

Book VII.
Title LIII.

Concerning executing a judgment.
(De exsecutione rei judicatae.)

Headnote.

1. Execution against the person.

The normal, and for a long time, the exclusive method of executing a judgment was, in early times, among many nations, by execution on and against the person of the debtor. In Rome, the creditor had the right to kill the debtor or sell him into foreign territory. Twelve Tables, 3, 5. To get away from this extreme penalty, debtors frequently sold or pledged themselves into bondage (*nexum*), to work out the debt. 7 Varro, *De L. L.* 105; Dionys. Hal., 6 *Ant. Roman.* 83; 22 *Z.S.S.* 96ff. Sale or pledge of self and of members of the family was a common ancient practice. 26 *Z.S.S.* 199-200. On what terms the Romans so sold or pledged themselves, we do not know. It was for a limited time in Greece. 26 *Z.S.S.* 201. In Babylonia, three years' time was the limit. *Code Hammurabi* § 117. This practice was, in Rome, forbidden by the Poetelian law of 326 B.C. 8 *Livy* 8, 28, 8. In fact it seems that this law was intended, as the law of Boccharis in Egypt (1 *Diod. Sic.* 79), and the law of Sohm in Athens (Plutarch, *Solon* 15), to prevent the bondage or imprisonment of persons for debts. But this intention was not wholly carried out, though, doubtless, levy and sale of property became from that time on the primary method of satisfying a judgment. We have evidences, however, that debtors were still set over to creditors to work out their debts. Gaius 3.199; Ps.-Quint, *Decl.* 311; 43 *Z.S.S.* 499. How long this continued is uncertain. But the time came, when, instead of being set over to the creditor, debtors were kept in public prisons, and could be so kept till the debt was paid, seemingly at the expense of the creditors, who must frequently have considered such expenses useless. 43 *Z.S.S.* 521 n. Such imprisonment was a common practice among ancient nations, as among the Greeks (Weiss, *Griech. P.R.* 514), and the Jews. Mathew 18:28-30. During imprisonment, the debtors were subjected to pressure and harsh treatment. C. 7.71.8 pr; Nov. 135. This method of execution on and against the person prevailed until Justinian's time. It is referred to in C. 7.71.1 and 3. See D. 42.1.34. A number of ameliorating laws were passed in the meantime. An assignment of property for the benefit of creditors, provided for by Augustus, prevented incarceration. C. 7.71.1. But that course was apparently available only to debtors who had not lost their property through their own fault. C. 7.71 headnote. Private prisons were kept by persons of power, but these were prohibited in 486 A.D. and thereafter. C. 9.5.1 and 2; C. 1.4.23. This but shows the practice of imprisonment for debt. So the right of asylum in a sacred place frequently gave relief. C. 1.12. In C. 9.4.6, it is shown that arrest to appear in court and imprisonment before judgment continued during Justinian's time, but the law also indicates that imprisonment after judgment was, in a civil case, forbidden. Nov. 134, c. 9 (see C. 1.48), on the other hand, forbade only imprisonment of woman, indicating that it was still permissible in case of men. However Justinian by C. 7.71.7, and Nov. 135, enabled any debtor to make an assignment of property, whether he had any or not, thus enabling him to avoid imprisonment in a civil case. Even a pecuniary penalty in a criminal case could be satisfied by such assignment.

C. 9.4.6.7. Imprisonment for public debt was, however, always permitted, though Constantine attempted, probably without success (C. 10.19.2) to mitigate the debtor's condition even in such case. See Edict 9. See generally, Woess in 43 Z.S.S. 485ff; Wenger, Inst. 221-223; Mitteis, R.R.u.V.R. 444ff. As to Hellenic law see Weiss, Griech P.R. 495ff.

