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The Uses and Limitations of the Writ of Capias Ad Satisfaciendum in Pennsylvania

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THE USES AND LIMITATIONS OF THE WRIT OF CAPIAS AD SATISFACIENDUM IN PENNSYLVANIA

The satisfaction of a judgment by execution upon the person of the judgment debtor recently received national attention when the press publicized the fates of two defendants in automobile negligence actions in Vermont who were imprisoned for two and fifteen months respectively after an adverse judgment. The process of the law by which they were incarcerated, and the fact that technically they faced life imprisonment, were the subjects of much criticism.[1] Execution on the body of the judgment debtor by a writ of *capias ad satisfaciendum* was once a common but rather impracticable form of execution, and can be used today in Pennsylvania, although it has been curtailed by statute and decision in the scope of its application.

The writ commands the sheriff to take the party named, and keep him safely, so that he may have his body before the court on a certain day, to satisfy the party for whom it is issued, the damages or debt and damages recovered by the judgment. It is to be compared with the writ of *capias ad respondendum* by which the defendant was brought before the court to answer the plaintiff's claim. It is from the latter writ that the writ of *capias ad satisfaciendum* developed. Because the civil action of trespass was criminal in origin, the defendant being liable to the king for a breach of the peace, after the year 1250 arrest of the defendant as a mesne process by *capias ad respondendum* became common in trespass actions.[2] Arrest for debt was not introduced until 1267, when it was authorized in an action of account. The development of a commercial society made the extension of civil arrest to all forms of debt actions inevitable. In 1352 the writ of *capias* was extended to the actions of debt, detinue and replevin, and in 1503 to actions on the case which included assumpsit.[3] By decision in the reign of Edward III it was laid down that in those actions which might be commenced by a writ of *capias ad respondendum* a writ of *capias ad satisfaciendum* could be used to execute the judgment. This resulted in imprisonment for debt becoming a general method of execution in England.[4] The oppression of honest debtors and the barbaric treatment they received at the hands of their creditors and the courts is a black page in the history of that nation. It has been observed that the Quakers who settled in Pennsylvania did not exhibit the same enlightenment towards their debtors as they displayed toward their criminals, for the system of imprisonment for debt was imported into Pennsylvania substantially the same as it existed in England.[5]

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1 New York Times, May 19, 58:7 May 20, 23:5; May 21, 6:7; May 22, 65:2 May 26, 32:4. Also see Life Magazine, June 6, 1949, p. 60.

2 2 POLLOCK AND MAITLAND'S HISTORY OF ENGLISH LAW 592 (1895).

3 8 HOLDSWORTH'S HISTORY OF ENGLISH LAW 231 (1926).

4 Ibid.

5 Freedman, Imprisonment for Debt, 2 TEMPLE LAW QUARTERLY 330 (1929). This article contains a much more thorough discussion of the English and Pennsylvania development of imprisonment for debt.

The Act of 1836 gives a judgment creditor in Pennsylvania the right to execute his judgment upon the personal and real estate of the defendant, and if he has neither, to execute upon the person of the defendant by writ of *capias ad satisfaciendum*.[6] The writ cannot be issued on a judgment for a sum less than one hundred dollars,[7] and cannot be executed where the defendant has any realty or personalty sufficient to satisfy the judgment. It may be issued for any portion of the unsatisfied judgment after the defendant's assets have been sold.[8]

In 1842 the legislature abolished imprisonment of the person in any civil action for the recovery of any money due upon any judgment or decree founded on an express or implied contract or for damages for non-performance of any contract.[9] This great step forward in social reform was anticipated by a provision relating to assignments by insolvents in the Constitution of 1776, § 28, where it was provided that "the person of a debtor where there is no strong presumption of fraud, shall not be continued in prison, after delivery up, bona fide, all his estate real and personal for the use of his creditors." This section of the Constitution of 1776 is included with slightly different wording in the Constitution of 1874, Article 1, § 16. This provision was the result of pressure brought by the poorer classes during the years immediately preceding the drafting of the Constitution to alleviate the intolerable situation of those debtors imprisoned in Pennsylvania jails.[10] The Act of 1842 continuing the policy announced by the Constitution has been described as "one of those great landmarks of legislation which point not only to a great change in the law, but also to a great revolution in popular sentiment and manners."[11] It might be noted here that imprisonment for debt was not finally abolished in England until 1869.[12]

