

Missouri Law Review

Volume 1
Issue 3 June 1936

Article 6

1936

Comments

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Comments, 1 Mo. L. REV. (1936)

Available at: <https://scholarship.law.missouri.edu/mlr/vol1/iss3/6>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

CREDITOR'S RIGHTS—SATISFACTION OF JUDGMENT OUT OF PROPERTY ON THE PERSON OF THE JUDGMENT DEBTOR—It is rather commonly assumed that a judgment creditor has no available means of satisfying his judgment when the debtor's only property consists of money, bonds, stock certificates, jewelry, etc. which he carries upon his person.¹ This assumption is based upon a well-settled common law rule that property upon the person of the judgment debtor can not be levied upon under a writ of execution.² The rule originated in the denial to a landlord of the right to distraint property on the person of the tenant.³ It is not clear whether the rule was based upon the nature or use of the property or upon the fact that it was carried upon the tenant's person. But the jealous regard of the common law for preservation of the peace indicates the latter to have been the important consideration.⁴ Thus, the question is entirely different from that of exemptions of certain kinds of property, e. g., wearing apparel, from levy.⁵ The property is not excluded from liability for debt by any positive rule, but is merely placed out of the creditor's reach by reason of its location.

Is the unscrupulous debtor, then, to be permitted to defy the judgment creditor by the simple process of converting his property into convenient form and carrying it inviolate upon his person? Does the creditor have any recourse for obtaining satisfaction of his judgment out of property which the debtor is apparently able to apply to the judgment debt?

In many states the situation is covered by statutory provisions for proceedings in aid or supplementary to execution,⁶ which have for their general purpose the satisfaction of the execution issued under a judgment. They usually provide for an order from the court to the debtor to appear and answer concerning the nature and location of his property.⁷ If he discloses property which is subject to levy, it may be taken by regular legal process. But if there are any obstacles to such levy, the court may order the debtor to deliver the property to the court or its officer for satisfaction of the debt,⁸ thus obviating the common law objection to a levy as tending to a breach of the peace. In Missouri there is a statute providing for the order of the court to the debtor to appear and disclose his property and its location,⁹ and if he refuses to appear or to disclose the nature and location of his property, he may be committed for contempt.¹⁰ But in the event that he does so appear and disclose property

1. The possibility of garnishment in case of bonds of a domestic corporation or stock certificates in states permitting attachment on the books of the corporation is excluded from consideration.

2. Mack v. Parks, 8 Gray 517 (1858); Maxham v. Day, 16 Gray 213 (1860). But *cf.* Green v. Palmer, 15 Cal. 412 (1860); State v. Dillard, 3 Ired. L. [N. C.] 102 (1842).

3. Simpson v. Hartopp, Willis 572 (1744); Gorton v. Falkner, 4 T. R. 565 (1792); Storey v. Robinson, 6 T. R. 139 (1795); Sunbolf v. Alford, 3 M. & W. 253 (1838); Adames v. Field, 12 A. & E. 649 (1840).

4. *Ibid.*

5. MO. REV. STAT. (1929) § 1159.

6. Bond v. Bulgheroni, 215 Cal. 7, 8 P. (2d) 130 (1932); Baker v. State *ex rel.* Mills, 109 Ind. 47, 9 N. E. 711 (1887); State *ex rel.* v. Burrows, 33 Kan. 17 (1885); Importers' and Traders' Nat'l. Bank v. Quackenbush, 143 N. Y. 567, 38 N. E. 728 (1894); Ohio Valley Bank v. Minter, 108 W. Va. 58, 150 S. E. 366 (1929).

7. *Ibid.*

8. *Ibid.*

9. MO. REV. STAT. (1929) § 1227.

10. State *ex rel.* Ames v. Barclay, 86 Mo. 55 (1885). It is possible that the debtor might assert his privilege against self-incrimination, since the conveyance of property with the intent or design to defraud, hinder or delay creditors is a misdemeanor. State *ex rel.* Strodtman v. Haid, 325 Mo. 1137, 30 S. W. (2d) 466 (1930).

which is not subject to levy because found on his person, no provision is made for an order by the court to deliver such property. And it has been expressly held that such an order can not be made under the statute.¹¹

