



1966

Discovery in Aid of Execution and Supplementary Proceedings: Two Weapons in the Creditor's Arsenal

J. Edmund Mullin

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Commercial Law Commons](#)

Recommended Citation

J. E. Mullin, *Discovery in Aid of Execution and Supplementary Proceedings: Two Weapons in the Creditor's Arsenal*, 11 Vill. L. Rev. 602 (1966).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol11/iss3/8>

This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

DISCOVERY IN AID OF EXECUTION AND SUPPLEMENTARY PROCEEDINGS: TWO WEAPONS
IN THE CREDITOR'S ARSENAL

I.

INTRODUCTION

On March 30, 1960, Pennsylvania adopted new Rules of Civil Procedure for the enforcement of money judgments. These rules apply only to execution upon money judgments originally entered in, or transferred to or certified to the Common Pleas Courts, and the County Courts of Philadelphia and Allegheny Counties.¹ The conformity provisions of the Orphans Court Act of 1951,² which provide that execution against personal property and attachment execution shall conform to execution issued out of the Common Pleas Courts, extend the new rules to Orphans Court judgments.³

This comment will contrast the modern provisions for discovery in aid of execution⁴ and supplementary relief in aid of execution⁵ with the prior Pennsylvania proceedings and with the present rules in the states of New York and New Jersey.

II.

PRIOR PENNSYLVANIA PROCEEDINGS

Prior to the enactment of the present rules of civil procedure, the Pennsylvania judgment creditor could institute either a Bill of Discovery⁶ or a Proceeding for Examination of Judgment Debtor⁷ to assist him in executing on the judgment.

The Bill of Discovery was enacted in 1836⁸ and the subsequent decisional gloss was rather slight. Since this was an equitable proceeding strict compliance with the act and the absence of an adequate remedy at law had to be demonstrated before the bill would be entertained.⁹ Such

1. PA. R. CIV. P. 3101(a).

2. PA. STAT. ANN. tit. 20, §§ 2080.754-2080.755 (1964).

3. The enforcement of judgments against the Commonwealth, political subdivisions or public authorities remains unaffected by the rules and the procedures provided by statute for either mandamus or petition for the assessment of taxes remain unsuspended. PA. R. CIV. P. 3101.

4. PA. R. CIV. P. 3117.

5. PA. R. CIV. P. 3118.

6. Pa. Laws 1836, No. 191, §§ 9-18.

7. The act of June 11, 1879, P.L. 129, which was intended to provide a similar remedy was held unconstitutional principally because it contained no immunity clause. ". . . no such thing as judicial discretion is left to the court, it is made the mere minister of the creditor. The plaintiff in the execution is clothed with the sole, unrestrained, and unlimited power to call before himself and his commissioner the defendant with his books and papers, and then and there at his own good pleasure examine him and them without rule, restraint or supervision, and without limitation as to time or manner." *Horstman v. Kaufman*, 97 Pa. 147 (1881).

8. Pa. Laws 1836, No. 191, § 9.

9. *Commonwealth v. Baker*, 14 W.N.C. 75 (Pa. C.P. 1883).

proceedings could be filed against the judgment debtor 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. . . .”¹⁰ The judgment creditor was required to set forth, under oath,¹¹ (a) that a judgment had been recovered; (b) its actual amount; (c) that he had reason to believe that the judgment debtor had real or personal property which could be applied to the satisfaction of the judgment; and (d) that “. . . such real estate has been conveyed, transferred or encumbered, or that such personal estate has been removed, transferred or concealed, or that by reason of concealment, or fraudulent transfer or encumbrance thereof, the complainant is prevented from having execution on his judgment.”¹² Any necessary or proper questions could be directed to the defendant in the bill itself or by interrogatories filed therewith.¹³ The court was empowered to award a writ of scire facias¹⁴ which was necessary to obtain a lien on the defendant's property¹⁵ and to make third persons liable for any of the defendant's personal property in their possession or the value thereof.¹⁶

The judgment referred to in this act was one from the court of common pleas and not one from a justice of the peace.¹⁷ While issuance and return *nulla bona* of an execution as to personal property was not required by the act, this limitation was imposed by the courts.¹⁸ However, the limitation was ignored and discovery was compelled without such previous execution where the subject of the discovery was real estate¹⁹ or where issuance of execution was obviously impractical or impossible.²⁰ Finally, a Bill of Discovery could be filed against a solvent or insolvent corporation.²¹ The Bill of Discovery was suspended by the Rules of Civil Procedure.²²

10. Pa. Laws 1836, No. 191, § 10. *Bevans v. Dingman's Choice Turnpike*, 10 Pa. 174 (1849), held that the remedy extends to all of the estate of the judgment debtor including real or personal estate, goods and chattels, choses in action, and money due or to become due.