The Act of 1842 contains a number of exceptions to its operation, and is limited to actions based upon contractual liability. Thus a writ of *capias ad satisfaciendum* may be used today to enforce a judgment in an action *ex delicto* for negligence[13] or an intentional tort.[14] Malice is not an essential element in the cause of action for the writ to issue. The writ has been used to enforce judgments in actions of slander[15] and for conspiracy and fraudulent conversion.[16] Defendants have tried in several cases to put an adverse judgment in a tort action within

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

7 Act of June 16, 1836, P. L. 755 §30, as amended by Act of June 12, 1931, P. L. 558, No. 190 §1, 12 P. S. 2142 a and b (Pa.).

8 Act of June 16, 1836, P. L. 755 §28, 12 P. S. 2142 (Pa.).

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

10 SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 (1936), p. 203.

11 Hammer v. Ladner, 17 Phila. 315 (1884).

12 Debtors Act, 1869, 32 and 33 Victoria c. 62 §4. Imprisonment of the defendant as a mesne process was abolished in 1838 by the Judgments Act, 1 and 2 Victoria c. 110 §1.

13 Romberger v. Henry, 167 Pa. 314, 31 A. 634 (1895); Kubit v. Witt, 127 Pa. Super. 434, 193 A. 81 (1937).

14 Powell v. Perkins, 211 Pa. 283, 60 A. 731 (1905).

15 Mankey v. Stocking, 213 Pa. 299, 62 A. 913 (1906).

16 Kalbfus v. Rundell, 134 Pa. 102, 19 A. 492 (1890).

the scope of the Act of 1842 by showing that the relationship between themselves and the plaintiff was founded in contract. The courts have said that such a recital of a contract or the fact that a contract existed between the parties is not sufficient to place an action clearly *ex delicto* within the prohibitions of the statute, and a writ of *capias ad satisfaciendum* may issue to enforce a judgment recovered in the action.[17]

In those situations where the plaintiff may have an election between an action of trespass or assumpsit, the cases on the subject of imprisonment during the action generally hold that the plaintiff's election to proceed *ex delicto* does not deprive the defendant of any rights he might have had if the action were brought *ex contractu*.[18] The best example of such a cause, and the one occurring most frequently in the cases, is an action on a contract induced by fraud. The plaintiff may bring a tort action for deceit or he may sue for breach of warranty in assumpsit. A writ of *capias ad respondendum* will not lie to bring the defendant into court merely because the plaintiff chooses to frame his action *ex delicto*. The proper form is a warrant of arrest provided by the Act of 1842 to commence an action on a contract tinged with fraud.[19] But when the facts present the requisite elements for a tort action of deceit, a judgment recovered in that form may be enforced by use of a writ of *capias ad satisfaciendum*.[20] The necessary *scienter* presumedly has been shown at trial, and the action is clearly *ex delicto* although arising from a contract. In *Condon v. Fessler*[21] it was said that where a *capias ad respondendum* would not issue to bring the defendant into court, it would seem illogical that a *capias ad satisfaciendum* should issue to enforce the judgment. The rule in an action on a fraudulent representation is quite logical, since in one case the plaintiff has merely averred deceit arising from a contract, perhaps to defeat the Act of 1842, and in the case of execution by *capias ad satisfaciendum*, he has proved it. When the action is clearly one of tort for deceit and there is no element of contract involved, both *capias ad respondendum* and *capias ad satisfaciendum* may be used.[22]

Where a defendant's liability is vicariously derived from the acts of another, the judgment may be enforced by arrest under a *capias* writ.[23] The case of *Baxter v. Wunder* involved the responsibility of one partner for the torts of another, but the court included within the scope of the rule the responsibility of a master for the torts of his servant. There was no distinction, according to the court, between torts committed personally and those committed by an agent. As far as a money

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17 Dungan v. Read, 167 Pa. 393, 31 A. 639 (1895); Kalbfus v. Rundell, supra.

18 Brown v. Burdick, 3 Clark 226 (1845); Hammer v. Ladner, 17 Phila. 315 (1884); Alexander v. Goldstein, 13 Pa. Super. 518 (1900); Koehler v. Woodford, 1 D. & C. 784 (1922).

