Wm. S. Sharp, Printer, 21 W. State St., Trenton, N. J.

Court of Errors and Appeals.

WILLIAM BROPHY, *Plaintiff in Error,* *vs.* *CITY OF PERTH AMBOY,* *Defendant in Error.*	*In Error to Supreme Court.*

Points of Plaintiff in Error.

The statute on insolvency applies, by its title, to persons imprisoned on civil process.

Rev., p. 497.

Brophy was arrested by virtue of a writ of execution against goods and chattels and the person.

The execution in this case is a civil process; it is exactly like executions of a similar nature issued out of the Small Cause Court.

See Nix. Forms, p. 271.

A judgment is a debt of record, and it is the same in principle, whether it be for damages or for a penalty forfeited.

A judgment is a debt provable in bankruptcy.
Bump on Bankr. 77, 556.

The Court of Common Pleas was, therefore, right. It had jurisdiction. Brophy was in custody by virtue of process of execution issued against him on account of their judgment and debt. A penalty forfeited becomes a debt, whether it be for the breach of the condition of a bond, or by reason of the breach of a city ordinance.

The actions to recover these penalties, under the charter of the city of Perth Amboy, (Laws 1870, p. 1131, §§ 11, 12,) are actions before a special statutory tribunal, and seem to be a special form of action, as pleadings are by the statute, dispensed with, but in all other matters the procedure is likened to an ordinary suit at law in a justice's court.

It is in all respects in the nature of an action of debt, with this one exception, that the statute permits the action to be tried without the use of pleadings. The whole procedure is by law to conform to the procedure in the Small Cause Court, a court having civil jurisdiction only, with an appeal also, "as in cases of civil suits before justices of the peace," to the Court of Common Pleas, which also is a court having civil jurisdiction only.

The actions under this charter are authorized, by statute, to be tried before the recorder of the city, the same as in many other cities of this state. It is the only civil action he is authorized to try, as will be found upon examination of the charter of other cities besides that of the city of Perth Amboy.
See Charter of New Brunswick, Laws 1863, p. 367, &c., § 48, &c.

See Charter of Elizabeth, Laws 1863, p. 127, §§ 46, 48, 52.

It will also be found in Laws of 1880, p. 177, that the legislature recognizes the right to the benefit of the insolvent act in the matter of these actions to recover penalties by taking that right away in the particular case then before the legislature.

In Laws of 1880, p. 199, will be found a provision authorizing executions against the bodies of females in these actions, which executions formerly could not be issued, as no execution in a civil case could, before the passage of this act, issue against the body of a female.

In some cities, however, there are two methods of procedure—one with pleadings, the other without.

The charter of New Brunswick, (Laws 1863, p. 363, &c., (§§ 33, 51,) is a fair illustration, but the action is the same, whether there are pleadings or not, *and the execution*, and the *judgment for the plaintiff*, and the *appeal* to the Court of Common Pleas, *is the same*, *whether there are pleadings or not*, and whether the case is tried before the recorder or before a justice of the peace.

If there was no statutory procedure given, to recover the penalty, it could only be sued for in a formal action of debt.

1 Chit. on Plead. 112.

In the charter of Elizabeth, (Laws 1863, p. 127, § 52,) we find that these judgments may be docketed, (even though the action be brought under Section 50 of that charter, which is the same as Section 11 of the charter of Perth Amboy,) and even though brought before a police justice, who is the same class of officer as the recorder.

Howe v Plainfield 8 Vroom 145

The courts certainly recognize these actions as civil actions.

In Greely *v.* City of Passaic, 13 Vroom 429, this court reversed all former decisions of the Supreme Court on this point.

See, also, Mayor *v.* Murphy, 11 Vroom 148.

Actions to recover penalties for violation of the insurance, the inn and tavern, game and other acts, are civil proceedings.

There is certainly no difference whether the action is brought to recover a penalty arising under a state law or a city ordinance, the proceedings being civil proceedings in both instances.

Again: This action must be a civil action for the purpose of recovering this money penalty; it cannot be in the nature of a prosecution for a criminal offence, because the recorder would have no jurisdiction.

See State *v.* Anderson, 11 Vroom 224.