11. Pa. Laws 1836, No. 191, § 12; *Mills v. Dillon*, 2 W.N.C. 198 (Pa. C.P. 1875). In 1844, Pa. Laws 1836, No. 755, § 13, which had required that the oath be made by the complainant was amended (Pa. Laws 1844, No. 512, § 2) to allow the making of the oath by the agent, attorney or any disinterested person on behalf of the complainant.

12. Pa. Laws 1836, No. 191, § 11. This section also provided that if the bill was filed against one other than the judgment debtor it must recite that said third person has possession or knowledge of such real or personal estate, or that he could make discovery of such facts.

13. Pa. Laws 1836, No. 191, § 13.

14. Pa. Laws 1836, No. 191, § 14.

15. *Peoples' Nat'l Bank v. Kern*, 193 Pa. 59, 44 Atl. 331 (1899).

16. Pa. Laws 1836, No. 191, § 17. *Bennett's Appeal*, 22 Pa. 476 (1854); *Albertini v. Schreffler*, 16 North. 65 (Pa. C.P. 1940); *Schram v. Cartwright*, 4 Pa. Dist. 632 (C.P. 1894).

17. *Zanin v. Forlin*, 52 York 149 (Pa. C.P. 1939).

18. *Page v. Heath*, 56 Pa. 215 (1867). Since this bill was in equity the practice probably arose because the judgment creditor had an adequate legal remedy.

19. *Id.* at 233.

20. *Brunozzi v. Stackhouse*, 35 Luz. L. Rep. 200 (Pa. C.P. 1940).

21. *Bevans v. Dingman's Choice Turnpike*, 10 Pa. 174. Another method the judgment creditor could use in aid of execution against a corporation was Pa. Laws 1828, No. 439, § 1.

22. Pa. R. Civ. P. 3241.

The judgment creditor's alternate procedure in aid of execution was the Proceeding for Examination of Judgment Debtor.²³ This derived from a statute enacted on May 9, 1913, pursuant to which the judgment debtor was compelled to answer all pertinent questions concerning his property in the same manner as other witnesses at judicial proceedings.²⁴ The legislature, mindful of the fate of the Act of 1879,²⁵ included an immunity from prosecution clause.²⁶ Costs of the examination were assessed against the defendant if it was ascertained that he had property which could have been subjected to satisfaction of the judgment.²⁷

Semantic difficulties concerning application of the phrase ". . . 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 . . ." plagued the lower courts. In *Wayne Title & Trust Co. v. Mellett*²⁸ the court held that the legislature intended a return *nulla bona* since it was the one customarily made by sheriffs.²⁹ *Mangan v. Smith*,³⁰ on the other hand, concluded that a return *nulla bona* was not sufficient for strict compliance with the act as it referred only to personal property.³¹ In any case, the return had to be in good faith and collusion rendered the petition supplemental proceedings fatally defective.³²

Whether a subpoena duces tecum was proper in connection with the proceedings and, if so, whether the judgment creditor could be permitted to examine the books and papers brought by the defendant or merely to question him concerning their contents presented further questions of statutory construction. Though the case of *Wayne Title & Trust Co. v.*

23. Pa. Laws 1913, No. 136, § 1:

In any case in which a final judgment has been or may hereafter 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 be applied towards 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.

24. Pa. Laws 1913, No. 136, § 2.

25. See note 7 *supra*.

26. Pa. Laws 1913, No. 136, § 2. This section was held to be constitutional because of its immunity provision in *Pennock v. West*, 23 Pa. Dist. 1062 (C.P. 1914).

27. Pa. Laws 1913, No. 136, § 3.

28. 29 Pa. D.&C. 117 (C.P. 1937).

29. Other courts held that a return *nulla bona* was sufficient but not if the return stated that it was *nulla bona* as to personal property. *John T. Lewis & Bros. v. Seay*, 50 Pa. D.&C. 547 (C.P. 1943); *Commonwealth v. Schiff*, 52 Pa. D.&C. 515 (C.P. 1944).

30. 71 Pa. D.&C. 38 (C.P. 1950).

31. *Accord*, *Kingston Nat'l Bank v. Naveen*, 77 Pa. D.&C. 377 (C.P. 1951). The reasoning in the latter cases in not accepting a return *nulla bona* as being in accord with the statute is more sound, in that such a return means no goods were found. The fact that it is the customary return is easily overcome by placing the burden of requesting a specific return from the sheriff on the judgment creditor. This point was never brought before the Pennsylvania Supreme Court for determination. The problem was purely semantic as all of the courts agreed that the execution process had to be exhausted before supplementary proceedings could be instituted.