19 Act of July 12, 1842, P. L. 339 §§2 and 3, P. S. 258 and 259 (Pa.).

20 Howard v. McKee, 82 Pa. 409 (1876); DeTurk v. Gachenbach, 96 Pa. Super. 38 (1929).

21 15 D. & C. 507 (1931).

22 Tyron v. Hassinger, 1 Clark 184 (1843); Bager v. Radley, 1 Phila. 47; Hirsch v. Simpson, 16 Phila. 85 (1882).

23 Baxter v. Wunder, 89 Pa. Super. 585 (1926).

judgment is concerned this is the well established rule and there is no doubt that the Act of 1836 makes no distinction as to the source of liability in allowing execution on the person, but to allow the enigmatic doctrine of *respondeat superior* to deprive the master of his freedom for the acts of his servant is not within reason, even if the deprivation is relatively short. One might justify the imprisonment of the tort-feasor on the basis that one who acts negligently or commits an intentional tort must be prepared to accept the consequences of liability which include imprisonment for failure to pay any judgment, and on the basis of an uncertain moral guilt, which does not approach a crime in many instances with its attendant safeguards over the liberty of the individual, but which is none the less culpable. But the imprisoning of one who is held liable as a matter of policy and not for the consequences of his own act cannot be so justified. In cases of vicarious liability the courts have refused to issue a writ of *capias ad respondendum* to commence the action.[24] The argument there was even stronger against it, since the master's liability would not be established until judgment.

A judgment in an action to enforce contribution between joint tort-feasors cannot be executed by a writ of *capias ad satisfaciendum*. The liability is contractual since it arises from an implied agreement to jointly contribute for the wrong done, and is therefore within the scope of the Act of 1842.[25]

Enforcement of a foreign judgment, whether recovered in an action of tort or contract, is had by suing in assumpsit on the judgment debt in the state where execution is sought. Supposing the cause to be one where a *capias ad satisfaciendum* might have issued in the first instance, had it been pursued in this state, can the plaintiff now have a *capias* to execute the judgment recovered in assumpsit on the judgment *ex delicto*? The only Pennsylvania case holds that since the action is *ex contractu*, a *capias ad satisfaciendum* cannot be used to execute such a judgment.[26] Now if the courts are seeking a logical consistency as they did in the case of *Baxter v. Wunder*, and if they will look to the substance of the action in determining whether the writ will issue, as they do in so many other cases, there is no reason why a *capias* should not be used to execute a tort judgment enforced in this state by an action of assumpsit. The merging of the original cause of action into the judgment and the suit upon the higher obligation should not destroy any advantages to which the plaintiff was entitled with respect to the original cause of action.[27] The suit in assumpsit is to enforce an obligation imposed by law, and is not a suit within the meaning of the Act of 1842, which prohibits imprisonment for suits on "contracts express or implied."

The Act of 1842 excepts from its operation a number of actions which might be considered judgments or decrees *ex contractu*. Proceedings for contempt to

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[24] Mason v. Sabulsky, 20 D. & C. 355 (1934).
[25] Feldman v. Gomes, 98 Pa. Super. 84 (1929).
[26] Condon v. Fessler, 15 D. & C. 507 (1930).
[27] RESTATEMENT, JUDGMENTS §47, comment d (1942).

enforce civil remedies are excepted so that the right of a court of equity to enforce its decrees by attachment of the person is not abridged, although where the only offense is a failure to pay money due on a contract, the courts have adopted the spirit of the Act of 1842 and have not allowed attachment of the person of the defendant.[28] A judgment for fines or penalties can be enforced by the use of a writ of *capias ad satisfaciendum,* and this includes penalties for the commission of acts forbidden by the state[29] and by muncipal ordinance.[30] This imprisonment is admittedly a penal infliction and not based upon contract.