2. Seizure of all of the debtor's property (Involuntary bankruptcy).

This method of enforcing a judgment was simply part of the larger system by which the Roman law sought to enforce the rights of creditors or claimants who otherwise were in danger of losing their rights. It was called *missio in possessionem* - putting the creditor or claimants in possession of property, which in many cases was followed by a sale of the property. Thus this right was given where a defendant failed to appear in a suit (note C. 2.2.4); to a legatee, to secure him for a legacy to be paid in the future (practically abolished by Justinian by C. 6.42.1); to a widow, to secure the rights of a posthumous child; to a property owner to secure him against damage from the falling of a neighboring house; C. 6.54; D. 36.4; D. 37.9; D. 39.2; Note C. 8.10.14. The right to seize property for the purpose of enforcing the satisfaction of a debt seems to have been known early. Livy mentions that this was done nearly 500 years B.C., in case of soldiers absent from home. Hist. 2.24. But it is thought that the right to do so in cases generally was introduced in the second century B.C. (Poste, Gaius 327, 2 Roby 439; Gaius 4.35). We are told that possession, followed by the right of sale, was given not alone in cases where a judgment was rendered against a man and remained unpaid during the time fixed by law (an action thereon having been brought), but also where defendants hid from their creditors, or were in exile, without having anyone to defend them; where debts of madmen or spendthrifts were urgent, and where it was certain that there was no heir or lawful successor of a person deceased. Gaius 3.78; D. 42.4, §§ 7 and 13; D. 42.5.4; D. 42.5.36; Lex Rubria 21. But the creditor was required to prove his claim to the person who ultimately purchased the property as hereinafter mentioned. The proceeding was virtually one in bankruptcy. All the creditors had a right to participate in the possession. D. 42.5.12 pr. After seizure of the property, the praetor made an order directing publication of a notice of thirty days, or in case the debtor was deceased, for fifteen days, to the effect that the property had been seized and would be sold. After that time the praetor issued a second order directing the creditors to select one of their number as master to sell the property. Such master, upon his appointment, pursuant to a third order of the praetor, published an inventory of the property and a list of the debts, and stating the fact that the debtor had committed an act of bankruptcy, that the property would be sold, and the conditions (and doubtless the time) of the sale. The property was sold as a whole (*per universitatem*), and the purchaser, instead of offering a definite sum, offered to pay a certain percentage of the debts, for he was regarded as succeeding to the whole estate just as an heir succeeded to the property of the decedent. Gaius 3.79; Theoph., Inst. 3.12pr; Cicero, Pro Quinc 15; Poste, Gaius 326-329; 2 Bethmann-Hollweg 667-682; 2 Roby 432-442. 2 Bethmann-Hollweg 681 thinks that the whole proceeding took sixty days, but the point is somewhat uncertain. Creditor and relatives might participate in the bidding, and they had a preference in the order named, over any other bidder, when the same amount was bid by them. D. 42.5.16. The payment to general creditors was, however, subject to certain preferential claims, referred to again later. While the point is

involved in some obscurity, it would seem that the time mentioned for the sale could not have been absolute. It must frequently have been of advantage to creditors to defer a sale of the property beyond the period of sixty days. Thus we are told that creditors who had a right to seize the fruits of the land of the debtor, could either lease or sell the property - the decision on that point, and the length of time of the lease to be determined by the creditors. In case of disagreement, the praetor determined the matter. D. 42.5.8. While these provisions are mentioned in connection with the seizure of a usufruct, it is not unlikely that the provisions for a lease applied in other cases. See 2 Bethmann-Hollweg 676. It is likely that in most cases where no immediate sale was held, a curator to take charge of and manage the property was chosen by the creditors and appointed by the judge on their application. D. 42.7.2. More than one curator might be appointed, and at times one for each district. D. 42.7.2.2. In some cases, it was not only permitted, but required to appoint a curator, as where a suit was to be brought to recover some property belonging to the debtor. D. 42.5.14 pr. In Justinian's time, when the sale of the debtor's property was deferred for a long time, such appointment must have been almost indispensable. The creditors and curators in possession were responsible for fraud. D. 42.5.9. They were bound to account for the income and were entitled to their expenses. D. 42.9.3 and 6.

Where the property of the debtor was sold as aforesaid, he became infamous. Gaius 2.154; C. 2. 12. 11; Lex Julia Mun. 115-117. It is not clear whether he was absolved from debts remaining unpaid or not. Gaius 2.155 says that only a compulsory heir was so relieved. But D. 42.8.25.70, seems to allow such actions against him only in case the debtor had acted fraudulently. It is clear that he was never released in the latter case. D. 42.1.5. A debtor might assign his property for the benefit of his creditors. In such event he avoided infamy, was exempt from arrest, and would be held for any unpaid debt only to the extent that he was able to pay. This subject is more fully treated in headnote to C. 7.71. Where such assignment was made, the sale of his property took place in a manner similar to that already above set forth. 2 Bethmann-Hollweg 688.