32. *Fid.-Phila. Trust Co. v. Miller*, 29 Pa. D.&C. 282 (C.P. 1937).

*Mellett*³³ stated that the subpoena duces tecum was proper to avoid the defendant's claim that his only knowledge was in records not present, it did not decide whether the judgment creditor's accountant could examine the books. Later, in *United States Rubber Co. v. Delmar*,³⁴ this latter issue was presented and both parties relied on the *Wayne Title* case and on *Trainer v. Saunders*³⁵ for authority. Though the court limited the judgment creditor to an examination of the defendant based on material contained in his books, their rationale was that this was all the judgment creditor had requested in his petition. Thus, the issue was never decided, but the wording of the statute and the attitude of the courts indicate that examination of the books would have been refused. Finally, unlike the Bill of Discovery under the 1836 Act, this proceeding was declared inapplicable to corporations.³⁶

Both the Bill of Discovery and the Proceeding for Examination of Judgment Debtor were suspended by the new Rules of Civil Procedure with the one exception that the immunity from prosecution provision of the latter act remained in force.³⁷

III.

PRESENT PENNSYLVANIA PROCEEDINGS

A. *Discovery In Aid of Execution*³⁸

The purpose of this procedure is to determine the existence, nature and location of any assets of the judgment creditor which may be applied to satisfy the judgments. The term "assets," as used in the rule, is not defined, nor is any distinction made between equitable and legal assets. The general definition of the term "asset," in Pennsylvania is ". . . property available for the payment of debts. . ."³⁹ Since the term "prop-

33. 29 Pa. D.&C. 117 (C.P. 1937).

34. 22 Pa. D.&C.2d 83 (C.P. 1960).

35. 270 Pa. 451, 113 Atl. 681 (1921). Here the Supreme Court said that supplementary proceedings could be used to discover the contents of a safety deposit box. It is interesting to note that during the forty-seven years of its existence that this was the only occasion on which the Pennsylvania Supreme Court had the statute before it and then it was discussed only as dictum.

36. *Kohn, Adler & Co. v. I. Hyman & Co.*, 9 Pa. D.&C. 3 (C.P. 1927), stated that the statute provides that the debtor is to be examined and questions cannot be answered by an artificial person.

37. PA. R. Civ. P. 3241. This same rule also suspended Pa. Law 1828, No. 439, § 1, relating to discovery of effects of corporations.

38. (A) Plaintiff at any time after judgment, before or after the issuance of a writ of execution, may, for the purpose of discovery of assets of the defendant, take the testimony of any person, including a defendant or a garnishee, upon oral examination or written interrogatories as provided by the rules relating to Depositions and Discovery. The prothonotary of the county in which judgment has been entered or of the county within this Commonwealth where the deposition is to be taken, shall issue a subpoena to testify.

(B) All reasonable expenses in connection with the discovery may be taxed against the defendant as costs if it is ascertained by the discovery proceedings that he has property liable to execution.

PA. R. Civ. P. 3117.

39. *Noble's Estate*, 344 Pa. 81, 23 A.2d 410 (1942).

erty" was used in both earlier Acts, the rules committee apparently had some reason for the variance of terminology. For example, while the judgment debtor's interest as beneficiary of a resulting trust is not real or personal property, it is an asset of the defendant, equitable in nature, and would be subject to discovery under the new rules. In conformity with the purpose of aiding the judgment creditor in satisfying his claim the rules committee, by supplanting the more encompassing term, "assets," for the restrictive "property," has sought to free this proceeding from a formalistic quagmire. Under the new rule, a defendant's objection to an inquiry concerning whether he supplied the purchase money for a tract of land recorded in the name of X, on the grounds that it is irrelevant in not concerning discovery of assets of the defendant, should not be sustained.⁴⁰ The proceeding should be considered a means for the judgment creditor to obtain information which will aid him in deciding whether or not to pursue a given asset in a later action concerning title.

Unlike the previous acts, the discovery need not take place before the court but, in accord with the rules governing discovery and depositions, may be had before any authorized officer.⁴¹ Both the 1836 Act and the present proceeding authorize written interrogatories unlike the 1913 Act which provided only for oral examination. However, the judgment creditor may not employ Rule 4005 which provides for written interrogatories sent directly to the adverse party (not as part of a deposition).⁴² Rather, the discovery authorized by Rule 3117 is limited to taking the "testimony" of any person "upon written oral examination or written interrogatories as provided by the rules relating to Depositions and Discovery." Thus, it is apparent that discovery under Rule 3117 is pursuant to the *procedure* of the rules for discovery and depositions but does not afford the judgment creditor access to all of those provisions. A similar procedural limitation is imposed on the inspection procedure under Rule 4009,⁴³ in that inspection is not the "testimony" of anyone. Yet, this testimony limitation does not impede the judgment creditor as severely as may appear at first blush. He may obtain a subpoena duces tecum and have the judgment creditor answer questions on the basis of the contents of the same books and papers which the judgment creditor is not permitted to inspect.⁴⁴