A judgment recovered in an action for breach of promise to marry is expressly excepted from the operation of the Act of 1842. Such actions are now barred in Pennsylvania by a statute expressing a strong public policy against them.[31] The exception might be of force, however, in regards to a foreign judgment on such a cause from a jurisdiction where they are recognized, since the full faith and credit clause of the federal Constitution requires enforcement of a valid money judgment of a sister state even though it would have been contrary to the public policy of the enforcing state to allow action on the original claim.[32]

Since actions on moneys collected by any public officers are excepted from the Act of 1842, the following definition of a public officer within the purview of the statute was necessary:

> ". . . all persons who, by authority of law, are intrusted with the receipt of public moneys, through whose hands money due to the public or belonging to it, passes on its way to the public treasury, must be so considered, by whatever name or title they may be designated in the law authorizing their appointment, and whether the service be special or general, transient or permanent."[33]

A judgment recovered in an action *ex contractu* or *ex delicto* for misconduct or neglect in office or in any professional employment can be enforced by a writ of *capias ad satisfaciendum,* these causes being excepted by the statute. The question then is what constitutes misconduct or neglect in office or professional employment. Failure of an attorney to pay over to his client money collected for him is clearly such misconduct,[34] but failure of a clergyman to hand over money entrusted to him for safekeeping is not, since the keeping of money is not within the professional employment of a clergyman.[35] Execution by writ of *capias ad satisfaciendum* could probably have been had in the latter case if the action had been *ex delicto.*

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28 Commonwealth ex. rel. Di Giacomo v. Heston, 292 Pa. 63, 140 A. 533 (1928).
29 Commonwealth ex. rel. Colbert v. Kerr, 32 A. 276 (1895).
30 Milton Borough v. Hoagland, 3 Pa. Co. Cts. 283 (1887).
31 Act of June 22, 1935, P. L. 450 §2, 48 P. S. 171 (Pa.).
32 BEALE, THE CONFLICT OF LAWS, p. 1413 (1935).
33 Sharswood, J. in Commonwealth v. Evans, 74 Pa. 124 (1873).
34 Wills v. Kane, 2 Grant's Cases 59 (1853).
35 Emerich v. McDevitt, 19 Pa. Co. Cts. 53 (1897).

Arrest of the defendant to enforce a judgment includes the right to arrest for the costs accruing in the action since the costs follow the judgment. But a separate judgment for costs is merely a debt and cannot be enforced by writ of *capias ad satisfaciendum,* even if recovered by the defendant in a tort action.[86]

A defendant may be exempt from arrest to enforce a judgment not because of the nature of the cause against him, but because the defendant is privileged from arrest. By the Act of 1842 a female cannot be imprisoned for her debts,[87] and by the Act of 1893 a married woman could not be arrested or imprisoned for her torts.[88] This leaves a single woman liable to imprisonment for her torts. The federal government has accorded immunity from civil arrest to certain diplomatic officials by virtue of the rule of international law that foreign officials are immune from the domestic laws of the nation to whom they are accredited. Election officials and electors, legislators and Congressmen are exempt from arrest while carrying on official business. Parties and witnesses in a judicial proceeding carried on in good faith are also immune from civil arrest.[89]

If imprisonment for the debt is not forbidden and the defendant is not privileged from arrest, the writ of *capias ad satisfaciendum* issues from a court of record and commands the sheriff to take the defendant and safely keep him so that the sheriff will have the body in court on the return day to satisfy the plaintiff. The plaintiff can have a writ of *fieri facias* and a *capias ad satisfaciendum* issued at the same time if he desires,[40] and the sheriff can confront the defendant with both writs. The writ of *capias* cannot be executed when the defendant has realty, but if he fails to disclose to the sheriff the existence of any property, then the sheriff can execute the writ of *capias ad satisfaciendum.* Therein lies one of the uses of the writ, for the prospect of arrest is of great persuasive force in inducing a recalcitrant debtor to disclose his assets. The plaintiff cannot execute both writs, however.

If arrest is made under the writ, the defendant is committed to the county jail. If the return is *non est inventus,* that the defendant is not found within the county, the plaintiff may issue a *testatum capias* into a different county[41] or an *alias* writ in the same county.