The system of seizure and sale here mentioned was in vogue in the time of Gaius. But innovations had already been made. By a senate decree passed before his time, but otherwise of uncertain date, creditors were allowed to sell the property of a person of noble rank by parcels, instead of in block. This avoided infamy of the debtor, because it did not necessarily result in bankruptcy. It is not unlikely that the same right was soon asked and granted in other cases. See Hunter 1039; Mackeldy § 524. Such sale in block entirely disappeared in Diocletian's time when the old system of procedure was abolished. Inst. 3.12 pr. Then, as hereinafter mentioned, Antoninus Pius instituted the method of executions in common use with us. Again the right of assigning the property for the benefit of creditors, mentioned at C. 7.71, which preserved the debtor from infamy and secured him against imprisonment, still more lessened the instances of use of the old system. Under Justinian it continued to exist in a modified form only in case where there were a number of creditors. That system is described in C. 7.72.10, and need not be described in detail here. It was a proceeding in bankruptcy and C. 7.72, should be read in connection with this note and headnote to C. 7.71, and in connection with later provisions in the Novels, appended to C. 7.72.10.

3. Distrainment of single parcels of property for judgment debt.

The seizure and sale of all the property of a debtor must often have been cumbersome. Yet up to the time of the Emperor Antoninus Pius it seems not to have occurred to the Romans that a creditor might be satisfied by the seizure or sale of only a portion of the debtor's property, and that this method was much more advantageous particularly when there was only one creditor. That emperor provided that in case of a judgment against a defendant, or in case the indebtedness was confessed, the debtor should be given time to pay according to the circumstances in each case, and that if he failed to pay within the time set or extended, property should be seized and sold, the excess price thereof, if any, to be paid to the debtor. D. 42.1.31. The legal time of payment was 30 days, under the 12 tables (3.2); it was later fixed at two months, and extended by Justinian to four months. C. Th. 4.19.1; C. 7.54.2. But it was in the judge's discretion to shorten or lengthen this time. D. 42.1.2 and 31. An action on the judgment was then brought (C. 7.52.1 note), and if the defendant had no good ground to resist execution, and order for seizure was issued upon the demand of the creditor, directed to enforcement officers of the court. C. 7.53.2; C. 8.22.1 and 2; D. 21.2.74.1. Levy was first made on movable property, including money, if any, except slaves, cattle or implements used for agriculture (C. 8.16.7 and 8, and note). If there was no personal property to be taken, lands were seized; upon order made to that effect; if there was no land, undisputed rights of action were (from the time of Ulpian) sequestered, which were either collected directly or sold as was deemed the most expedient. Military salaries were exempt - at least to a limited extent. If a third person claimed to be the owner of the property distrained, the judge determined summarily as to whether the claim was in good faith, without prejudice to the ordinary action. In case of doubt, resort was had to only undisputed property. In case a lien existed against property, it might be sold, either after the lien was, with his consent, paid off, or if that consent was not given with the lien against it, but with all the rights of the lienholder preserved. D. 42.1.15.2; D. 42. 1. 15.4 and 5; 8-12; C. 8.16.7; C. 8.16.8; C. 7.53.4 and 5; D. 42.1.16.11; C. 4.15.2. If the debtor caused the sale to be defeated, or no proper bid was made, the creditor might have the goods, or so much as was necessary, adjudged to him as his property in satisfaction of the debt, but he could not hold the property seized or a portion of it for only a portion of his debt. D. 42.1.15.3; C. 7.53.3; C. 8.22.2 and 3. A creditor was strictly forbidden to take the law into his own hands; he did not, by seizure, become the owner of the property and could not sell it upon his own responsibility. If he did, he might be sued in a civil action for theft. D. 42.1.6.2; C. 8.22.3. The property was sold for cash, at public auction by enforcement officers of the court, and usually at the expiration of two months after the seizure D. 42.1.31; C. 8.22.2. If the officers acted fraudulently in making the sale, an action lay against them, but no otherwise. D. 21.2.50. The purchaser of such sale was not governed altogether by the rule of caveat emptor. If he was evicted from the property, he had an action over against the debtor. C. 8.44.13; D. 21.2.74.1. The creditor was not responsible except in certain cases mentioned in C. 8.45, and headnote. 9 Donn. Comm. 1484-1486.

4. Execution in suits for the recover of specific things.

Astonishing as it may appear to us, final judgments were rendered only for money under the formulary system. Gaius 4.48 informs us that even if a plaintiff claims a

corporeal thing, as land, a slave, a garment, an article of gold or silver, the judge condemns the defendant to deliver not the thing itself, but its value in money. He states that under the still older system, the rule was otherwise. Justinian changed the rule and provided (Inst. 4.6.32), (see also citations at 1 Wachter 565-566), that it is the judge's duty in delivering judgment, to make his award as definite as possible, whether it relate to the payment of money or the delivery of property. In D. 6.1.68, a statement is attributed to Ulpian, who lived in the early part of the third century A.D., to the effect that if a man is ordered to hand over property and refuses to obey, the property may be forcibly transferred to the owner. Roby (2 Roman Private Law 441) believes this statement to be attributable to Justinian and that there is no evidence that specific performance for the restoration of any property was not known in Antonine times. The defendant, however, often had the option to restore instead of paying its money value, and in actions for the recovery of specific property, a money-judgment was not rendered until the defendant refused to obey the decision of the judge for the delivery of the property. Gaius 4.114; 2 Roby 411. See also C. 7.4.17; 3 Bethmann-Hollweg 29.