Perhaps the most noteworthy departure from the old acts is the absence of a requirement that a writ of execution be returned unsatisfied. For that matter, the present act no longer requires that a writ even be *issued* before the judgment creditor may proceed with his discovery. The procedure is available at any time after obtaining judgment.⁴⁵

40. PA. R. CIV. P. 4007, provides that questions must be relevant.

41. PA. R. CIV. P. 4015.

42. PA. R. CIV. P. 4005.

43. PA. R. CIV. P. 4009.

44. This is assuming that PA. R. CIV. P. 126 which provides for liberal construction is given effect and that the rationale of the older cases is accepted; *supra* note 33.

45. Since there is no limitation expressed the judgment creditor could bring this proceeding after the time for appeal has elapsed.

Another significant change is the requirement concerning the knowledge of the judgment creditor. Previously, the debtor was required to state his belief that the defendant had some property liable for satisfaction of the judgment. The new rules contain no qualification whatever as to the judgment creditor's knowledge. That the judgment creditor knows of some property of the defendant or of some third party who could be made garnishee is immaterial; the judgment creditor may have immediate discovery of all defendant's assets. The rules committee sought further to avoid the objection that a corporation could not be subjected to questioning. The 1913 Act did not encompass corporations and the judgment creditor of a corporate debtor was compelled to rely on the 1828 Act.⁴⁶ The new rules suspend the 1828 Act⁴⁷ and, since Rule 3117 provides that "any person" may be required to testify, the officers and directors of a corporation clearly come within its provisions. Compulsion upon "any person" to testify may be important in contexts other than those concerning corporations. It enables the judgment creditor to question one who is not a party and who could not even be made a garnishee. He has virtually unlimited power to examine anyone he thinks might have any knowledge of the defendant's assets.

The rule makes no provision concerning the locus of discovery. The last sentence of subsection A indicates that the proceeding can be instituted in any county in which the creditor can locate a person whom he desires to question. Discovery is not limited to those counties wherein the judgment was originally entered or to which it was thereafter transferred.⁴⁸ Finally, while the new rule has no immunity from prosecution clause, the immunity provision of the Act of 1913 has *not* been suspended.⁴⁹

B. *Supplementary Relief In Aid of Execution*⁵⁰

While Rule 3117 is a modification and enlargement of the right to discovery in aid of execution afforded the judgment creditor by the Acts of 1836 and 1913, rule 3118 provides a proceeding completely new and without precedent in Pennsylvania. Generally, it provides the judgment creditor with yet another weapon to use against the uncooperative judgment

46. See note 21 *supra*.

47. See note 37 *supra*.

48. There is no provision for discovery outside of Pennsylvania, but neither Rule 3117 nor the rules of discovery limit discovery to Pennsylvania.

49. PA. R. CIV. P. 3241 (84). PA. STAT. ANN. tit. 12, § 2243 (1951), provides for immunity for the judgment debtor only, and not for third persons.

50. (A) On petition of the plaintiff, after notice and hearing, the court in which a judgment has been entered may, before or after the issuance of a writ of execution, enter an order against any party or person

1. enjoining the negotiation, transfer, assignment or other disposition of any security, document of title, pawn ticket, instrument, mortgage, or document representing any property interest of the defendant subject to execution;
2. enjoining the transfer, removal, conveyance, assignment or other disposition of property of the defendant subject to execution;
3. directing the defendant or any other party or person to take such action as the court may direct to preserve collateral security for

debtor. The judgment creditor may obtain supplementary orders to enjoin the conveyance or dissipation of the debtor's property, to preserve such property, to have it disclosed and restored or to acquire such other relief as may be necessary and appropriate. The petition, required by the rule, must conform to Rule 207 which requires that it be divided into consecutively numbered paragraphs, each containing as nearly as possible a single allegation of fact.⁵¹ Since, normally, the allegations will not be on record, the petition must be verified by affidavit.⁵²

Subsection (b) of Rule 3118 limits the scope of this proceeding to parties or persons who may be served within the state and in accordance with Rules 233(a)(1) and 233(a)(2) and (b). Thus, an internal inconsistency results since Rule 3118 provides for an order against any party *or person*, while Rule 233(a)(1) provides that service of petitions and orders within the county shall accord with Rule 1027, which provides only for service on other parties and makes no mention of other persons. Consequently, Rule 3118, so interpreted, would seem to exclude service on a person other than a party to the action. Further, the language of the rule precludes the assumption that the rules committee intended such persons to be considered parties for purposes of the supplementary proceedings.⁵³

Rules 127 and 128 concerning construction of rules will be helpful in resolving this dilemma to effect the obviously desired result. Interpreting Rule 3118(b) to require that service be made in accordance merely with the procedure of the other rules without being limited by their scope of application avoids a result that would render the Supreme Court's intent absurd or impossible.