This action is brought to recover a penalty upon a complaint which sets up, in substance and effect, that Brophy kept a disorderly house. If the action is viewed in the light of a criminal prosecution, as Judge Parker seems to view it in his opinion, the recorder had no jurisdiction. If it is viewed in the other light, that of a *qui tam* action, brought by a common informer, (to whom one-half of the penalty goes, and who is a party to the suit,) then the action is a civil action, and the Court of Common Pleas had jurisdiction in the premises.

Further: There is no provision in the charter of Perth Amboy, as there is in some cities, to imprison the person of the defendant *for a certain number of days*, upon failure to pay the judgment. Imprisonment for the non-payment of a penalty, or a debt, or a judgment, is not by way of punishment, (except in those cases where expressly given by statute,) but to enforce the payment of judgment.

See Mayor *v.* Herdt, 11 Vroom 264.

David *v.* Blindell, 11 Vroom 374.

Where the charter of a city gives the authorities power to enforce their ordinance by fine or imprisonment, the fine must be held to be the milder penalty, and is so designed by the legislature. But if Judge Parker's decis ion is correct, we have this result: The milder punishment, to wit, the money penalty or fine, by its transformation into a judgment, becomes not only the heavier punishment of the two, by far, but may become a means of grievous oppression to the citizen, because the imprisonment given by the statute is but for a brief and definite term, whilst the imprisonment under the judgment for the money penalty, is without limit. Judge Parker's decision gives the recorder, in effect, the power to add to his judgment of fifty dollars penalty, the additional judgment of imprisonment until the penalty and costs are paid, a power not given to him by statute or ordinance. There must be relief somewhere. The pardoning power does not extend to these cases. If the insolvent act does not apply, and the Court of Common Pleas had no jurisdiction in the matter, then Brophy is liable to imprisonment for years, at the will or caprice of the judgment creditor, to wit, the city of Perth Amboy and Farrel ~~Torrey~~ in the event of his inability to pay the judgment.

It may be said that the view here suggested will interfere with the efficiency of the means for enforcing the ordinance, but I submit that the view contended for, by Justice Parker, would work an injury to the citizen of far greater importance in the administration of justice than those offered by me, as the judge's ruling gives to a prosecutor of these actions an unlimited power to imprison, which even Supreme Court judges do not possess.

Again: In the case of Mayor *v.* Hurdt, 11 Vroom 264, the very question before the court was, whether the imprisonment was to be a part of the punishment for the violation of the ordinance, and the court held it was not; that it was simply to enforce the payment of the judgment—and which is the same principle in every other civil action. The charter of Bayonne and Perth Amboy will be found to be similar.

Even bastardy proceedings are held to be civil actions only.

Hildreth *v.* Overseers, &c., 1 Green 6.
Leconey *v.* Overseer, &c., 14 Vroom 407.

This action before the recorder was brought to recover a money penalty *only*, and was brought by *a common informer*, to whom *one-half* of the money penalty so recovered is to be paid, by virtue of the ordinance in question. In criminal cases the fine goes to the state, and this is the distinction between this case and the case of State *v.* Sterns, 11 Foster 106.

These actions have been held to be civil proceedings in this country, even though brought before the recorder of the city.

Goshen *v.* Croxton, 34 Ind. 239.
Jenkins *v.* City of Cheyenne, 1 Wyoming Ter. 291.
Williams *v.* City of Augusta, 4 Ga. 514.
Floyd *v.* Commissioners, 14 Ga. 356.
Ewbanks *v.* Ashley, 36 Ill. 177.
City of Alton *v.* Hersch, 68 Ill. 261.

And also in England.

Att'y Gen. *v.* Bowman, 2 Bosanquet & Puller's R. 532, note.

Said ~~Gustro~~ Eustis, C. J., in First Municipality *v.* Cutting, 4 La. Ann. 336: "We understand the fine which a municipal corporation is authorized to recover for the violation of its ordinances, to be a penalty *in the nature of liqui-*

reensburgh v Corwin 58 Indª 578
Brookville v Gagle 73 Indª 117
edden v Covington 29 Indª 118
ooper v. People 41 Mich 403
ixer v Supervisors 26 Mich 423
eiker v. Rochester 13 Hun. 157. 161
Baldwin v. Chicago 68 Ills. 418
Kansas City v. Clark 68 Mo 588

dated damages, and established as such in lieu of the damages which a court would be authorized to assess."

