor, if the judge is satisfied of the existence of any of the grounds upon which an order of attachment may be issued, the order may issue before the issuance and return of execution.

"On examination, no person shall be excused from answering any question on the ground that his examination will tend to convict him of fraud. His answer shall not be used as evidence against him in a prosecution for such fraud.

"The judge of the court of common pleas or the probate judge may order a reference to a referee agreed upon, or appointed by such judge to report the evidence or the facts. Such judge or referee may continue his proceedings from time to time, until they are completed.

"A party or witness may be compelled, by an order of the judge, or by a subpoena, to attend, before a judge or referee, to testify.

"If an examination is before a referee, such examination must be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee must be on oath. When a corporation answers, the answer must be on oath of an officer thereof.

"If a person, party, or witness disobeys an order of the judge, court, or referee, issued and served, such persons may be punished as for contempt; and such referee may report the case to the court, or judge, and such court or judge may punish for contempt."

*Massachusetts*¹³

"A judgment creditor or a person in his behalf may file in court on application for supplementary process. Upon the filing of such application, a summons may issue, requiring the judgment debtor to appear at a time and place named therein and submit to an examination relative to his property and ability to pay. Such summons may be served by an officer qualified to serve civil process, by delivering to the debtor an attested copy thereof, or by leaving it at his last and usual place of abode, at least seven days before the return day thereof. If due service is not made, the court may order further notice. A judgment debtor who has been arrested on mesne process or on execution, or a person in his behalf, may file such an application and cause service to be made upon the judgment creditor or his attorney of record in the action, in a similar manner, requiring the judgment creditor to appear at such examination; and upon failure of the judgment creditor to appear personally or by attorney the proceedings under this section may be dismissed. The failure of a judgment debtor personally to appear without reasonable excuse upon such summons, or at an examination otherwise appointed, or to submit to the examination as provided in section fifteen, shall constitute a contempt of court. Supplementary proceedings shall be in order for examination at the return day and hour set forth in the summons or further notice, but may on order of court for good cause shown be continued from time to time for examination, and may be brought up for further proceedings at such time or times, and in such manner as the court by general or special rule or order may direct. The death of the judgment creditor shall not affect supplementary proceedings.

"The judgment debtor, if he appears, shall be examined on oath as to his property and ability to pay; and such examination, if in writing, shall be signed and sworn to by the debtor and filed with the court. Either party may introduce additional evidence; and if the debtor fails to appear at the examination it may proceed and orders made in his absence. The examination may be oral or in writing, in the discretion of the court. The execution, or a certified copy thereof, shall be sufficient proof of the judgment.

"If the court finds that the debtor has no property not exempt from being taken on execution, and is unable to pay the judgment, in full or by partial payments, or if the creditor fails to appear at the examination, personally or by at-

¹³ Annotated Laws of Massachusetts, c. 224, § 14.

torney, the proceedings may be dismissed. If the court is satisfied that the debtor has property not exempt from being taken on execution, the court may order him to produce it, or so much thereof as may be sufficient to satisfy the judgment and costs of the proceedings, so that it may be taken on the execution; or may order him to execute, acknowledge if necessary, and deliver to the judgment creditor, or to a person in his behalf, a transfer, assignment or conveyance thereof; or if the debtor is able to pay the judgment in full or by partial payments the court may, after allowing the debtor out of his income a reasonable amount for the support of himself and family, which amount need not be stated, order the debtor to pay the judgment and costs of the proceedings in full or by partial payments from time to time; or the court may make an order combining any of the orders above mentioned. The court may prescribe the times, places, amounts of payments, forms of instruments and other details in making any of the orders above mentioned. The court may at any time renew, revise, modify, suspend or revoke any order made in any proceedings under the provisions of this chapter. Failure, without just excuse, to obey any lawful order of the court in supplementary proceedings shall constitute a contempt of court."

*New York*¹⁴

"Proceedings may be instituted:

1. By order of the court served upon the judgment debtor, a third party, or a witness.

2. Within two years from the date of judgment by subpoena of the judgment creditor's attorney, served upon the judgment debtor, a third party, or a witness.

3. By a warrant issued as in this article provided.

4. Within two years from the date of judgment, by a service of a subpoena on a financial institution. Such order or subpoena shall require the attendance of the judgment debtor or third party or witness, to whom it is directed to appear for examination at a time and place to be specified therein, concerning the property or income of the judgment debtor and may require the production at such examination of any books, papers or records in his or its possession or control which have or may contain information concerning the property or income of the debtor. Examinations of the debtor, third party and witnesses may be had simultaneously or separately, and the close of one or more of such examinations shall not affect the proceedings not concluded.