As in proceedings under Rule 3117, the judgment creditor may petition for supplementary relief at any time after judgment has been entered in his favor. Since no writ of execution is prerequisite, the proceeding may be instituted against one who was not served with a writ or against one as to whom the writ has expired. The judgment creditor is not required to show any cause for petitioning for supplementary relief; rather, his right to petition is a matter of course. This proceeding may be used separately

- property of the defendant levied upon or attached, or any security interest levied upon or attached;
- 4. directing the disclosure to the sheriff of the whereabouts of property of the defendant;
- 5. directing that property of the defendant which has been removed from the county or concealed for the purpose of avoiding execution shall be delivered to the sheriff or made available for execution; and
- 6. granting such other relief as may be deemed necessary and appropriate.
- (B) The petition and notice of the hearing shall be served only within the Commonwealth in the manner provided by Rules 233(a)(1) and 233(a)(2) and (b).
- (C) Violation of the mandate or injunction of the court may be punished as a contempt.

PA. R. Civ. P. 3118.

51. PA. R. Civ. P. 207.

52. PA. R. Civ. P. 206. There is no provision for an answer by the defendant as he will be permitted rebuttal at the hearing.

53. If this was the intent of the Rules Committee the phrase "party or person" would be redundant.

or in conjunction with Rule 3117. Having discovered property of the judgment debtor, Rule 3118 could be employed with its attendant sanction⁵⁴ as a means of preserving that property.

Subsection (1) of Rule 3118 provides for an injunction against the negotiation, transfer, assignment or other disposition of any security, document of title, pawn ticket, instrument, mortgage, or document representing any property interest of the defendant subject to execution, by any party or person. Each of the listed items has the similar quality that its value to the defendant exceeds its paper content; that is, it is representative of some asset belonging to the defendant. The judgment creditor should endeavor to procure an order restraining both the defendant and any other person who may have possession or control of the document. Since such an injunction has an in personam effect, failure to enjoin both persons may result in the frustration of later action if, for some reason, either is not required for effective transfer. Such full protection may be impossible where one person cannot be served in Pennsylvania. As previously mentioned, the judgment creditor need not allege that transfer is imminent or would be prejudicial to his rights; the only necessary allegation is that the person has possession or control of the document and has power to effectuate a transfer. This may, at first blush, appear radical since the judgment creditor may cause an injunction to issue without showing imminent danger of irreparable harm; however, a writ of execution directed to a garnishee has the same effect.⁵⁵

Subsection (2) of Rule 3118 affords the judgment creditor similar precautions in regard to all property of the defendant other than that represented by documents. Consequently, the discussion of subsection (1) applies equally here. The word, "property," in this subsection is generic and refers to both real and personal property.⁵⁶

Subsection (3) of the rule provides for an order that collateral security for property of the defendant, levied upon or attached, or any security interest, levied upon or attached, be preserved. The judgment creditor would be required to allege some reason for this order. A prime situation for its use would arise when the judgment creditor has consented, pursuant to Rule 3126,⁵⁷ to the debtor's sale of inventory in the ordinary course of trade, after levy, and the sheriff is not acting diligently.⁵⁸

The order prescribed by subsection (4) directs that the whereabouts of defendant's property shall be disclosed to the sheriff. The rules committee apparently intended no qualification on this subsection. The judg-

54. PA. R. Civ. P. 3118(c) provides that disobedience is a contempt of court.

55. PA. R. Civ. P. 3111.

56. PA. R. Civ. P. 76.

57. "Merchandise, inventory or stock in trade of a defendant engaged in trade or business may, after levy, be sold by the defendant for cash in the ordinary course of trade or business if the plaintiff shall consent by writing directed to the sheriff . . . the proceeds of sale shall be immediately collected by or delivered to the sheriff. . . ." PA. R. Civ. P. 3126.