See, also, Willcock on Mun. Corp. 368, found in 14 Law Library, top p. 85.

Violations of ordinances imposing fines, held to be in the nature of tort.

This was a liquor prosecution.

Jacksonville *v.* Holland, 19 Ill. 271.

It is submitted that the Supreme Court was in error, and that the judgment of the Court of Common Pleas of the county of Middlesex was correct, and should be affirmed.

J. KEARNY RICE,

Att'y and of Counsel with Plaintiff in Error.

Davison & Co., Law Printers, 27 Montgomery st., Jersey City.

New Jersey Court of Errors and Appeals.

William Brophy,
Plff. in Error,

ads.

The State,
The City of Perth Amboy, Pros.
Deft. in Error.

In Error.

Points and Authorities of the Defendant in Error.

This case was fully examined into, adjudicated upon, and decided by the Court below. (See Opinion.)

I.

The Insolvent Act applies only to proceedings *strictly* civil in their nature, vide Insolvent Act, and cannot apply to proceedings that are of a quasi criminal character.

II.

The plaintiff in error was convicted of an offense embraced in the public criminal statute of this state, the punishment of which is vested absolutely in the municipality of the City of Perth Amboy.

Rev. Statutes, page 495, sections 12, 13, 14.
Also ibid Crimes, section 50.
Also the Charter of the City of Perth Amboy, Pam. Laws, 1870, page 1126.

III.

The proceeding against Brophy by the city, under its ordinance, for keeping a beer saloon (which includes the selling of malt liquors) without license, was a quasi criminal proceeding, a prosecution of a public nature, and a police regulation.

1. Because of the character of the offence charged and its supposed evil consequences to society and morality.

   Dillon on Mun. Corporations, sections 301, 302, 344, 345, 364, and notes.
   State vs. Stearns, 11 Fost. N. H. 106.
   Fink vs. Milwaukee, 17 Wis. 26.
   Cooley on Taxation, 409, 410, and note 1 on last page.

2. Because the proceeding (by which Brophy was convicted) has all the ingredients of a criminal action, viz., complaint, warrant, and conviction, and is a special criminal proceeding under the charter of the city.

IV.

The decisions of the Courts of this State in similar proceedings have strongly intimated (if not directly decided) that they are of a criminal nature.

   Howe vs. Plainfield, 8 Vroom, 417.
   State vs. Plunkett, 3 Harr. 5.
   State vs. Zeigler, 3 Vroom, 265.
   Weeks vs. New Brunswick, 1 Harr. 247.
   Robertson vs. City of Lambertsville, 9 Vroom, 69,

and on page 72 of last case, Justice Van Sickle speaks of the proceeding to obtain a warrant in such case, as "*the basis of a substantive criminal charge*," &c.

V.

The issuing of an execution as the charter requires cannot alter the nature of the proceeding. It is only a method pointed out by law to punish the offender. He could not be imprisoned in any other manner except by execution;—vide case, The City of Bayonne vs. Herdt, XI Vroom, 264—where the wording of its charter is identical with the wording of the charter of the defendant in error, in relation to the issuing of an execution.

Charter of City, Pam. Laws 1870, p. 1130, sec. 11.

VI.

If the proceeding under which Brophy was convicted is held to be a civil proceeding, and the Insolvent Act applies, a person could make his poverty a cloak to commit crime, and then escape punishment under the Insolvent Act.

Lastly. The judgment of the Court below should be affirmed with costs.

Respectfully submitted,

JNO. W. BEEKMAN,
Atty. of Deft. in Error.

WM. S. SHARP, Printer, 21 West State street, Trenton.

COURT OF ERRORS AND APPEALS

WILLIAM BROPHY, *Plaintiff in Error* *vs.* *CITY OF PERTH AMBOY,* *Defendant in Error.*	*In Error.*

Writ of Error.

New Jersey, *ss.*—The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature—Greeting:

[L. S.]

