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EXECUTION AGAINST LAND IN ALBERTA

by

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled

EXECUTION AGAINST LAND IN ALBERTA

submitted by JAMES D. ROUT

in partial fulfilment of the requirements for the degree of Master of Laws.

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ABSTRACT

This paper is a study of the present laws of Alberta concerning execution against land. It deals in detail with both the statutory and common law sources for these laws.

The principal method of execution against land in Alberta is under the writ of fieri facias. The historical background of this writ is discussed and the principles which are used by the Courts in determining whether an interest in land is or is not subject to execution under it are considered at length.

The method of execution under fieri facias is to have a sheriff seize the execution debtor's land, to sell it and to pay the proceeds to the execution creditor and to any others who may be entitled to share in the proceeds. The procedure to be followed in commencing and completing such an execution is therefore dealt with as well.

Some interests in land which are not subject to execution by fieri facias may be liable to equitable execution in aid of the execution creditor's right to execution at law. Several different kinds of equitable execution are described, together with some of the principles which are followed by courts of equity in deciding whether or not to grant this kind of remedy.

The conclusion reached is that the remedy of execution against land in Alberta is extremely restrictive and that there may be justification for legislation to extend the

rights of execution creditors to recover payment of their judgments by execution against land owned by their execution debtors.

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Chapter I

INTRODUCTION

The purpose of this paper is to describe the present laws in force in Alberta which relate to execution against land.

"Execution" has been defined in many ways. In its most general sense it "is the mode of obtaining the debt or damages, or other thing recovered by the judgment";[1] or it "is the obtaining actual possession of a thing recovered by judgment of law";[2] or it "signifies the enforcement or giving effect to the judgments or orders of courts of justice".[3]

A stricter meaning of execution is that it is a method of enforcing a judgment "by means of writs issuing out of the court where the record was upon which they were founded",[4] or that it is "the enforcement of those judgments or orders by a public officer under the writs of fieri facias, elegit, capias, sequestration, attachment, possession, delivery, fieri facias de bonis ecclesiasticis, etc."[5]

A writ has been said to be primarily a means of conveying "the Kings's commands to his officers and servants of whatever nature these commands might be".[6] Thus a writ of execution might be defined as a command by the King to his officers to enforce a judgment of one of his courts. For example, although there is no express definition given for "writ of execution" in the Alberta Supreme Court Rules,[7] the form of writ prescribed by Form F of the rules reveals that it is indeed in the nature of a command by the King to

one of his officers, namely it is a command by the Queen to a sheriff, to recover from a judgment debtor the amount due under a judgment to a judgment creditor.

This paper is concerned only with the enforcement of judgments for the payment or recovery of money. It will therefore deal only with the enforcement of this kind of judgment either by the use of a writ of execution or by the use of some method other than a writ.

According to the stricter meaning of "execution" the first of the above methods of enforcing a judgment is execution while the second method is not execution but something else.[8] In this paper, therefore, execution is used in its general sense rather than in its stricter meaning.

There are many sources of laws which can affect execution against land in Alberta. These may include: (1) some statutes of the Imperial Parliament which are (or were) in force in Alberta <u>proprio vigore</u>; (2) the laws of England (statutory and non-statutory) as of July 15, 1870 which are applicable in Alberta and which have not been repealed, altered, varied, modified or affected by any subsequent statute or ordinance applicable thereto; (3) statutes of the Parliament of Canada; (4) ordinances of the Northwest Territories; and (5) statutes of the Province of Alberta. Aspects of the law from each of these sources relating to execution against land will be dealt with.

Furthermore, in any area of law, in endeavouring

to explain the present law, it is often worth while to consider the history of the subject. The paper therefore also discusses, in some detail, the historical development of the law of execution against both land and chattels.

Chapter II

THE SOURCES OF LAWS RELATING TO EXECUTION AGAINST LAND IN ALBERTA

A. Statutes in Force Proprio Vigore

In any British colony a statute of the Imperial Parliament was, by section 1 of the Colonial Laws Validity Act,[9] to extend to that colony when it was made applicable to such colony by the express words or necessary intendment of the statute:

> An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament.

