IMPRISONMENT IN CIVIL CASES.

By G. H. LUSH, LL.B.

Dans le très ancien droit, c'est la personne du débiteur, son corps, qui répond avant tout du payement de sa dette; par extension, ses meubles en repondent aussi, car mobiliam ossibus inhaerent.[1]

AT Common Law there was no general process of imprisonment of judgment debtors available to judgment creditors as an ordinary method of execution. There were two writs of execution—*fieri facias* and *levari facias*. The former was directed against the goods of the debtor, the latter against profits of land and goods, but on neither of them could the debtor be arrested and imprisoned. Pollock and Maitland[2] point out that it is "not a little remarkable that the Common Law knew no process whereby a man could pledge his body or liberty for payment of a debt, for our near cousins came very naturally by such a process, and in old times the 'wite theow'[3] may very often have been working out by his labours a debt that was due to his master."

Process of imprisonment was, however, provided in cases which the law of the time regarded as bordering on the criminal.[4] In *Harbert's Case*,[5] Coke states the position thus:—"The body of the defendant was not liable to execution for debt at Common Law. . . . But the Common Law, which is the preserver of the common peace of the land did abhor all force as a capital enemy to it, and therefore against those who committed any force the Common Law did subject their bodies to imprisonment, which is the highest execution, by which he loses his liberty till he agree with the party and pay a fine to the King; and therefore it is a rule in law that in all actions *quare vi et armis capias* lies; and where *capias* lies in process, then, after judgment, *capias ad satisfaciendum* lies; and then the King shall have *capias pro fine.*" In this connection it will be remembered that the writ of trespass contained the words "*vi et armis . . . et contra pacem nostram.*"[6] It appears that, in addition to actions "*quare vi et armis,*" process of arrest was available in Crown debt cases, pleas of the Crown, and contempt of court cases, but it was not available in debt, detinue, or covenant.[7]

Beginning from the latter part of the thirteenth century, statutory provision was made to extend the power of arrest and imprisonment. "From the first a writ of *capias ad respondendum* had been part of mesne process in actions of trespass *vi et armis*. In the thirteenth century this writ was extended to actions of account; in the fourteenth century to actions of debt, detinue, and replevin; and at the

1. Brissaud, Droit Francais, II, 1462.
2. *History of English Law*, II, 594.
3. One who has sold himself into slavery in order to raise his fine.
4. Compare Maitland, Forms of Action, 343.
5. 3 Rep. 11.
6. Maitland, op. cit., Quare clausum fregit, 380; De ejectione firmae, 381.
7. Hale, Discourse Concerning the Courts of King's Bench and Common Pleas, cited by Fox, XXXIX, L.Q.R., 46.

beginning of the sixteenth century to actions on the case. It had been laid down in Edward III's reign that when a writ of *capias ad respondendum* lay to get the defendant before the court, a writ of *capias ad satisfaciendum* would lie to obtain execution of the judgment. The result was that in practically every case a creditor could take his debtor's body in execution. But if he elected to adopt this remedy, as he usually did, no other mode of execution was open to him."[8]

The immoderate introduction of this form of execution led to the gravest social abuses. In 1551 we find this pious statement:[9] "If one be in execution he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle and puts them in the pound. . . . And if he have no goods he shall live of the charity of others, and if others will give him nothing, let him die, in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill-behaviour brought him to that imprisonment." A series of Acts in the latter half of the 17th century brought little or no relief, nor, apparently, did the early bankruptcy statutes. At any rate, at the beginning of the 19th century the cruelty and injustice of the process were as marked as ever. The gaols were still "sanctuaries for the rich and able debtors, and murdering dens of cruelty to poor men and women."[10] And, as Mr. Pickwick observed, the genuine rascal was not punished by imprisonment because, given spirits, cards, and the company of his intellectual kin, he was just as happy in gaol as out of it.

