

1182.

PROBATE COURT—DUTIES UNDER INSOLVENT STATUTE—SECTION
11171, GENERAL CODE, DISCUSSED.

SYLLABUS:

Section 11171, General Code, prescribing that a probate court may, upon hearing grant to an insolvent debtor, who had been imprisoned under process for a fine, penalty or costs, in a criminal proceeding, a certificate of release or dismiss his petition, as seems just, vests in the court a legal or judicial discretion, to be exercised according to law upon the facts found to be true by such court, and if the court finds that an applicant is in fact insolvent and has complied with all of the provisions of law relative to insolvent debtors such court may not refuse to grant the certificate provided for in said section.

COLUMBUS, OHIO, October 21, 1927.

HON. B. F. McDONALD, *Prohibition Commissioner, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion as follows:

“Referring to the letter from Probate Judge L., of-----County, Ohio, asking for an opinion under certain sections involving the question of insolvent debtor and believing that the matters therein contained are of state-wide interest I am asking for your legal opinion upon the questions therein involved.”

The letter referred to is as follows:

“Enclosed find a statement of fact in the case of M. P., who has petitioned the court, under Sec. 11166, G. C., praying to be released from liability to further arrest for the offense committed by him.

Due to the fact that the State of Ohio would be entitled to one-half of the fine assessed in this case, if it were collected, I am taking the liberty of asking for your interpretation of several sections of the Code, before making a decision in the matter.

Section 11171, G. C., provides that ‘on hearing the Court may grant to the petitioner a certificate or dismiss his petition, as seems just’. Does this mean that the court must grant the petitioner a certificate, if the facts show he is insolvent, and no fraud has been committed, or can the Probate Judge exercise his discretion and decline to do so if he thinks the public interests will be subserved by further imprisonment? Your attention is called to the use of the word ‘shall’ in Section 11159, G. C., and the use of the word ‘may’ in Section 11171. Section 11173, G. C., may be of some assistance in interpreting Section 11171.

The case of ‘In Re Carrie McAdams’ found in 21 O. C. C. 450 may, also, be of some assistance to you in considering this matter.

If you should find that the court has no discretion in the matter, if the facts show that the petitioner is insolvent and no fraud has been committed, would a commitment for the non-payment of a fine and costs under Sec. 12376, G. C., be subject to the provisions of the insolvent debtor act, viz.: Sections 11146 to 11180, G. C., inclusive?

Thanking you, in advance, for any assistance you may give the court in disposing of this case, I am”

Accompanying said letter is a statement of facts, as follows:

“M. P. was convicted of a second offense for selling intoxicating liquors in the Probate Court of this county, on November 19, 1926, and was sentenced to pay a fine of \$2,000.00 and the costs of prosecution, taxed at \$30.93. The sentence contained a commitment, reading as follows:

‘Said defendant is, therefore, ordered into the custody of the sheriff of this county, to remain confined in the county jail until said fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, he to receive credit upon such fine and costs at the rate of \$1.50 per day for each day’s imprisonment.’

Error was prosecuted to the Court of Common Pleas, which affirmed the conviction, and later error was prosecuted to the Court of Appeals, which court also upheld the judgment of the Probate Court.

On May 14, 1927, an execution was issued, directed to the sheriff. This execution was returned by the sheriff endorsed as follows:

‘Received this Writ May 14, 1927, at 11 o’clock A. M., and pursuant to its command, and for want of goods and chattels, lands and tenements of the within named M. P., whereon to levy the writ, I have arrested the said M. P. and have him now in my custody.’

After the defendant had been confined in the county jail for sixty days, he made application to the Commissioner of Insolvents of _____ County, Ohio, to be released from the custody of the sheriff as an insolvent debtor. At the same time he made a deed of all property which he claims he owned to the Commissioner of Insolvents as follows, to-wit.:

1 1926 Model Paige Sedan, No. 406471, valued at.....	\$750.00
1 horse, valued at.....	50.00
3 hogs, valued at.....	80.00
2 cattle, valued at.....	60.00

In the schedule of exempted property, he claimed 1 horse at \$50.00; three hogs, valued at \$80.00 and 1 cow, valued at \$20.00. The petitioner made no other claim for exemption for the reason that his wife owns a home-
stead.

On the 19th day of July, 1927, the Commissioner of Insolvents issued to the petitioner, a certificate of compliance and he was released from the custody of the sheriff.