By section 2 of this Act (which was partly repealed by the Statute of Westminster, 1931[10]) any colonial law which was or should be repugnant to the provisions of any Imperial Act extending to the colony was, and should remain, to the extent of the repugnancy, absolutely void and inoperative:

> Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

An Imperial Act which is, or was, in force in a colony as a result of the provisions of the Colonial Laws Validity Act is usually described as a statute in force proprio vigore (i.e. by its own force).[11]

The Northwest Territories, out of which the province of Alberta was formed, and the province itself were both British colonies[12] so that the Colonial Laws Validity Act, before it was partly repealed, applied in its entirety in the Territories and in the province and to the extent that the Act is not repealed it is still in force in Alberta.

By sections 2 and 7 of the Statute of Westminster, 1931,[13] the Colonial Laws Validity Act does not apply to any law (other than a law dealing with the British North America Acts, 1867 to 1930) made after the commencement of the Statute of Westminster on December 11, 1931 by the Parliament of Canada or by the legislature of a province in relation to matters within the competence of each.

The Statute of Westminster, 1931, itself (as well as the express words and necessary intendment of these Acts) indicates that the British North America Acts, 1867 to 1930 were and are in force proprio vigore in Alberta under the Colonial Laws Validity Act, 1865. Of these various British North America Acts only that of 1867[14] is a source of law relating to execution. This Act gives the Parliament of Canada exclusive legislative authority over the regulation of trade and commerce,[15] interest,[16] and bankruptcy and insolvency[17] and gives the provincial legislature the exclusive power to make laws in relation to property and civil rights in the province[18] and the administration of justice in the province.[19]

It seems to be taken for granted that these

sections of the Act give the provincial legislature general jurisdiction over execution but subject to specific federal legislation with respect to bankruptcy[20] and interest.[21] Nothing affecting execution generally seems to have been done within the federal jurisdiction over trade and commerce.

Other than the British North America Act, 1867, there is only one statute of the Imperial Parliament relating to execution which may have been in force proprio vigore in the Northwest Territories (but not, it seems, in Alberta). It was entitled "An Act for the more easy Recovery of Debts in his Majesty's Plantations and Colonies in America," 1732.[22] This Act was associated with the use of the writ of fieri facias against land and accordingly a detailed discussion of the Act will be deferred until the next chapter, which deals with this writ.[23]

B. The Laws of England as of July 15, 1870, Ordinances of the Territories and Federal and Provincial Statutes

The Province of Alberta is part of the former North-western Territories and Rupert's Land which together were eventually called the Northwest Territories. The history of the name of the Territories is complicated.

The British North America Act, 1867[24] provided that the North-western Territory (as it was described in that Act) and Rupert's Land or either of them might be admitted into the Union of Canada by the Queen. This was done by an Imperial Order in Council on June 23, 1870 which ordered that both the North-western Territory (as

it was styled in the order) and Rupert's Land be admitted into and become part of the Dominion of Canada on July 15, 1870. The Manitoba Act, 1870,[25] which was assented to on May 12, 1870, that is, before the Imperial Order in Council was made, provided that the North-Western Territory (as it was styled in the Manitoba Act) and Rupert's Land, excepting that part thereof which was to form the Province of Manitoba, should, when they became part of Canada, have the name of the North-West Territories. After an intervening period in which the name was the North-west Territories[26] it settled down to the present form, Northwest Territories, in 1906.[27]

Until February 18, 1887, the laws in force in the Territories were probably a combination of the applicable laws of England as of May 2nd, 1670, (the date of the grant of the charter of the Hudson's Bay Company), subsequent Imperial Acts applicable to the Territories, Territorial ordinances and federal Acts.[28]

However, effective on February 18, 1887, section 3 of the North-West Territories Act Amendment Act,[29] which became section 11 of the North-West Territories Act,[30] introduced the laws of England as of July 15, 1870 into the Territories insofar as the same were applicable to the Territories and insofar as they had not been or were not subsequently repealed, altered, varied, modified or affected by any legislation of the Imperial Parliament applicable to the Territories or by the Parliament of Canada or by

any ordinance of the Lieutenant-Governor in council of the Territories, or, as a result of an amendment in 1897,[31] by any ordinance of the Legislative Assembly:

> Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the territories, in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council or of the Legislative Assembly.

Presumably the date of July 15, 1870, was selected as the effective date for the introduction of English law into the Territories because that was the date on which the Territories became part of Canada.