In Victoria the writ *capias ad satisfaciendum* was being abolished at the time Dickens was writing. By the Statute 7 Vict. (No. 19) Section XXVI, it is enacted that "no person shall be arrested or imprisoned on any civil process issuing out of any Court of Law or on any execution issuing out of any Court of Equity." This section extended to judgments in actions on contract, for breach of contract, and of trespass, trover, and case. It did not extend (Section XXVII) "to any proceeding as for contempt to enforce civil remedies, or to actions for fines or penalties or to promises to marry or for seduction or criminal conversation or libel or assault or for moneys collected or for any misconduct or neglect in office or in any professional employment." Of these exceptions all, except possibly actions for breach of promise and libel,[11] are matters affecting the public interest in order and morality as well as being disputes between the parties. By Section XXVIII the Act provided that in cases where by Section XXVI the defendant could not be imprisoned the plaintiff could obtain an order that the defendant be held to bail on proof that the defendant was about to remove out of the jurisdic-

8. Holdsworth, *History of English Law*, VIII, 231. See also *Harbert's Case*, above, and notes thereto.
9. *Dive v. Manningham* (1551), Plowden, at 68.
10. Petition of prisoners to House of Lords, 1660. Hist. MSS. Comm., 7th Rep., App. 141.
11. The criminal nature of libel in its early history will be remembered.

tion with intent to defraud or that he was concealing his property or that he refused to avail himself of rights of action, or that he had means to pay and refused to do so, or that he was making away with his property with intent to defraud, or that he fraudulently incurred the liability, and that the judgment would be defeated unless the defendant were apprehended. The defendant could then apply (Section XXIX) for an order *nisi* calling upon the plaintiff to show cause why he should not be discharged from custody, and unless the order was made absolute the defendant was consigned to prison (Section XXX) until he paid the debt, gave security to pay it, assigned his estate to the satisfaction of his creditors, or sequestrated.

The broad effect of this Act, therefore, was to confine the use of imprisonment as a means of execution to cases of fraud and injuries of a public nature.

The Act 10 Vict. (No. 7) repealed Sections XXVI to XXX of 7 Vict. No. 19. Sections II and III of the new Act provided that no person should be arrested on final process unless it appeared that he was fraudulently concealing property or about to leave the jurisdiction without satisfying the debt. A writ of *ca. sa.* might, however, still be issued out of the Supreme Court in actions for breach of promise of marriage, libel, slander, seduction, criminal conversation with the plaintiff's wife or any malicious injury. The provisions of this Act both as to the conduct of the defendant giving rise to liability to imprisonment and as to the cases in which a *ca. sa.* issued as of right are considerably narrower than those of its predecessor, and represent a further step towards confining imprisonment to cases in which something in the nature of an offence has been committed.

Legislation on the subject of imprisonment of debtors assumed its modern form in the Act 21 Vict. No. 29, the forerunner of the Imprisonment of Fraudulent Debtors Act 1928. The Acts dealing with this topic which have been passed between 1858 and 1918 are fully reviewed by Cussen J. in *The King v. Wallace, Ex parte O'Keeffe.*[12]

The position to-day is that there are two Acts providing for arrest on mesne process, and two providing for arrest on what for the moment may be called final process.

Arrest on mesne process is categorically abolished by Section 140 of the Supreme Court Act 1928. Section 141 provides for the making of an order for arrest on proof by affidavit that the plaintiff has a cause of action to the amount of £20 and upwards, and that the defendant is about to leave the jurisdiction, thus defeating the action. This, then, is the sole surviving use of the writ *capias ad respondendum.* It is submitted that even this use is oppressive. The writ is always issued on the eve of the departure of the defendant, although the plaintiff has often been aware of the existence of his cause of action for several months. Apart from the annoyance and humiliation caused to the defendant, the writ so used is a powerful weapon

12. [1918] V.L.R. 285.

to force him into a disadvantageous settlement. This abuse could be easily rectified by requiring the plaintiff in his affidavit to set out the date at which he became aware of his cause of action, and his reasons for not having commenced the action sooner.[13] Further, it is submitted that the plaintiff, in obtaining an order for arrest, should give an undertaking to pay damages (and the damages would be heavy) to the defendant if the action is in the event unsuccessful, in some form similar to the undertaking of a plaintiff obtaining an interlocutory injunction.

The Maintenance Act 1928, Sections 4, 5, and 9, provides for the arrest of deserting husbands to answer to complaints for maintenance. These provisions are, however, repealed by the Maintenance and Alimony (Imprisonment) Bill 1935, which has recently been passed by the Legislative Assembly.

The two Acts providing for imprisonment consequent upon judgment are the Maintenance Act 1928 and the Imprisonment of Fraudulent Debtors Act 1928, the former being in process of substantial amendment.

The Maintenance Act provides for the imprisonment of husbands or fathers against whom orders for maintenance have been made.