Because in the record and proceedings, and also in the giving of judgment in a plaint which was in our Supreme Court at Trenton, before you, on a certain writ of *certiorari* issued out of our said Supreme Court in the name of the State of New Jersey, the City of Perth Amboy, prosecutor, against William Brophy, (and in which said writ Farrel Murry was named as prosecutor of the said suit against the said William Brophy,) and which said writ of *certiorari* was directed to the Inferior Court of Common Pleas in and for the county of Middlesex, whereby we caused to be certified and brought into our said Supreme Court, before you, as well a certain petition and application of the said William Brophy, by him theretofore made to the judges of the said Inferior Court of Common Pleas in and for the county of Middlesex, for the benefit of the insolvent laws of this state, as also the proceedings had therein in our said Inferior Court of Common Pleas, manifest error hath intervened, to the great damage of the said William Brophy, as by his complaint we have been informed.

We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you distinctly and openly send, under your seals, the record and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals in the last resort in all causes of law, to be held at Trenton, on the twenty-first day of December, instant, before our judges of our said court, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error what of right and according to the laws of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the tenth day of December, in the year of our Lord one thousand eight hundred and eighty-one.

HENRY C. KELSEY, *Clerk.*

J. KEARNY RICE, *Att'y.*

The answer of the Justices of the Supreme Court of New Jersey within named: The record and proceedings, whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within we are commanded.

M. BEASLEY, *C. J.* [L. S.]

Copy of Judgment.

The court having heard the argument of counsel and duly considered the same:

It is ordered that the order and rule heretofore made in said matter by the said Court of Common Pleas of Middlesex county, discharging the said defendant, William Brophy, as an insolvent debtor, be reversed, annulled and for nothing holden; and that such discharge be set aside, with costs to be taxed.

Entered November 7th, 1881, on motion of

JOHN W. BEEKMAN,
Attorney, &c.

I, Benjamin F. Lee, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of an order made in the above-stated cause by said court, and entered in the minutes thereof.

In testimony whereof, I have hereto set my hand and the seal of said court, at Trenton, this [L. S.] twentieth day of December, A. D. eighteen hundred and eighty-one.

BENJ. F. LEE, *Clerk.*

Copy of Execution.

State of New Jersey, city of Perth Amboy, Middlesex county, *ss.*—The State of New Jersey to [L. S.] any policeman of said city:

You are commanded by the subscriber, recorder of the city of Perth Amboy, in the county aforesaid, that you levy and make of the goods and chattels of

William Brophy, the sum of fifty dollars penalty and five dollars and fifty cents costs, which the city of Perth Amboy, (Farrel Murry, prosecutor,) by my judgment entered August 6th, A. D. eighteen hundred and eighty, recorded against him, and also one dollar and twenty-five cents costs hereof, and forthwith pay the same to the subscriber; and for want of sufficient goods and chattels whereon to levy and make the same, take the body of the said William Brophy and convey him to the jail of the county of Middlesex, and deliver him to the sheriff of the county of Middlesex, or the keeper of the common jail thereof, who is required to receive the body of the said William Brophy into his jail and custody, and him safely to keep until the said penalty and costs shall have been paid; and within thirty days from the time you shall receive this execution, make return to me of the proceedings had thereon.

Given under my hand and seal, this twenty-third day of August, A. D. eighteen hundred and eighty.

SAMUEL G. GARRETSON,
Recorder, city of Perth Amboy.

Opinion.

On *certiorari* to Middlesex Common Pleas.

J. W. Beekman, attorney of prosecutor.

J. Kearny Rice, attorney for defendant.

Argued at June Term, 1881, before Justices DIXON and PARKER.

The opinion of the court was delivered by

Parker, J. William Brophy was tried and convicted before the recorder of the city of Perth Amboy for keeping a beer saloon in said city, contrary to the first section of an ordinance of said city, in relation to inns and taverns, beer saloons, &c.