Section 11 of the Northwest Territories Act, as amended, is still part of the law of Alberta as it was, in effect, continued in force by section 16 (1) of the Alberta Act, 1905[32] by which, generally, all of the laws previously existing in the Territories were to continue in force in Alberta until (except for Imperial Acts) they were repealed, abolished or altered by Parliament or by the Legislature, according to the authority of each:

> All laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor, and all courts of civil and criminal jurisdiction, and all commissions, powers, authorities and functions, and all officers and functionaries, judicial, administrative and ministerial, existing immediately before the coming into force of this Act in the territory

> hereby established as the province of Alberta, shall continue in the said province as if this Act and The Saskatchewan Act had not been passed; subject, nevertheless, except with respect to such as are enacted by or existing under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the said province, according to the authority of the Parliament, or of the said Legislature: Provided that all powers, authorities and functions which, under any law, order or regulation were, before the coming into force of this Act, vested in or exercisable by any public officer or functionary of the North-west Territories shall be vested in and exercisable in and for the said province by like public officers and functionaries of the said province when appointed by competent authority.

The laws of England thus introduced into Alberta include statute law, rules of equity and the common law. It has already been noted that such laws of England do not include statutes in force proprio vigore which are in force in Alberta directly and not as a result of the North-West Territories Act.[33]

Presumably, also, the reference in section 16 (1) of the Alberta Act to Acts of the Imperial Parliament is limited to statutes in force proprio vigore. Otherwise this provision would be inconsistent with section 11 of the Northwest Territories Act under which the federal Parliament or provincial legislatures may repeal, etc., statutes which form part of the laws of England but which are not in force proprio vigore.

C. Summary

The combined results of the above may, it seems,

be summarized, as far as the law of execution is concerned, as follows:

(1) The provisions of the British North America Act, which concern execution can only be amended, etc., by the Imperial Parliament;

(2) Since, but not before, 1931 any other Imperial statute in force proprio vigore, if any, can be amended, etc., by whichever of the Legislature or Parliament has jurisdiction;

(3) As a result of the distribution of powers given to the Parliament of Canada by section 91 of the B.N.A. Act, 1867, Parliament has the exclusive jurisdiction to make laws concerning trade and commerce, interest and bankruptcy.

(4) Under section 92 of the B.N.A. Act, 1867, the provinces have the exclusive power to make laws in relation to property and civil rights and the administration of justice. No other sections of the B.N.A. Act, 1867, appear to have relevance to the law of execution against land.

(5) As a result of the combination of section 11 of the Northwest Territories Act and section 16 of the Alberta Act, any law of England as of July 15, 1870 which is applicable in Alberta is in force here to the extent it has not been amended, etc., before 1905, by an Act of Parliament, by an ordinance of the Lieutenant-Governor or by an ordinance of the Legislative Assembly of the

Territories or since 1905 by an Act of Parliament or the legislature according to the competence of each; and

(6) As a result of section 16 of the Alberta Act any Act of Parliament, ordinance of the Lieutenant-Governor of the Territories or ordinance of the Legislative Assembly of the Territories in force in the Territories in 1905 is still in force here unless it has since been repealed, etc., by Parliament or by the Legislature according to the competence of each.

Chapter III

THE WRIT OF FIERI FACIAS

A. Origin of the Writ

The writ of *fieri facias* is among the oldest forms of execution. In England it has always been used against the goods and chattels, but not the lands, of the debtor. Most writers and jurists consider that it is a writ which lay at common law[34] but some[35] suggest that it may have acquired its name and existence from chapter 18 of the Statute of Westminster the Second, 1285.[36]

Part of the latin text of this Act is "*de cetero in electione illius qui sequitur pro hujusmodi debito aut dampnis sequi breve quod vicecomes fieri faciat de terris & catallis*". The English text of this is "it shall be from henceforth in the election of him that sueth for such debt or damages to have a writ of *Fieri facias* unto the sheriff for to levy the debt of the lands and goods" of the debtor.

By the express words of this statute a creditor could, under the writ of *fieri facias*, levy the debt from the lands of the debtor but, in fact, lands never were levied under the writ. The apparent difference between the common law practice and the Act requires some explanation.