What is the defendant's fate once he is imprisoned under the writ? He can, of course, pay the judgment and be released or he may choose to remain in jail. The imprisonment of the debtor was at common law the highest satisfaction known, and only death or the creditor could release him. By statute in Pennsylvania, when the defendant dies in prison or is discharged at his own request (either by person-

86 Lane v. Baker, 2 Grant's Cases 424 (1853).
87 Act of Feb. 8, 1819, P. L. 57, 12 P. S. 255 (Pa.).
88 Act of June 8, 1893, P. L. 344, 48 P. S. 111 (Pa.).
89 5 CORPUS JURIS 388.
40 Act of June 16, 1836, P. L. 755 §27, 12 P. S. 2141 (Pa).
41 Act of June 16, 1836, P. L. 755 §81, 12 P. S. 263 (Pa).

ally requesting the plaintiff to discharge him or by petitioning for a discharge under the insolvency laws) or by reason of privilege, or escapes, the judgment is deemed satisfied by the arrest, but the plaintiff can have his remedies at law as if the *capias* had not been issued.[42] But when the plaintiff discharges the defendant on his own motion, the debt is extinguished and the judgment satisfied.[43]

The imprisoned debtor can petition the court for discharge under the insolvency laws. The Act of 1901[44] is the general insolvency law of Pennsylvania and is in effect insofar as it does not conflict with the Federal Bankruptcy Act, so that it controls the discharge of an imprisoned debtor. The debtor must make an assignment for the benefit of his creditors and present his petition to the court seeking a rule to show cause why he should not be discharged from arrest. The debtor can be released by posting a bond, pending the hearing on the rule. Notice must be given to the plaintiff and to the defendant's creditors of the date set for the hearing. Upon the hearing of the rule, the petitioner must answer all the questions put to him and present his books for examination. If it appears to the court that the petitioner has made an assignment for the benefit of his creditors, that he has not violated any provisions of the insolvency laws, and that all claims against him would be discharged by the creditors accepting a dividend, the court should discharge him from arrest.

If the plaintiff's action is based on an intentional tort such as deceit or fraud, libel, slander, malicious prosecution, conspiracy, seduction or criminal conversation or those involving "actual force," a judgment based on such action would not be barred by the plaintiff's accepting a dividend and, therefore, the defendant could not be released under the Act of 1901.[45] According to the statute he may then be imprisoned for not more than ninety days since he has not complied with the provisions of the act.[46]

The Act of 1915[47] was passed to provide for those situations where the imprisoned defendant is without assets to assign. The procedure is basically the same under this act as under the Act of 1901. If the court is satisfied at the hearing on the rule that the defendant has no property or means to pay the judgment and has not secreted or assigned his property to avoid payment, the court may discharge him. Such discharge does not affect the plaintiff's judgment in any way, whereas a discharge under the Act of 1901 bars the plaintiff from further action on the claim. Under the Act of 1915 no defendant who has complied with the requirements of the insolvency laws can be detained for more than sixty days.

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42 Act of June 16, 1836, P. L. 755 §81, 12 P. S. 2143 (Pa.).
43 Bamford v. Keefer, 66 Pa. 389 (1870).
44 Act of June 4, 1901, P. L. 404 §5, 39 P. S. 4-8 (Pa.).
45 Act of June 4, 1901, P. L. 404 §83, 12 P. S. 100 (Pa).
46 Act of June 4, 1901, P. L. 404 §5, 39 P. S. 5 (Pa.).
47 Act of June 1, 1915, P. L. 704 §1, 39 P. S. 9-12 (Pa.).

At one time the courts said that discharge under the Act of 1915 before sixty days expired was a matter of grace within the discretion of the court, and after sixty days a matter of right.[48] The statute reads, "the court *may* discharge him from arrest," which was construed as leaving the matter within the discretion of the court, subject only to review for its abuse. In *Miller's Petition*[49] it was held that such discretion allowing imprisonment up to sixty days violated Article I, § 16 of the Pennsylvania Constitution, referred to before, which says that the debtor who has delivered up his estate for the benefit of his creditors shall not be continued in prison. The only discretion provided for by the act is whether or not there is any evidence of the debtor's secreting his property, and if the debtor places himself within the terms of the act he is entitled to release, not as a matter of grace, but by mandate of the statute.