The creditor is then no nearer solution of his problem than he was before. Why, then, cannot the creditor, by the familiar judgment creditor's bill, invoke the aid of an equity court because of the inadequacy of his remedy at law? From very early times the courts of Chancery have entertained judgment creditor's bills in which various forms of relief are sought by the creditor, but the ultimate goal is always satisfaction of his judgment against the debtor.¹² Before such a bill will be allowed the creditor must allege that he has exhausted his remedies at law.¹³ It is usually necessary, therefore, for him to show that a judgment has been obtained, a writ of execution issued, and that it has been returned unsatisfied.¹⁴ But the return of an execution *nulla bona* is not always required, if it can be proved that the issuance of a writ would be ineffectual.¹⁵ And, indeed, it may not even be necessary to first secure a judgment in certain cases where it can be shown that a judgment can not be obtained or is very impracticable.¹⁶ To support such a bill a creditor must also allege that he has reasonable grounds to believe that the debtor has property which he wrongfully withholds from the creditor.¹⁷ The debtor is then summoned before the court and examined. If he discloses property in his possession which is subject to levy, but cannot be reached for any reason, the court may order him to deliver it to its officer to satisfy the judgment, and his refusal to do so may be punished by commitment for contempt.¹⁸ If the order is merely for the payment of money it might be objected that such procedure violates constitutional and statutory provisions against imprisonment for debt.¹⁹ But these provisions are clearly intended to prevent the attachment of the body of a debtor who is unable to pay his debts and not to prevent a creditor from obtaining satisfaction when the debtor wrongfully refuses to pay the debt, though he has a specific fund of property which could be applied to the debt.²⁰ These provisions cannot be so construed as to limit the traditional means employed by an equity court to enforce its decrees, which would strike directly at its *in personam* jurisdiction.²¹

It is submitted, therefore, that the statutory provisions in Missouri have inadequately covered the question and that the creditor may still resort to traditional equity procedure as permitted under the judgment creditor's bill. It is a well recognized rule of statutory construction that where the common law has not been expressly abrogated or by necessary implication annulled, it remains effective. Indeed, some statutes providing for such supplementary proceedings have expressly retained

11. *In re Knaup*, 144 Mo. 653, 46 S. W. 151 (1898).

12. *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829 (1913); 5 POMEROY, EQUITY JURISPRUDENCE (4th ed.) § 2294. These bills should be distinguished from the creditor's bill filed by creditors of a decedent in a suit to satisfy their claims out of the estate of the decedent. *Perkins v. Warburton*, 4 F. (2d) 742 (D. Md. 1922).

13. *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491 (1923); *Dalton v. Barron*, 293 Mo. 36, 239 S. W. 97 (1922).

14. *Merry v. Fremont*, 44 Mo. 518 (1869).

15. *Steele v. Reid*, 284 Mo. 269, 223 S. W. 881 (1920).

16. *Pendleton v. Perkins*, 49 Mo. 565 (1872); 38 A. L. R. 269.

17. *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829 (1913).

18. *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666 (1868); *Hadden v. Spader*, 20 Johns. 554 (1822); *Ohio Valley Bank v. Minter*, 108 W. Va. 58, 150 S. E. 366 (1929).

19. Mo. CONST. art. II, § 16.

20. *Coughlin v. Ehlert*, 39 Mo. 285 (1865), noted in 37 YALE L. J. 509; *State ex rel. Ames v. Barclay*, 86 Mo. 55 (1885); *Carnahan v. Carnahan*, 143 Mich. 390 (1906); *Ford, Imprisonment for Debt*, (1926) 25 MICH. L. REV. 24.

21. 1 FREEMAN, EXECUTIONS (3rd ed. 1900) § 8a.

the judgment creditor's bill.²² And, in general, the creation of statutory devices in the nature of judgment creditor's bills have been held not to eliminate such a bill; quite the contrary, it is still available.²³