Plucknett, in his *Concise History of the Common Law*[37] gave two possible explanations. First he suggested that the statute only referred to specific lands which were in law regarded as chattels more than lands:

> [The] reference in the statute to lands in connection with *fi. fa.* is curious. It

> possibly means those devisable burgages in towns which the law regarded more as chattels than lands (as in the Statute of Acton Burnell); cf, also p. 390, n.1 above.

Plucknett's second explanation is given in the note referred to in the above quotation. It states that leases "could also be sold under fi. fa."[38] The inference from Plucknett's reference to leases is presumably that leasehold interests combine the attributes of both real and personal property and that the use of the word "lands" in the Statute of 1285 can possibly be explained by interpreting it to mean "leases" which had always, because a lease was a kind of chattel, been saleable under the writ of fi. fa.

Bacon, in his Abridgement of the Law,[39] gave a different explanation for the fact that, despite the express words of the Statute of 1285, lands were never leviable under fi. fa. He suggested that the Statute of 1285 might simply have been codifying the rights of the execution creditor under the older writ of distringas per terras et catalla which had permitted execution against both chattels (by a sheriff's sale) and lands (by permitting the creditor to receive the profits and rents of the land.)

Bacon then speculated that the words of the Act of 1285 were complied with, although not literally, by using two separate writs in place of distringas. Under the first writ, the writ of fieri facias (with the name of this writ possibly being derived from the latin words of

the Act of 1285), the creditor could only levy against the debtor's goods and chattels. Under the second writ, the writ of levari facias, the creditor could levy against the goods and lands of the debtor.

Under the writ of "levari facias the sheriff was commanded quod de terris et catallis ipsius a levari facias."[40] In English, the writ directed the sheriff to cause (facias) the debt to be levied (levari) from the lands and chattels of the debtor. Although the writ directed the sheriff to recover the debt from the debtor's land the sheriff did not thereby acquire the right to deal with the land itself as by selling it or by delivering it to the creditor. All he could do was to "collect the debt out of the profits of the land, as the corn or grass growing thereon, or out of the rents payable to the debtor."[41]

The right of the sheriff to collect rents and other profits of land under a levari facias was not the same thing as his right to sell leasehold interests and chattels real under fieri facias. Under the latter writ the sheriff had to sell the leasehold interests and pay the proceeds to the creditor while under the former writ the sheriff had to collect the rents or other profits of the land[42] and then, presumably deliver these profits directly to the creditor in satisfaction of the judgment. Another difference between the two writs in relation to the collection of rents and the sale of leasehold interests is that the sale of a leasehold interest under fieri facias

is a remedy against the tenant while the collection of rents under levari facias was a remedy against the landlord.

In England, the writ of levari facias was abolished in civil proceedings by the Bankruptcy Act, 1883.[43] This leaves open the possibility that it may still exist in Alberta by virtue of section 11 of the Northwest Territories Act,[44] although it may have been impliedly abolished by section 128 of the Land Titles Act.[45]

B. The Form of the Writ

In England, as of July 15, 1870, the writ was in form an order by the King[46] to a sheriff commanding the sheriff: (1) that of the goods and chattels of the debtor he cause (facias) to be made (fieri)[47] the amount of the judgment debt together with the costs of the judgment and of the execution plus interest on the judgment and costs: (2) that he bring the money to the court immediately after the execution of the writ to be paid to the creditor; and, (3) that immediately after the execution of the writ he should make appear to the court in what manner he had executed it.[48]

The requirement that the sheriff "make appear to the Court in what manner he had executed" the writ was called the return of the writ. In practice the sheriff in fact usually did not make a return of the writ to the court,[49] nor is this now in practice done in Alberta.[50]

The concluding words of the writ, beginning with the word "witness" were called the teste[51] of the writ. The teste consisted of the date on which the writ was issued and the name of the chief justice of the court from which the writ was issued.[52]

The distinction in meaning between the words goods and chattels, which the writ commanded the sheriff to take in execution, is none too clear, mostly because there is little consistency in defining the terms. Where there is a distinction "chattels" is usually given a wider meaning. Thus "chattels" may mean all kinds of personal property including chattels real,[53] while "goods" may be (in contracts) restricted to inanimate tangible objects.[54] On the other hand, depending on the context "goods" may have the same wide meaning as chattels.[55]