(a) In default of security for maintenance being found;[14]
(b) In default of payment of maintenance;[15]
(c) For absconding out of Victoria.[16]

Although imprisonment under the headings (a) and (b) will soon be a thing of the past,[17] the value of imprisonment as a means of enforcing payment may be gauged from the following figures showing the admission and discharge of prisoners under the Maintenance Act:—

	1930	1931	1932	1933	1934
Prisoners from previous year	13	31	24	16	14
Received	205	252[18]	198	172	136
Complied with order	54	55	40	40	33
Released by special authority on bond	123	164	111	75	41
Released by special authority without conditions.	10	40	53	58	61
Released on expiration of term . ..	—	—	2	1	1
Paid arrears	29	32	29	27	14
Amount paid	£403/0/8	£350/7/1	£347/16/5	£553/18/11	£194/0/0

13. Compare Divorce Rules, R. 3 (9) and (10).
14. Sec. 6 (1) (c) and (d).
15. Sec. 12 (1). Note that by this time the defendant has become the "offender." Now amended.
16. Sec. 22.
17. Sec. 4 of the Bill repeals Sec. 6 (1) (c) and (d), and amends Sec. 12 (1) by eliminating imprisonment as a means of enforcement of an order.
18. "Petitioners' miserable condition is occasioned by the decay of trade." Hist. MSS. Comm. 7th Rep. App. 113, 1660.

That the authorities have been conscious of the futility of the practice appears from the following extracts from the annual reports of the Penal Department:—

1930. "The fact that 61% of the number of this class of prisoner under detention during the year was released by special authority is indication of the careful consideration given to each case by the Crown."

1931. "The fact that 78% of the number released was by special authority shows that the circumstances under which these defaulters are committed to prison are carefully reviewed from time to time by the Crown."

1932. "It will be seen that of those released 79% were given their freedom by the Crown, after a careful review of the circumstances under which they are committed to prison."

1933. "Of those released 76% were given their freedom by the Crown, this course being taken after a careful review of the circumstances under which they were committed to prison."

The proportion of prisoners who pay their arrears is significantly small, just as the proportion released because it is realized that no good purpose is served by keeping them in gaol is significantly high.

The second Act is the Imprisonment of Fraudulent Debtors Act 1928. It is not necessary to set its terms out in these columns, except to remark that by Sections 3, 14, and 22 it abolishes all forms of imprisonment of the judgment debtor as of right. The question relevant to this paper is whether the imprisonment provided for by that Act is imprisonment as process of execution or imprisonment as punishment for acts of a criminal nature. In *The King v. Wallace*[19] it was held that imprisonment under this Act is a criminal penalty. Putting aside the juridical aspect of the matter, every solicitor and every solicitor's clerk knows that the Act is invoked in the course of debt-collecting as an ordinary method of getting in the debt when other methods fail. But it is applied by the Bench with the caution with which a criminal statute ought to be applied, and this is revealed by the fact that in the years 1930-1934 the numbers of persons received into gaol under it were 15, 14, 13, 11, and 8 respectively.

After the passing of the Maintenance and Alimony Bill defaulting husbands and fathers will be arraigned under the Fraudulent Debtors Act, with this difference, that the onus of proving absence of means and ability to pay—not, as one newspaper expressed it, "the onus of proof of means and ability"—will lie on the husband.

In the future, therefore, the only process of imprisonment in enforcement of a judgment will be under the Imprisonment of Fraudulent Debtors Act—a criminal process. Some device for personal punishment has been found necessary in most systems of law. "The law has at no time been able to dispense wholly with the power of restraining the debtor's person in the last resort. At all times there

19. [1918] V.L.R. 285.

will be persons whose morality is so much below the average commercial morality of the age, that they do not scruple to take advantage of the credit which, in reliance upon the existence of that commercial morality, is given to them. . . . It is necessary to bring home to such persons, in the only way in which they will feel it, the consequences of their conduct. It is true that the imprisonment of a debtor who is unable or unwilling to pay, will not necessarily give the creditor his money, but it will tend to stop such abuses of confidence.''[20]

But it is remarkable that, after seven hundred years of legislation, we have returned to the original Common Law notion that imprisonment should be permissible only where there is an act against the ''common peace of the land.'' In a commercial age the ''common peace'' may reasonably be taken to cover more than freedom from physical violence; it includes the smooth working of everyday business. And allowing for the difference of the age, the principle underlying the use of imprisonment in civil cases is again the same as it was in the early part of the thirteenth century.

20. Holdsworth, *loc. cit.*