58. The relief provided for by Rule 3118(a)(3) is measured by the substantive law (*e.g.*, the Uniform Commercial Code) as to who is responsible for personal property.

ment creditor is permitted to guess that a certain person has knowledge of the defendant's property and, on that basis, have him ordered to disclose its whereabouts. Since this proceeding may be invoked before execution, no unsuccessful attempt to discover the defendant's property need be shown. The type of property to be disclosed is unlimited; it may be real or personal, tangible or intangible. Though this subsection would enable the judgment creditor to require disclosure of names and addresses of others having knowledge or possession of the defendant's property, the courts might justifiably restrict it to mean that a given person can be required to disclose the whereabouts of a *particular* asset or assets rather than allow the judgment creditor to attempt a fishing expedition. This latter interpretation appears more reasonable because the subsection otherwise becomes redundant. Since Rule 3117 was enacted for discovery of the defendant's assets, it would seem subsection (4) of 3118 was perhaps enacted to allow the judgment creditor to compel disclosure of the location of a known but missing piece of property. However, a literal interpretation of this subsection could be justified since it would burden the judgment creditor to have him institute proceedings under Rule 3117 when the person from whom he desires disclosure is already present at the hearing. The protection afforded the defendant under Rule 3117 by the rules for deposition and discovery would be supplanted by the protection of the judge at the hearing. This proceeding is further distinguished from Rule 3117 in that disclosure under this rule is made to the sheriff rather than to the judgment creditor and consequently it will be necessary to have the sheriff available. The immunity provision of the Act of 1913⁵⁹ would be broad enough to apply to this proceeding.

Subsection (5) provides that property which has been removed from the county or concealed to avoid execution shall be delivered to the sheriff or be made available for execution. That the concealment or removal from the county was for the purpose of avoiding execution presents an important limitation of this subsection. It is implicit that the judgment creditor must allege this fact in his petition. Further, he must name the person in possession of the defendant's property in the order because an order on the defendant will ordinarily not be effective on a third party. If the property has been removed to another state, an order directed to the defendant will have to suffice unless service within Pennsylvania can be made on the party who removed it.⁶⁰ In addition, the section provides the alternative that the property may be delivered to the sheriff or made available for execution without such delivery.

Subsection (5) was before the Supreme Court of Pennsylvania, along with subsection (6), which provides for such other relief as may be deemed necessary and appropriate, in the case of *Greater Valley Terminal Corp. v. Goodman*.⁶¹ The lower court had stated that full equitable relief was available to the judgment creditor under Rule 3118 and considered the

59. See note 49 *supra*.

60. Jurisdiction here is limited to Pennsylvania.

61. 415 Pa. 1, 202 A.2d 89 (1964).

petition as a complaint in Equity for the relief of fraudulent conveyances of chattels and stock certificates. The Supreme Court, reversed the lower court, stating that Rule 3118 encompasses only property to which the judgment debtor clearly has title because each of the first five paragraphs refers to "property of the defendant." Consequently, ". . . the catchall statement in paragraph six . . . must be read in conjunction with and as effectuating the same purpose as the other five paragraphs . . .";⁶² that is, to preserve the status quo rather than adjudicate questions of title.

It is submitted that, while Rule 3118 should not be a proceeding to set aside a fraudulent conveyance, its application should not be limited to property to which the defendant clearly has title. If subsection (4) is considered a device for discovery, the judgment creditor should be permitted to examine a third party to discover whether he has possession of property of the defendant. For, as to the judgment creditor, such property, if fraudulently conveyed, is the debtor's property regardless of where title may be.⁶³ If this was not the intent of the rules committee, subsections (4) and (5) state the same principle, requiring disclosure of the property of the defendant.⁶⁴

IV.

PRESENT PROCEDURE IN NEW YORK

The procedure in New York which corresponds to Pennsylvania Rule 3117 for discovery in aid of execution is found in section 5223 of the Civil Practice Law and Rules.⁶⁵ This section allows the judgment creditor, at any time before a judgment is satisfied or vacated, to compel disclosure of all matter relevant to the satisfaction of the judgment. A subpoena, which may be served upon any person, must state certain enumerated facts and state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.⁶⁶ Any of the following types of subpoena may be served: (1) a subpoena requiring attendance for the taking of a deposition upon oral or written questions; (2) a subpoena duces tecum requiring the production of books and papers for examination; and (3) an information subpoena (interrogatories).⁶⁷

As in Pennsylvania, recovery of a judgment is the only prerequisite to institution of this proceeding. The remedy becomes available in Pennsylvania "at any time after judgment" while New York uses the phrase "at any time before a judgment is satisfied or vacated." The two states similarly provide that any person may be compelled to testify; the judgment debtor

62. *Id.* at 5, 202 A.2d at 92, 93 (1964).

63. Uniform Fraudulent Conveyance Act, PA. STAT. ANN. tit. 39, §§ 351-63 (1954).

64. However, PA. R. CIV. P. 127 states that the rules are to be given the effect intended by the Supreme Court. See generally *Commonwealth v. Michelson*, 196 Pa. Super. 464, 175 A.2d 122 (1961).