By the provisions of said ordinance a penalty of $50 is imposed for its violation Upon conviction of Brophy execution was issued, commanding the officer to whom it was directed, to make the penalty and costs of his goods and chattels, and for want thereof to take his body and deliver him to the keeper of the jail of the county of Middlesex. The officer, not finding goods, delivered the body of Brophy to the keeper of said jail, whereupon Brophy gave bond under the act entitled "An act for the relief of persons imprisoned on civil process," and upon giving such bond he was released from custody.

Upon application under said act for his discharge as an insolvent debtor, the city of Perth Amboy opposed, and moved to dismiss for want of jurisdiction in the Court of Common Pleas. The motion was denied, the petition granted, and the prisoner discharged.

The question to be decided is, whether the insolvent laws gave the Court of Common Pleas power to discharge Brophy from the confinement he was undergoing, by virtue of the execution which had been issued by the recorder of the city of Perth Amboy.

The insolvent laws of the state provide only for the relief of persons imprisoned on civil process. Was Brophy imprisoned on civil process?

The twelfth section of the act entitled "An act to revise the charter of the city of Perth Amboy," approved March 17th, 1870, provides that the recorder of the city shall have jurisdiction to determine and give judgment for violation of ordinances of the city, without the filing of any pleadings, and forthwith to issue execution against the goods and body of the person convicted. It is further provided that the fine shall not exceed $50, and that the term of imprisonment shall not exceed sixty days for each offence, and application may be made to the council for the remission of any penalty.

After the act above referred to became a law, the council of the city passed an ordinance by which it was ordained that no person should carry on the business of an inn-keeper or tavern-keeper, keeper of a restaurant or beer saloon within the corporate limits of the city, without a license, under the penalty of $50. It was also ordained that any penalty arising under the ordinance may be recovered before the recorder in the manner prescribed by the city charter; and it was made the special duty of the policemen of the city to see that the requirements of the ordinance should be complied with, under penalty of dismissal from office.

It will be observed that the procedure, under the charter of the city for the recovery of the penalty, is not by action of debt, nor before a justice of the peace, but before the recorder, who is a city officer. The proceeding is summary, merely by complaint under oath, and without pleadings.

The ordinance in this case was framed in concurrence with the general policy of the state to punish the illegal sale of ardent spirits or malt liquors and in the interest of public order, and not simply for the benefit of the municipality of Perth Amboy. It is in the nature of a public prosecution, and in spirit a police regulation. A proceeding like an action of debt before a civil tribunal, is not provided. A public prosecution for an offence made penal by a city ordinance, because of its supposed evil consequences to society, is considered to be a criminal and not a civil proceeding. *State* v. *Stearns*, 11 *Foster* (*N. H.*) 106.

The proceeding in this case is criminal in its nature, and the insolvent laws, which apply only to civil actions, did not give power to the Court of Common Pleas to discharge Brophy.

The order of discharge as an insolvent debtor is set aside, with costs.

Assignment of Errors.

And now, at this day, in the Court of Errors and Appeals in the last resort of all causes of the State of New Jersey, comes the said William Brophy, by J. Kearny Rice, his attorney, and says that in the record and proceedings aforesaid, and also in giving judgment, there is manifest error in this, to wit:

First. Because the said inferior Court of Common Pleas, in and for the county of Middlesex, had full and complete power and authority to make the said order and decree discharging the said William Brophy from the imprisonment of his person, by virtue of an act entitled "An act for the relief of persons imprisoned on civil process," approved March twenty seventh, eighteen hundred and seventy-four, and in making said order and decree, and in the proceedings whereon the same is founded, the said court, in all things, acted in accordance with, and in pursuance of, the provision of said act. And the said Supreme Court erred in not giving full force and effect to the said statute.

Second. There is error in this, that by the record aforesaid it appears that judgment was given for the defendant in error and against the plaintiff in error, reversing said order of discharge from imprisonment of said William Brophy, when, by the law of the land, judgment should have been given in favor of the plaintiff in error and against the defendant in error, affirming said order discharging the said William Brophy from imprisonment.

And the said William Brophy prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings, may be reversed, annulled and altogether holden for naught.

J. KEARNY RICE,

Attorney and of Counsel for the Plaintiff in Error.

[Joinder in error in common form.]

State of the Case.