"The judgment creditor shall be entitled to an order for the examination of such judgment debtor concerning his property, income or other means for satisfying the judgment upon proof by affidavit that the judgment is unpaid in whole or in part. When a proceeding shall have been instituted and closed, no further proceedings shall be instituted herein against the judgment debtor except by order of the court which shall be granted upon showing that one year has elapsed since the last examination of the judgment debtor in supplementary proceedings on such

¹⁴ New York Civil Practice Act, art. 45, §§ 774 and 775.

judgment or that there is reason to believe the judgment debtor has property or income or is entitled to property or moneys, which may be reached under the judgment. An order for examination of a judgment debtor may contain a provision restraining the judgment debtor from making or suffering any transfer or other disposition of, or interference with any of his property then held or thereafter acquired by or becoming due to him not exempt by law from application to the satisfaction of the judgment, until further direction in the premises, and such other provisions as the court may deem proper. Unless previously vacated by order of the court or by stipulation of the parties, a restraining provision as herein provided shall remain in full force and effect for a period of two years from the date thereof, at which time it shall be deemed vacated for all purposes unless extended by order of the court for good cause shown."

*Indiana*¹⁵

"When an execution against the property of the judgment debtor, or any of several debtors in the same judgment, issued to an officer authorized to serve the same at the place where such judgment debtor resides, or, if he does not reside in the state, to the officer of the court rendering such judgment who is authorized to serve such execution, is returned unsatisfied, in whole or in part, the judgment creditor, after such return is made, shall be entitled to an order, to be issued by any circuit, superior, municipal or city court or by any justice of the peace in the jurisdiction to which such execution issued, or by the clerk thereof in vacation, requiring the judgment debtor to appear forthwith before the court, if in session, or, if the court is not in session, then before the judge thereof, at a time and place to be specified therein, or on the first day of the next term of the court, to answer concerning his property or income or profits within the county to which the execution was issued; and a transcript of a judgment from a justice of the peace filed and docketed in the circuit court shall, for the purpose of this act, have all the effect of a judgment rendered originally in such court.

"If, after the issuing of an execution against property, the execution plaintiff, or other person in his behalf, shall make and file an affidavit with the clerk of any court of record of any city, county or township to the effect that any judgment debtor, residing in the territorial jurisdiction of such court, has property or income or profits, describing the same, which he unjustly refuses to apply toward the satisfaction of the judgment, the court, if in session, or the judge or clerk thereof in vacation, shall issue a subpoena requiring the judgment debtor to appear forthwith before the court, if in session, or, if not, at the next term of the court, or before the judge thereof, at a time and place to be specified therein, to answer concerning the same; and such proceedings may, thereafter, be had for the application of the property or income or profits of the judgment debtor toward the satisfaction of the judgment as provided upon the return of an execution."

It will be noted that the statutes cited provide an adequate and speedy remedy

¹⁵ Burns Indiana Statutes-Annotated, c. 44, §§ 2-4401 and 2-4402.

for the judgment creditor. The statutory provision of Ohio¹⁶ requires only that the execution be returned unsatisfied in order to have available the use of this proceeding.¹⁷ The provision also provides that the judgment debtor may be examined before the court or a referee appointed by the court and that the judge may issue a warrant directing the sheriff to arrest the defendant and to bring him before the court or order him to enter into a bond if there is danger that he may leave the state or conceal himself in order to avoid examination.

The Massachusetts statute¹⁸ is novel in that the judgment debtor who has been arrested on mense process or execution may file an application for supplementary process and require the judgment creditor to appear. The provision also gives the judgment creditor some relief where full satisfaction can not be had by allowing the court to order partial payment out of the debtor's income.

The operative provisions of the New York¹⁹ and Indiana²⁰ statutes also contain complete and effective remedies for the judgment creditor.

The acts of Pennsylvania²¹ are very sketchy in their language and lack the necessary provisions for adequate relief which such a proceeding should provide. In effect, they merely state that there is a remedy available for discovery of a judgment debtor's property. Consideration should be given to the statutory provisions of the other jurisdictions with a view to revising Pennsylvania's statute to provide complete and speedy relief.

The intent of the legislatures in these jurisdictions is clear. It is to provide for a swiftly administered remedy for the collection of unpaid judgments. This purpose was very clearly brought out in *Everight Utilities Corp. v. Lousheim*²² where the New York court stated:

"It is the intent of the Legislature to provide not merely the substitution of a subpoena for an order, but likewise to enable the use of a swiftly and directly administered, new remedy for the collection of unsatisfied judgments, by means of which the judgment creditor may forthwith reach out for assets such as debts, claims, intangible property, and choses in action not leviabale under execution. . . . Whether legal or equitable, all remedies may be pursued simultaneously in order to enforce satisfaction of the judgment."

Careful thought and consideration should be given to the present situation in regard to collection of unsatisfied judgments in Pennsylvania and the statement quoted above kept in mind in light of possible revision of the present statutes.

Alfred M. Isaacs

Member of the Middler Class

¹⁶ See n. 12, supra.

¹⁷ *Stern v. Mutual Life Ins. Co.*, 39 Ohio App. Rep. 498, 177 N.E. 923 (1931).

¹⁸ See n. 13, supra.

¹⁹ See n. 14, supra.

²⁰ See n. 15, supra.

²¹ See n.'s 5 and 8, supra.

²² 246 N. Y. Supp. 681, 147 Misc. 833 (1933).