It would seem, therefore, that the creditor placed in the troublesome situation hypothecated is completely without a legal remedy and is a proper subject for relief through a judgment creditor's bill in equity. It seems reasonably clear that the creditor's bill is appropriately effective to reach property carried upon the person of the judgment debtor. Indeed, the power of the court of equity in such a proceeding to make whatever orders and decrees that may be necessary to aid the creditor is almost limitless.²⁴ Thus, in *Frazier v. Barnum*,²⁵ the court held that, since jewelry disclosed in an examination of the debtor might be beyond the reach of a levy, a receiver should be appointed and an order made directing the debtor to deliver it to him. In *Hadden v. Spader*,²⁶ an early New York case, the court said that an equity court has power to assist a judgment and execution creditor to reach property of his debtor whenever it is out of reach of execution at law, and that to do so the court might direct the transfer of choses in action, money and stock. The court accordingly approved a decree of the lower court that the debtor, or his trustee, to whom he had paid his money, pay it to the creditor in satisfaction of his debt. In *In re Burr*²⁷ the court sustained an order of the lower court committing a debtor for contempt in refusing to pay over money to his assignee in insolvency as required by an order of the court. The court said, "It would be an intolerable weakness of the law if there were not some way to reach this class of men, who prey upon the credit of the community and then, when caught in their nefarious schemes, appeal to the technicalities of the law, or the sympathy of those who administer it." In *Pendleton v. Perkins*,²⁸ the Missouri court, in sustaining a bill to reach money of a debtor in the hands of a third person, recognized the possibility of a debtor's defying his creditors by merely accumulating wealth without having committed any fraud. The court indicated the availability of a creditor's bill and a court order to make it effective in such a case. In *In re Knaup*,²⁹ the Missouri Supreme Court denied a writ of *habeas corpus* to a debtor who had been committed for contempt in refusing to deliver bonds in compliance with a court order. The order was held to have been properly made under the garnishment statute, but the court intimated that it would not have so held if the order had been based merely upon a statute providing for examination of the debtor, except for his refusal to appear, because of no express provision therefor. But the court seems to overlook the traditional power of an equity court above referred to.

In conclusion, there can be little doubt that, despite widespread belief to the contrary, the law is not unequipped to deal with the recalcitrant debtor mentioned in the opening paragraph.

WARNER G. MAUPIN

22. *Winslow v. Dousman*, 18 Wis. 479 (1864).

23. *Feldenheimer v. Tressel*, 6 Dak. 265, 43 N. W. 94 (1889).

24. *In re J. H. Small Shoe Co.*, 16 F. (2d) 205 (C. C. A. 2d, 1926). Although the order was made in bankruptcy proceedings, it does not appear that it was based upon

any particular provision of the Bankruptcy Act.

25. 19 N. J. Eq. 316, 97 Am. Dec. 666 (1868).

26. 20 Johns. 554 (1822).

27. 56 Minn. 397 (1894).

28. 49 Mo. 565 (1872).

29. 144 Mo. 653, 46 S. W. 15 (1898).

OFFICERS—COUNTY AGENT AND THE MISSOURI COUNTY BUDGET LAW¹—Under the 1933 County Budget Law² the county court is directed to classify expenditures of the county into six named classes which are listed in order of priority, which priority is to be sacredly preserved. This note touches only on classes four and six.

Class four³ provides for the payment of the salaries and certain office supplies "of all county *officers* [italics the writer's] where the same is by law made payable out of the ordinary revenues of the county." Class six⁴ authorizes the county court to expend any balance for lawful purposes after the preceding designated five classes are cared for, provided, however, that nothing shall be appropriated under class six unless there is sufficient cash on hand to make all payments under the first five classes and to pay outstanding warrants. Since the majority of counties have exhausted their funds by the time they reach class six, it is of great importance to determine the question of whether certain public servants are officers or only employees. If they are officers, appropriations for their salaries and certain supplies must be made from class four. If, on the other hand, they are employees, they fall into class six, which, in most counties, contains no funds.

Courts have not laid down a uniform test for determining the line of demarcation between public office and public employment. However, generalizing from the cases, one may say that a position is a public office when it is created by law,⁵ not by contract,⁶ in which the incumbent performs duties involving an exercise of the sovereign power,⁷ which are continuing in their nature,⁸ and when it is such as to make the performance of the position of concern to the public. Some states have distinguished, either in their constitution or by law, between an office and an employment. The Illinois constitution on this subject provides as follows: "An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished."⁹

One of the most perplexing questions confronting county courts in carrying out the new Budget Law is that of the status of the county agent. If he is an officer, certain of his office supply charges must be paid out of class four; if, on the other hand, he is merely an employee, then this expense can be met only under class six, which, in most counties, as noted, contains no funds. The Attorney General of Missouri has ruled that this position is an employment and, therefore, the expense of same must be paid out of class six,¹⁰ which is, as stated, an impossibility in most counties because of lack of funds over and above those needed in caring for the first five classes. The Attorney General bases his ruling on the premise that the act allowing the county courts to appropriate money to county farm organizations¹¹ merely authorizes such to be done, and that it is not mandatory on the court to so

1. Mo. Laws 1933, p. 340, *et seq.*

2. *Ibid.*

3. *Ibid.* § 2.