This may be compared with section 62 of the Sale of Goods Act, 1893[56] which provided that:

> Goods include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Our Seizures Act[57] does not define "goods" but by section 3 a writ of execution "binds the goods of the judgment debtor" and by section 4 under a writ the sheriff may seize any goods or other personal property of the debtor.[58]

Our Supreme Court Rules[59] do not define "goods"

or "lands" but by rules 346 and 347 an execution creditor may issue a "writ of execution"[60] which is actually the common law writ of fieri facias[61] under a different name, and which commands the sheriff to cause the debt to be made from the goods or lands[62] of the execution debtor rather than from his goods and chattels as in England.

C. Obtaining and Maintaining the Writ

(1) The Time when the Creditor can first take out a Writ

At common law a judgment signed during any sittings during which a trial was held, or during the subsequent vacation, related back to the first day of those sittings (even if the defendant died before the judgment were actually signed). At the time of signing of the judgment the creditor could also take out an execution against the defendant, also tested on the first day of those sittings. Obviously such a rule was mostly to the advantage of the creditor but in other ways the creditor was at a disadvantage for if the trial were not held during the regular sittings of the court or if the creditor took out his writ during or after the first sittings of the court following the signing of the judgment he could only do so while the court was actually sitting and not during a vacation.[63]

In 1852 sections 27 and 28 of the Common Law Procedure Act[64] altered the rights of execution creditors by, in effect, permitting a creditor who obtained a default

judgment to take out a writ at the expiration of eight days after the judgment.

Presumably these sections have been superceded by our rule 346(1)[65] under which, in general, all judgment creditors may immediately issue a writ of fieri facias:

> Except as otherwise provided every judgment creditor is entitled immediately to issue one or more writs of fieri facias but if the judgment is for payment within a period therein mentioned, the writ shall not be issued until after the expiration of the period.

Section 120 of the Common Law Procedure Act then gave a creditor who obtained a judgment in a trial not held during a regular sitting of the court to take out a writ in 14 days. This section also has, presumably, been superceded by our rule 346(1).

In 1853, acting under their general powers,[66] the Courts of Queen's Bench, Common Pleas and Exchequer made new rules of practice common to all the courts which annulled all existing rules inconsistent with the new rules.[67]

Rule 56 of these Regulae Generales, Hilary (Practice), 1853, (referred to as R.G.H. (Pr.), 1853) restricted the rights of creditors by providing that all[68] judgments should be entered as of their date of signing and should not have relation to any other day:

> All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the court or a judge to order a judgment to be entered nunc pro tunc.

Our rule 322[69] is inconsistent with, but presumably supercedes, rule 56 of R.G.H. (Pr.), 1853. Rule 322 states that every judgment shall be dated and take effect as of the day on which it is pronounced:

> Every judgment or order shall be dated as of the day on which it is pronounced and takes effect from that date unless otherwise directed, or by leave of the court, may be ante-dated or post-dated.

Sections 27, 28 and 120 of the Common Law Procedure Act, 1852, had left a gap respecting the right of all creditors to take out a writ during a vacation notwithstanding when the trial was held. The gap was filled by rule 57 of R.G.H. (Pr.), 1853, which, in effect, permitted creditors other than those mentioned in sections 27, 28 and 120 of the Common Law Procedure Act, to take out a writ in 14 days after judgment was signed:

> When a plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been nonsuited at the trial in or out of term, judgment may be signed and execution issued thereon in fourteen days, unless the judge who tries the cause, or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms.

This rule, as for sections 27, 28 and 120 of the Common Law Procedure Act, is probably superceded by our rule 346(1), quoted above, which permits all judgment creditors to obtain a writ immediately.

The common law rule with respect to the date of teste of the writ was also restricted by R.G.H. (Pr.), 1853. By rule 72 each writ of execution was to bear date

on the day on which it was issued:

> Every writ of execution shall bear date on the day on which the same shall be issued, and shall be tested in the name of the lord chief justice or of the lord chief baron of the court from which the same shall issue; or in the case of a vacancy of such office, then in the name of the senior puisne judge of the said court, and may be made returnable on a day certain in term.

This rule is reproduced, but more simply, by our rule 359:[70]

> Every writ of execution shall bear date of the day on which it is issued.