The following title of the Code deals only with executions mentioned in subdivision 3 of this headnote.

7.53.1. Emperors Severus and Antoninus to Justinus.

The judge was too hasty in ordering pledges of Marcella to be seized and sold before judgment. You should, accordingly, first, by observing the regular order, commence an action against her, and obtain judgment after the trial of the case.¹ Promulgated January 30 (206).

7.53.2. Emperor Antoninus to Maximus.

If there has been no novation of the judgment, the president of the province will order it to be satisfied by seizure and sale of pledges. But if there was a novation, you have an action on the stipulation (made in connection therewith), and you must try the case according to law, before a referee appointed for that purpose.²

7.53.3. The same to Agrippa.

The regular order in which things have been done and the delay in payment which has followed, demands more effective assistance. If, accordingly, you go before the president of the province who should carry the judgment into effect, and show that the land (res soli), given in pledge, has long been exposed for sale and has not, through combination, or through corrupt solicitation of the opposite party, found a purchaser, he

¹ [Blume] Property ceased [seized], when no judgment was rendered, could be recovered. D. 42.1.58. [Blume then added: "What about attachment?"]

² [Blume] In the time of Justinian, a novation - merger of a prior debt in a new contract - could be made only by stipulation. Hunter 629.

will put you in possession thereof, so that the matter, so long protracted, may, by such remedy, be closed.³

7.53.4. The same to Marcellus, a soldier.

The president of the province will not allow your salary to be detained to satisfy a judgment against you, so long as he is able to compel it to be satisfied by some other method.

Promulgated June 3 (216).

Note.

The translation of Otto, Schilling & Sentennis corresponds with this translation, and exempts the salary only so long as the debt cannot be enforced otherwise (cum rem iudicatum possit aliis rationibus exsequi). 2 Bethmann-Hollweg 695, and 9 Cujacius 1024, take the position that such salaries were absolutely exempt, and this is borne out by the Basilica 9.3.80, which leaves out the qualifying clause. If this qualifying clause is taken as a concessive clause, it is not clear how the judgment could "otherwise" be enforced, unless in that particular case the soldier had property which might have been levied on. And even then, absolute exemption would apparently not exist.

7.53.5. Emperor Gordian to Amandus.

It is not unknown that a demand due to a debtor may be taken to satisfy a judgment.

Promulgated October 13 (242).

7.53.6. Emperors Philip and Caesar Philip to Titianus.

If, as you state, the enforcement officer (executor) of the judgment arrogated to himself the office of judge and undertook to render a decision contrary to what was previously decided in your favor, such decision does not have the force of a judgment.

7.53.7. Emperors Diocletian and Maximian.

If restitution (of slaves) is delayed by long and open opposition of your adversary, and the slaves die in the meantime, the value thereof must be paid you by the party making such opposition. Animals, too, (adjudged to be your property) will, by the intercession of the president, be restored to you along with its offspring.⁴

7. 53. 8. The same and the Caesars.

It is clear that he only is an enforcement officer who enforces a judgment after the parties have been heard, the trial has been fully finished and a decision has been rendered.

Without day or consul.

³ [Blume] In 8.22.2, it is provided that a judgment creditor may become the purchaser, if no satisfactory offer is made or the sale prevented. A creditor who received the property released his whole claim. D. 42.1.15.3.

⁴ [Blume] See comment of this law. C. 3.9.1, note [illegible] 6. C. 2, as to fruits, including offspring, see C. 3.31.1 note; headnote [actually note] C. 4. 32. [illegible] 3.

7.53.9. The same to Glyco.

Sue the men, whom you contend to be your debtors, before the rector of the province. If they confess the debt, or deny it but are defeated and condemned and they fail to make payment within the time fixed⁵, and have deserved that the judgment be enforced, including seizure and sale of property according to oft-repeated provision, the rector of the province will lend you his assistance according to law.

Given November 5 (294).

⁵ [Blume] Four months - C. 7.54.2.