4. *Ibid.*

5. State *ex rel.* Wingate v. Valley, 41 Mo. 29 (1867); Gracey v. St. Louis, 213 Mo. 381, 111 S. W. 1159 (1908).

6. United States v. Maurice, Fed. Cas. No. 15,747 (D. Va. 1823); Harrington v. State, 200 Ala. 480, 76 So. 422 (1917) at 423 says, "a public employment may be created by law, or by contract; but a public office can never be created by contract."

7. State *ex rel.* Cannon v. May, 106 Mo.

408, 17 S. W. 660 (1891); State *ex rel.* Hull v. Gray, 91 Mo. App. 438 (1902); State *ex rel.* Pickett v. Truman, 333 Mo. 1018, 64 S. W. (2d) 105 (1933).

8. State *ex rel.* Tedford v. Knott, 207 Mo. 167, 105 S. W. 1040 (1907); United States v. Germaine, 99 U. S. 508 (1879).

9. ILL. CONST. art. V, § 24.

10. Opinion of Attorney General of Missouri advising the Dunklin County Court relative to the salary of the Secretary of Farm Bureau Agent (April 16, 1935).

11. Mo. REV. STAT. (1929) § 12616 *et seq.*

act. However, the position might reasonably be taken that, although the act is not mandatory, once the position is created, as authorized, it becomes an office.

In view of the above rulings distinguishing between an office and an employment, it would seem that a conclusion contrary to that of the Attorney General, as to the status of the county agent, might well be reached. Analyzing the position of county agent in the light of the essential characteristics of the office, it may be plausibly argued that he is a public officer and that the expenses of his office are to be paid from class four.

The position is created by statute,¹² and not by contract. As a matter of fact there is no contract existing between the county agent, himself, and the county.¹³

The objects of the county farm organization, which together with the University of Missouri selects the county agent, are clearly set forth in the statute.¹⁴ The duties of the county agent in carrying out the statutory objectives of the farm organization would seem to be such as to prompt the Court to say that they involve the exercise of the sovereign power. The Missouri Supreme Court in *Jasper County Farm Bureau v. Jasper County*,¹⁵ ruled that appropriation of public funds to the county farm bureau was appropriating money for a public purpose, and therefore valid. The decision in this case serves to indicate that the Court would have little difficulty in finding that the duties of the county agent in carrying out this public purpose are such as to amount to an exercise of the sovereign power of the state, and such as to make the position one of concern to the public.

One of the chief requisites of an office is that the duties performed be of a continuing nature. An officer has duties of a permanent character, as opposed to occasional, transient and incidental duties. Looking at the position of county agent from this viewpoint, one could well say that this element is met and that he is an officer. By the statute providing for the county farm organization the county court must appropriate, if at all, for a period of not less than three years.¹⁶ If the incumbent is removed, dies or resigns, the position remains and a successor will continue with the work. The duties are of a general nature, and not special. When a particular task is finished the county agent is not through with his work but continues to care for the everyday routine of his program.

There are other elements which may be helpful in deciding in particular cases between a public office and an employment,¹⁷ but they are not controlling. Each of the essential factors in making the distinction have been here considered. It is submitted that in the light of the tests set forth, the county agent may well be considered an officer and his position an office. Therefore, under the classification provided by the County Budget Law the expenses of the county agent should be paid from class four.¹⁸

HOWARD B. LANG, JR.

12. *Ibid.*

13. The only agreement which is had is the memorandum agreement entered into between the county farm organization and the University of Missouri.

14. MO. REV. STAT. (1929) § 12618.

15. 315 Mo. 560, 286 S. W. 381 (1926).

16. MO. REV. STAT. (1929) § 12623.

17. Tenure provided by law; official bond; oath of office; designation by the law as an office.

18. For examples of specific positions which have been held offices (or employments) see the annotation in (1928) 53 A. L. R. 595, (1934) 93 A. L. R. 333.