65. N.Y. CONSOL. LAWS, CIV. PRACT. LAW, § 5223 (McKinney 1963).

66. N.Y. CONSOL. LAWS, CIV. PRACT. LAW, § 5210 (McKinney 1963), provides for the power to punish for the contempt of court mentioned in § 5223.

67. N.Y.R. CIV. PRACT. § 5224.

is not limited to questioning parties. In neither jurisdiction is the judgment creditor required to allege that the third party has possession or knowledge of the judgment debtor's property.⁶⁸

However, New York uses broader terminology than Pennsylvania in defining the permissible scope of the examination. While the Pennsylvania judgment creditor is limited to questions designed for the discovery of assets of the defendant, New York permits inquiry concerning "all matter relevant to the satisfaction of the judgment." Should the Pennsylvania Supreme Court's construction of Rule 3117 be as strict as that of Rule 3118,⁶⁹ the judgment creditor would be rendered unable to inquire into a fraudulent conveyance because the subject would not be an asset belonging to the defendant. No such stricture can be inferred from the more encompassing language of the New York provision. The two procedures are further dissimilar in that Pennsylvania restricts the judgment creditor to "testimony" of the person being examined while New York permits a wider range of discovery. Since written interrogatories are answered not by testimony but by a sworn written answer,⁷⁰ their use is foreclosed in Pennsylvania while they are expressly permitted in New York. New York also provides for a subpoena duces tecum to allow examination of books and papers of the person called, while the Pennsylvania judgment creditor does not have access to the inspection procedure⁷¹ because books cannot "testify." Thus, unless the Pennsylvania courts accept the rationale of the older cases,⁷² a subpoena duces tecum may not be permitted if its only purpose is having the person testify as to the contents of the records.

The New York plaintiff has a further procedure, more immediate than either Pennsylvania's Rule 3117 or New York's section 5223. The party in whose favor a verdict or decision has been rendered may, before judgment, move that the trial judge: (1) order examination of the adverse party; and (2) order him restrained as if a restraining order had been served on him after judgment.⁷³ It must be noted that this section applies only to the adverse party and not to third persons. The party making the motion will probably be required to show a danger that assets will be transferred or that, for some other reason, delay would hinder him.

While New York has no section comparable to Pennsylvania's Rule 3118 wherein all the relief supplementary to execution is listed, several separate sections may be used by the judgment creditor to effect the same result. Section 5222⁷⁴ authorizes a restraining notice to be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court. Such notice may be served upon any person, and disobedience is

68. As in Pennsylvania the proceedings in aid of execution may be brought against a corporation.

69. See note 60 *supra*.

70. PA. R. CIV. P. 4006.

71. PA. R. CIV. P. 4009.

72. See note 33 *supra*.

73. N.Y. CONSOL. LAWS, CIV. PRACT. LAW, § 5229 (McKinney Supp. 1965).

74. N.Y. CONSOL. LAWS, CIV. PRACT. LAW, § 5222 (McKinney 1963).

punishable as a contempt of court. A judgment debtor who is served with a restraining notice is forbidden to make or suffer any conveyance of, or interference with, any property in which he has an interest until the judgment is satisfied or vacated.⁷⁵ A restraining notice served upon a third person is effective only if, at the time of service, he owes a debt to the judgment debtor or has possession of property in which he knows or should know the judgment debtor has an interest.⁷⁶ The notice extends to all such property or debts due the judgment debtor, then in, or thereafter coming into, the possession of such person for a period of one year or until the judgment is satisfied or vacated.⁷⁷

For purposes of this discussion, Pennsylvania's injunctive orders and New York's notices shall be called orders. In both states, orders may issue against any person at any time after judgment.⁷⁸ While Pennsylvania requires a hearing, New York facilitates the process by permitting the judgment creditor's attorney or the clerk of the court to issue the order. In effect, this New York section provides the same relief as Pennsylvania's Rule 3118(a), (1), (2) and (5). The New York order goes beyond restraining various conveyances to prohibit interference with the property. This includes concealing or removing the property of the debtor. Both states treat disobedience of the order as a contempt of court and authorize its issuance against corporations.

New York imposes a time limit of one year in the case of third persons while the order remains effective for the life of the judgment in the case of the judgment debtor. In any case, the order expires upon satisfaction of the judgment. While Pennsylvania stipulates no expiration date for its orders, presumably the courts will infer that their effectiveness continues for a reasonable time; thus, the judgment creditor would be compelled to pursue his execution with due diligence.

New York's order is binding upon any property of the defendant which subsequently comes into the possession of the person restrained. No such provision is expressed in Pennsylvania, but an inference that the order was intended to bind the subsequently acquired property would seem fair since the Rule is to be given liberal construction.⁷⁹ Finally, the judgment creditor in New York, as in Pennsylvania, should obtain restraining orders against both the defendant and the person in possession of his property to avoid the judgment debtor's transfer of his interest in the property to a third person without actual delivery of the property.