The matter now comes before the Probate Court for final hearing, under the insolvent debtors’ act and he prays to be released from liability to arrest for any debt or claim named in his schedule of debts filed with the Commissioner of Insolvents. This schedule lists debts of over \$4,000.00 which includes the fine and costs of \$2,030.93 assessed in the Probate Court for which he was imprisoned.

In the testimony taken before the Commissioner and this court, it is conclusively shown that the petitioner owed no debts of any kind at the time the fine and costs referred to herein were assessed against him, on November 19, 1926, except a mortgage on his automobile of approximately \$400.00, and a chattel mortgage on a player piano, which he did not list as part of his assets, claiming that it belonged to his wife. Among his creditors are J. H., from whom he borrowed \$200.00, during December, 1926; C. W., from whom

he borrowed \$500.00, during January, 1927; A. M., from whom he borrowed \$300.00, during February, 1927; and The.....Garage, from whom he borrowed \$500.00 during May, 1927.

The petitioner never made a personal tax return until April 28, 1927, when he listed chattels practically the same as that given in the Deed of Assignment, except that he returned household goods valued at \$100.00, and the player piano, referred to above, valued at \$100.00 in addition.

Four or five years ago, the petitioner sold the family homestead, where he now resides to his wife and he claims she paid him \$4,800.00 in cash for it. When asked what he did with this money, he replied that he spent it. He also, claims that his wife owns the chickens, the household goods, and the player piano.

When the sheriff committed the petitioner to the jail on execution, the sheriff asked the petitioner whether he owned any property subject to execution and he was informed by the petitioner that he had none."

The request calls for a construction of the law relative to insolvent debtors, under the head of "Assignments to Avoid Arrest", Sections 11146 to 11180, both inclusive of the General Code. These sections require the appointment of a commissioner of insolvents, and Sections 11148 and 11150 make the same applicable, in certain cases, to persons who are in prison. It is not necessary in this discussion to determine what prisoners are entitled to the benefits of this act, that question, in so far as the facts presented in your inquiry are concerned, having been decided in an opinion of the Court of Appeals of Cuyahoga County in the case of *Kohler vs. State ex rel. Goldstein*, 24 O. App. 233, as published in the Ohio Law Bulletin and Reporter, under date of September 12, 1927. The third, fourth, fifth and sixth paragraphs of the headnotes of the Goldstein case, supra, read as follows:

"3. Imprisonment of insolvent debtor for no other reason except insolvency, which would be excessive for violation of liquor laws, would be in nature of 'imprisonment for debt,' which is prohibited by law.

4. Under Section 11150, General Code, giving benefit of insolvency statutes to person imprisoned under process of fine, penalty, or costs, sentence of fine of \$500 for violating liquor laws, defendant to stand committed until fine is paid or until otherwise discharged by law, was not in nature of penalty, but a 'debt.'

5. Under Section 13717, General Code, magistrate may impose sentence for violating liquor laws and provide that defendant remain in jail until fine and costs are paid, or is otherwise legally discharged.

6. Under Sections 11148-11155, General Code, insolvent person, convicted in magistrate's court for violation of liquor laws, under Section 6212-17, sentenced to pay fine and to remain in county jail until paid or otherwise discharged by law, may be discharged by commissioner on finding of insolvency and after serving 60 days, and mandamus will issue to compel such discharge; Sections 4129, 4141, referring to workhouses, not being applicable."

In the opinion, Judge Sullivan, speaking for the Court of Appeals, said.

"It will be noted that Section 11150, General Code, provides that the benefit of the insolvency statutes shall be applied to persons who are imprisoned under process of a fine, penalty, or costs in a criminal proceeding, after an imprisonment for a period of 60 days, unless the judgment in the case requires imprisonment until the fine, penalty, or costs be paid.

It is conceded in the record that the sentence contained the alternative, 'until the fine and costs are paid or security given for the payment thereof, or until otherwise discharged according to law.' The defendant in error insists that under the Insolvent Debtors' Act, the commissioner of insolvents, acting in accordance with the statutes, declared the prisoner insolvent, and thus under that statutory power this order became a discharge of the prisoner, and that therefore the language of the sentence, to-wit, 'or otherwise discharged according to law,' became applicable to the defendant, and that the same is consistent with the sentence itself.

* * * * *

It is argued that the principle of imprisonment for debt does not apply to the instant case, for the reason that the fine and costs may be discharged by a credit allowance given the prisoner, which in time would release him by its full payment in that manner. Under the circumstances such as these, however, it is obvious that the insolvent debtor for that reason alone would suffer a period of imprisonment for no other reason except insolvency, which, for the offense committed, would under the Constitution and laws be excessive in its character. It cannot be denied, however, that such a situation vitally partakes of that obnoxious doctrine that compels a person to suffer imprisonment in the county jail for debt, which has been practically swept from our law.