If the defendant has made no assignment or has not attempted to pay the debt there is apparently no time limit on his incarceration. A defendant without property may be released upon proof of this fact, without prejudice to the plaintiff's claim by operation of the Act of 1915. In a negligence action an assignment of whatever property the defendant has frees him by the Act of 1901, but for those actions in which the assignment by the defendant does not bar the plaintiff's claim, the defendant must remain in prison for not more than ninety days. His release thereafter does not bar the claim of the plaintiff, since it is considered a release by operation of law or at request of the defendant and not a release with the consent of the plaintiff, so that the plaintiff may have his remedy as if no *capias* had been issued. The conclusion to be drawn from this summary is that the period of up to ninety days which the defendant must serve in the latter instance becomes punitive in nature. The judgment is not satisfied, and the assignment by the defendant in good faith has been futile. Punishment by incarceration is not within the realm of a civil action.

Comment on the use of the writ of *capias ad satisfaciendum* to enforce judgments has generally been unfavorable. Civil arrest has been described as a barbaric relic of another era unbecoming to our civilization and, in arguments less emotional, a legal process better left to criminal courts where the interests of society and not the individual are to be protected. Viewing the use of the writ as a punitive measure or as satisfaction of a judgment, these opinions are not without merit.

It is submitted, however, that in Pennsylvania civil arrest following judgment serves a useful purpose, and one for which its continued existence can be justified. In most cases, with the exception of certain implications of the Act of 1901 mentioned above, the philosophy that a *capias* is to be used to punish the defendant is long gone. It is today an inducement to pay a judgment.

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[48] Ostrowke's Petition, 79 Pa. Super. 311 (1922).
[49] 119 Pa. Super. 283, 180 A. 904 (1935).

The legislation and the cases commented upon have shown this purpose. If the defendant has property or means to pay his obligation and does so he may not be deprived of his liberty. If he has neither and convinces the court of this fact, he may be freed since imprisonment cannot induce payment in such a situation. When the defendant has some property but is insolvent, his situation is somewhat less favorable since even by assigning all his property certain claims are not barred and he cannot be freed. In keeping with the view taken of civil arrest after judgment as an inducement to pay, the better practice under the Act of 1901 would be to allow the assigning defendant his freedom immediately, despite the fact that the claim would not be barred under other sections of the insolvency laws. The plaintiff's judgment remains enforceable after release as under the Act of 1915. Detention achieves nothing except punishment by deprivation of liberty, a criminal philosophy of doubtful practical value. The foregoing assumes an honest defendant, but when the judgment debtor secretes property or refuses to take available steps to satisfy a just obligation, nothing is better than confinement behind bars to change his views.

Imprisonment for all debt in its broadest sense is indeed a relic of another day. The exigencies of a commercial world required that businessmen could incur honest debts without fear of imprisonment as an incident of liability. To allow otherwise would seriously hinder an economy based on a free flow of credit. By the same token, those who fraudulently avoid their obligations are not and should not be protected.

But our modern society by no means demands that imprisonment of a financially able tort-feasor should be abolished, if the imprisonment is only a means to the satisfaction by payment of that financial liability which the law creates in the tort-feasor because of his power to interfere with the rights of others. As to the negligent tort-feasor, the deadliness of a machine age justifies this incident of liability as a caution to those who would proceed without providing a method of satisfying the claims of those whom they wrong.

If imprisonment by *capias* is considered as an inducement to satisfy financial liability, and as incidental thereto, at first glance the views before expressed on the arrest of a master for the torts of his servant seem inconsistent. The master is not being punished nor is execution being had upon his body, but he is merely being induced to pay his obligation, and if he cannot, then he should be freed. This more modern attitude, however, cannot refute the arguments against such arrest as discussed above in considering the case of *Baxter v. Wunder*. We are justifying what exists under our law on the basis of the power liability concept, and a different approach to an established legal process cannot justify imprisonment of the master based on liability for a power existing in another person, the servant. Financial liability without the incident of imprisonment as an inducement to pay is a matter of policy and the deep pocket, but deprivation of liberty for the acts of another remains unreasonable under any view.

Abuse by a vindictive plaintiff of the right to use a *capias* is, of course, always possible. Under any philosophy by which one views the writ, the deprivation of the liberty of an individual is to be guarded closely. Imprisonment of a breadwinner of small means is a hardship often resulting in loss of employment and if the *capias* is ineffective to induce payment such hardship should be immediately alleviated. The rights of a defendant seem to be fully protected by constitutional provisions and by the view of the courts that the use of a *capias ad satisfaciendum* is an extraordinary remedy which is abhorrent to the courts of this state.

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