75. The sheriff or the court may allow such sale, § 5222(b).

76. Such knowledge may be contained in the restraining order itself.

77. The judgment creditor is liable for damages caused by the issuance of the restraining notice if property specified therein does not in fact belong to the judgment debtor, § 5222(b).

78. See note 74 *supra*, for the New York section which allows restraining orders to be issued before judgment. This is applicable to the defendant only and not third persons.

79. PA. R. CIV. P. 126.

V.

PRESENT PROCEDURE IN NEW JERSEY

New Jersey has two separate rules for discovery in aid of execution, one governing civil practice in the Superior Court,⁸⁰ and the other governing civil practice in the County District Courts and Municipal Courts.⁸¹ Since the former provision authorizes the judgment creditor to proceed in the manner prescribed by the latter, this discussion deals only with the latter. Rule 7:11-3 provides for examination of any person, including the judgment debtor, by the judgment creditor or his successor in interest when that interest appears of record. The proceeding is instituted by verified petition⁸² to the judge of the district court stating the amount due and his belief that the judgment debtor has property or other things in action in excess of that exempt from execution. The judge then orders the person to be examined to appear and make discovery on oath before the judge or an attorney.

As in both Pennsylvania and New York, this proceeding may be instituted at any time after judgment and any person may be examined. The New Jersey proceeding differs from those of Pennsylvania and New York, in that the party bringing the proceeding must state his belief that the judgment creditor has some property or thing in action which is not exempt from execution. Yet, in conformity with the other states, he need not allege that the person being called for examination has possession or knowledge of such property of the judgment debtor.

The discovery proceeding extends to questions concerning the judgment debtor's property and things in action. This language lies somewhere between the Pennsylvania and New York terminology. While Pennsylvania's Rule 3117 might be construed to authorize only those questions which relate directly to discovery of defendant's assets, such as names of those in possession, New York's broad phraseology allows any question which is relevant to the satisfaction of the judgment. The New Jersey judgment creditor is further limited to testimony of the person called and a subpoena duces tecum could not be used.⁸³

The only New Jersey provision for a proceeding similar to Pennsylvania's Rule 3118 is the order forbidding transfer or other disposition of property or money.⁸⁴ Section 2A:17-65 provides that, upon proof by the oath of the party or of any other person, showing facts that the judgment

80. N.J. RULES 4:74-4.

81. N.J. RULES 7:11-3.

82. N.J. RULES 1:27F provides for certification in lieu of the oath in the following form: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment for contempt of court."

83. However, the rule for the Superior Court, note 80 *supra*, expressly provides for the use of interrogatories.

84. N.J. STAT. ANN. § 2A:17-65 (1952).

debtor has property or that someone owes him a debt, or holds money or property for him not exempt by law, the court out of which execution issued may make an order forbidding the payment of such debt, or the transfer of such property or money by or to the debtor, or any third person until the further order of the court.⁸⁵

This provision differs from those of New York or Pennsylvania, in that the New Jersey judgment creditor must first obtain a writ of execution. This is not expressly stated in the statute but institution of the proceeding is limited to the court "out of which execution issued." However, nothing indicates that the writ must be returned *nulla bona* before the order will be allowed.

While New Jersey does not specify that the proceeding may be used against any person, the general context of the statute would so imply. As to institution of such proceedings, Pennsylvania authorizes the plaintiff and New York allows the clerk of court or the attorney for the judgment creditor to issue the restraining order; New Jersey does not state who may commence the proceeding but allows any person to prove, under oath, that the judgment debtor has property subject to execution.⁸⁶

VI.

CONCLUSION

Not only the rules here examined, but all of Pennsylvania's modified rules for enforcing money judgments have simplified and streamlined execution procedure. As most of the older provisions were enacted in 1836 a revision was sorely needed. However, some aspects of the rules and statutes of the other states would be desirable in Pennsylvania. Among these are: (A) New York's broad language allowing any question relevant to the satisfaction of judgment; (B) New York's provision for the use of interrogatories rather than only testimony; and (C) New York's authorization for issuance of restraining orders without a hearing. A real necessity exists for constant revision of the rules to conform to current problems. The rules deal only with procedure and not with substantive matters which are in the domain of the legislature. Great facility, therefore, exists for the Rules Committee to promulgate necessary amendments or new rules wherever possible, thus avoiding the languorous machinery of the legislative branch of government.

J. Edmund Mullin

85. See N.J. STAT. ANN. § 2A:17-57 (1952) for the definition of property as used in § 2A:17-65.

86. It is clear from the language of this rule that it was intended for use against corporations as well as individuals.