It is claimed by the state that the fine and costs imposed in the case at bar are penalties, and not an indebtedness, but this interpretation, we think, does violence to Section 11150, General Code, where it makes clear that the language of the section is applicable to a 'person who is imprisoned under process for a fine, penalty, or costs, in a criminal proceeding.'

As to the question of the right of the magistrate to impose a sentence of the character of the one in controversy, we cite Section 13717, General Code, which provides as to misdemeanors in general that the court may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged."

Section 11148 of the General Code reads as follows:

"When a person, resident in this state or not, is arrested, or in custody of a sheriff, or other officer, on mesne or final process, in a civil action, the officer having such person in custody, if requested by him, shall go with such person before the commissioner of insolvents of the county where he is arrested, or in custody, who shall, if required, make out for such person, under his direction, an accurate schedule in writing of all debts by him owing, specifying the names of the persons to whom owed, and the original consideration thereof, and whether they are by bond, note, or otherwise. Also, an accurate schedule in writing of all debts and demands owing to him, with a pertinent description of all contracts in which he is interested, and of all property of every kind, real and personal, in possession, remainder, or reversion, to which he has any claim. Such applicant must surrender to the commissioner all written evidences of title and of claims and his books of account."

As herein set forth, Section 11150 makes this section applicable to certain persons confined in the county jail for the non-payment of a fine.

It will be noted that the person seeking the benefits of this insolvency law must file with the commissioner of insolvents a schedule of all his debts and also an accurate schedule of all moneys owing to him and a list of all contracts in which he is interested

and of all property of every kind, both real and personal. He must also surrender to the commissioner of insolvents all written evidence of choses in action, book accounts, etc.

Section 11151 provides:

“Before a person making application as aforesaid, shall be entitled to a certificate from the commissioner, he must make and deliver to him an assignment, in writing, of all his property, rights, and credits, of every kind and description, except only exempted property or rights; but no particular form of words shall be necessary to the validity of such assignment. When made and delivered to the commissioner, it shall operate as a conveyance of all the property of the applicant, and vest in the commissioner all the rights, legal and equitable, which such applicant had in or to any property rights, and credits, whether mentioned or described in such schedules and inventory, or not except as aforesaid.”

As prescribed by this section, after the schedule is filed the person making the application shall make and deliver to the commissioner an assignment, in writing, “of all his property, rights, and credits, of every kind and description, except only exempted property or rights.”

Section 11154 reads as follows:

“When a person makes application to the commissioner, at the time of making it, he shall make and subscribe an oath before the commissioner, in the following form: I, A. D., do swear that I was not arrested, nor am I now in custody of an officer, at the suit of -----, by any collusion or combination with such -----, or with any other person; that I have delivered up and assigned to the commissioner of insolvents of the county of -----, all the property that I have, or claim any title to, or interest in; that the schedules and inventory of any property, rights, and credits by me made, contain, as far as I know or believe, a full description of all my property, rights, credits, and claims in possession, remainder, or reversion, property exempted from execution excepted; also all my bonds, notes, contracts in writing, and other contracts, in which I am beneficially interested, and that I have delivered them to the commissioner; also my books of account, and all written evidences of my right or title to any property whatsoever; and that I have not directly or indirectly, at any time, sold, conveyed, or disposed of, for the use of any person, any money or property, debt, right or claim or intrusted them to or with any person, thereby to defraud my creditors, or any of them, or to secure them so that I, or my heirs, or any other person, shall receive or expect any profit or advantage therefrom.”

Section 11155 of the General Code provides for a hearing before the commissioner, at which time the applicant is required to answer all questions put to him by the commissioner or any creditor or any attorney or persons interested in the matter.

Section 11159 provides:

“When a person applies to the commissioner, and has complied with the foregoing provisions, he shall give to the applicant a certificate of his having so complied.”

The "foregoing provisions" mentioned in said section refer to the requirements of the statutes hereinbefore pointed out that the applicant has filed with the commissioner a complete list of his debts and assets and given him a deed of assignment to all of his property, except that which is exempted by law. If the commissioner finds that he has done so, he *shall* then give the applicant a certificate to that effect. The commissioner must then make a return to the probate court of all which has transpired, as well as give notice of the granting of said certificate by advertisement in a newspaper. The applicant must thereafter file a petition in the probate court as provided in Section 11166, General Code, which reads as follows:

"On such third Monday, or the next day, or any day prior thereto, the applicant shall file his petition in the court, setting forth his application to the commissioner, and praying to be released from liability to arrest for any debt or claim named in his schedule of debts."