The defendant, William Brophy, was arrested and afterwards tried and convicted before and by Samuel G. Garretson, Esq., recorder of the city of Perth Amboy, for keeping a beer saloon in said city, contrary to the first section of a certain ordinance, entitled "An ordinance relating to inns and taverns, restaurants and beer saloons, and the sale of spirituous, intoxicating and malt liquors in the city of Perth Amboy." By the provisions of said ordinance there is a penalty imposed of fifty dollars for its violation, and judgment for this penalty, with costs of conviction, was given by said recorder against the said defendant, and an execution issued thereon, commanding the officer to whom it was directed to make said penalty and costs of the goods and chattels of said defendant, and for want of such goods and chattels, to take defendant's body and deliver the same to the keeper of the jail of Middlesex county, there to remain until said penalty and costs were paid. In pursuance to the command of said writ the said officer, not finding goods and chattels to make said penalty and costs, or any part thereof, took the body of said defendant and delivered him to the sheriff or keeper of said jail, whereupon the said defendant gave bonds under the act entitled "An act for the relief of persons imprisoned on civil process," and was released by said sheriff from custody, and made application by virtue of said act to the Court of Common Pleas of said county for his discharge as an insolvent debtor, and such proceedings were had thereon, that on the thirtieth day of November, eighteen hundred and eighty, said court granted said petition and discharged said defendant on the hearing of said petition; the prosecutor appeared by attorney and opposed the granting of said discharge, and moved to dismiss the same for want of jurisdiction in said court, which motion was overruled, and this *certiorari* brought to review said proceedings of said court in said matter.

It is hereby admitted that the proceedings on the part of the defendant in said insolvency matter, were in conformity with the requirements of the statute.

And it is hereby further agreed that either party have the right to use the ordinances and charter on the argument of this *certiorari*.

JNO. W. BEEKMAN,
Attorney of Prosecutor.

J. KEARNY RICE,
Attorney of Defendant.

Agreement.

We agree that the state of the case in this court shall be the same as that used in this matter in the Supreme Court, with the addition of the writ of error, return and judgment complete, the assignment of errors and joinder in error, and the opinion of Parker, J., also the execution issued by the recorder.

J. KEARNY RICE,
Attorney and of Counsel for Plaintiff in Error.

JOHN W. BEEKMAN,
Attorney and of Counsel for Respondent.

Ordinance.

An ordinance relating to inns and taverns, restaurants and beer saloons and the sale of spirituous, intoxicating and malt liquors in the city of Perth Amboy.

Be it ordained by the Council of the city of Perth Amboy, as follows:

1. No person shall carry on the trade or business of an inn-keeper, or tavern-keeper, keeper of a restaurant or beer saloon within the corporate limits of the city of Perth Amboy without a license, previously first had and obtained for that purpose in the manner and on the terms provided for by this ordinance, under the penalty of fifty dollars for each and every offence.

* * * * * * *

Sec. 16. Shall not sell liquor by small measure, without license, under penalty of $50

Sec

SEC. 18.—Any penalty arising ~~out of~~ under this ordinance may be recovered before the Recorder in the manner provided by the City Charter and ordinances of this City, which penalty, when received, shall one-half go to the person who shall first give information to the Recorder of the cause, matter or thing whereby such penalty shall have been incurred, and the other half shall be paid into the city treasury, and it shall be the especial duty of the policemen of this city, in accordance with such regulations as the Mayor shall from time to time prescribe, to see that the requirements of this ordinance are faithfully complied with, and under penalty of dismissal from office shall promptly make complaint to the said Recorder of the violation of any of the provisions thereof which may or shall come under their observance.

Ordinance.

An ordinance relating to inns and taverns, restaurants and beer saloons and the sale of spirituous, intoxicating and malt liquors in the city of Perth Amboy.

Be it ordained by the Council of the city of Perth Amboy, as follows:

...all carry on the trade or business of an
...ern-keeper, keeper of a restaurant or
...n the corporate limits of the city of
...out a license, previously first had and
...urpose in the manner and on the terms
...is ordinance, under the penalty of fifty
...d every offence.

* * * * *

...ll not sell liquor by
...easure, without
...under penalty of $50

...f of penalty recovered
...der ordinance goes to
...informer