The statutes further provide that there shall be a hearing or hearings upon said application, at which time creditors and others interested may appear to question the petitioner relative to the pertinent facts in connection with his application.

We now come to a consideration of the provisions of Section 11171 mentioned in the request. Said section reads as follows:

"Upon the final hearing of the petition, the examination of the petitioner may be read as evidence by any creditor. The petitioner, and his creditors, may examine witnesses before the court, and also offer any other evidence or depositions taken according to law. On hearing, the court *may grant to the petitioner a certificate or dismiss his petition, as seems just.*" (Italics the writer's.)

The first question presented in your inquiry requires an interpretation of the last sentence of the above quoted section to determine what is meant by the expression "as seems just." This question seems to be raised in the communication enclosed in your letter because of the provision of Section 11159 which provides that when the commissioner is satisfied that the law has been complied with, he "shall" issue a certificate, while the provision of Section 11171 states that upon the hearing the probate court "may" grant a certificate or dismiss the petition, "as seems just."

The matters to be inquired into at the hearings provided by law are whether or not the applicant has done the things which the law requires to-wit, whether or not he has properly listed his debts and assets and assigned his assets as required by law. If the probate court finds that he has not so listed and assigned all of his assets, it would "seem just" to dismiss the petition.

In Words and Phrases I find:

"The word 'just' is derived from the Latin 'jus' which means a right, and more technically, a legal right—a law; * * *"

Webster's New International Dictionary defines "just" as:

"conforming to, or consonant with, what is legal or lawful; legally right; lawful."

It is noted from the statement of facts that there is some question as to whether or not the applicant has complied with the law by listing and assigning all of his property, for the reason that there seems to be some doubt as to whether or not the player

piano mentioned belongs to the wife of the applicant or to the applicant. This is a question for the probate court to determine. If he finds that the law has not been complied with, he should dismiss the petition. If, on the other hand, he finds that the applicant is insolvent and has complied with the law and made a correct listing of his property, and assigned all of the property required by law to the commissioner of insolvents, then the applicant has a legal right to be released as prayed for in his petition. In other words, the last provision of Section 11171 does not give the probate court power to grant or refuse a release merely as he desires, but he must give or refuse such release according to the facts established. The discretion to be exercised by the court is a legal or judicial discretion and not a mere personal or arbitrary one. That is to say, the question of granting the certificate or the dismissing of the petition must be determined on the facts according to law and not by questions of policy.

For the reasons stated, answering the first question raised by your inquiry, if the probate court finds that the applicant is insolvent and has complied with all of the provisions of law relative to such insolvent debtors, the probate judge may not refuse to grant the certificate provided for in section 11171 of the General Code.

Inquiry is also made as to whether or not these insolvency sections apply when there has been "a commitment for the non-payment of a fine and costs under Section 12376, G. C." Said section reads as follows:

"When, under the provisions of law, a convict may be imprisoned in the county jail, the court, upon the recommendation of the prosecuting attorney, may sentence such convict to hard labor therein; and when a person may be committed to jail for the non-payment of fines and costs, the court may commit him to hard labor therein until the value of his labor at the rate of one dollar and fifty cents a day equals such fine and costs, provided that no commitment under this section shall exceed six months, and this section shall not affect the laws relating to workhouses."

The only part of said section which could be at all brought in question in this case is the latter part thereof. It permits the court who requires a person to be committed to jail for non-payment of a fine "to commit him to hard labor" therein until the value of his labor at the rate of one dollar and fifty cents a day equals the sum of his fine and costs, but that such commitment shall not exceed six months.

This section is not applicable to the case which you present for the reason that the sentence which is set forth in the statement of facts does not contain any commitment to hard labor. The statement of facts shows that the sentence imposed was as follows:

"Said defendant is, therefore, ordered into the custody of the Sheriff of this County, to remain confined in the County Jail until said fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, he to receive credit upon such fine and costs at the rate of \$1.50 per day for each day's imprisonment."

It is readily seen that said sentence is almost in the exact language of the sentence involved in the Goldstein case decided by the Court of Appeals hereinabove quoted. There was no commitment to hard labor in said sentence, and therefore Section 12376 is not applicable to the instant case, and no opinion is expressed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.