In England, by R.G.H. (Pr.), 1853, rule 71, the writ could only be issued on praecipe and upon the judgment being seen by the issuing officer:

> No writ of execution shall be issued till the judgment paper, postea, or inquisition, as the case may be, has been seen by the proper officer, nor shall any writ of execution be issued without a praecipe being filed with the proper officer.

Our rule 358[71] requires only the praecipe without the requirement that the judgment be seen by the officer issuing the writ:

> A writ of execution shall be issued or renewed only upon praecipe.

In practice, the clerk of the court will not issue a writ until the judgment has been filed but on balance it seems that a specific rule such as rule 71 R.G.H. (Pr.), 1853 would be preferable. This follows, it is suggested, because the combination of our rule 322 under which a judgment is effective from the day on which it is pronounced and rule 346(1) under which an execution creditor

can immediately issue a writ of execution gives the impression that a creditor has a right to issue the writ before entering the judgment.

This was in fact permitted by the common law in England[72] at one time and probably rule 71 R.G.H. (Pr.), 1853 was designed to prevent this.

Finally, with respect to whether the creditor had to give notice to the debtor before taking out an execution, in England, and presumably in Alberta now, to be entitled to issue a writ of execution under a judgment for the payment or recovery of money the creditor did not even have to serve the debtor with a copy of the judgment before issuing the writ, nor did the creditor have to make a demand for the debtor to pay the judgment debt before doing so.[73]

(2) The Latest Time within which the Creditor can take out the Writ

At common law, apart from the effect of the rule that judgments were only valid for 20 years at common law,[74] there may have been no limitation on how long after a judgment the creditor could take out an execution. In any event the common law was superceded by the enactment of chapter 45 of the Statute of Westminster the Second, 1285,[75] by which, in general, a plaintiff could not take out a writ of execution after one year from the date of signing of the judgment unless he renewed the judgment by the writ of scire facias.[76]

But substantial changes were made to the old procedure by the Common Law Procedure Act, 1852.[77] By section 128 during the lives of the parties the creditor could issue a writ at any time within six years from the judgment:

> CXXVIII. During the Lives of the Parties to a Judgment, or those of them during whose Lives Execution may at present issue within a Year and a Day without a Scire facias, and within Six Years from the Recovery of the Judgment, Execution may issue without a Revival of the Judgment.

This section is substantially reproduced in our rule 355:[78]

> As between the original parties to a judgment or order, execution may issue at any time within six years from the date of the judgment or order.

Provision for issuing a writ even after six years was made by sections 129 to 134 inclusive of the Common Law Procedure Act, 1852 which stated the conditions under which a judgment could be revived and execution issued thereon.

These sections of the Common Law Procedure Act, 1852, have, in a sense, been duplicated by our rule 356[79] with the difference that our rule does not require the original judgment to be revived but simply provides that the court may allow execution to issue:

> Where the six years have elapsed or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the court for leave to issue execution accordingly or to amend any execution already issued, and the court may

> make an order to that effect or may order that any issue or question necessary to determine the rights of the parties be tried in any way in which a question in an action may be tried.

There does seem to be some authority for concluding that, as a result of the Limitations of Actions Act,[80] after the 10 year limitation period for taking an action on the judgment has expired the creditor cannot obtain leave to issue a writ.[81] The question is probably by no means conclusively settled since it is only a part of the subject of limitations of actions and this area of law is a frequent topic for review.[82]

(3) Duration of a Writ of Fieri Facias

It seems that at common law (again, apart from the effect, if any, of the 20 year common law limit on the lifetime of a judgment)[83] a writ of execution was kept alive until it was actually executed[84] but by section 124 of the Common Law Procedure Act, 1852[85] if unexecuted it expired after one year from its teste unless in the meantime it was renewed, and this applied equally to each following year:

> CXXIV. A Writ of Execution issued after the Commencement of this Act, if unexecuted, shall not remain in force for more than One Year from the Teste of such Writ, unless renewed in the Manner herein-after provided; but such Writ may, at any Time before its Expiration, be renewed, by the Party issuing it, for One Year from the Date of such Renewal, and so on from Time to Time during the Continuance of the renewed Writ, either by being marked with a Seal bearing the Date of the Day, Month, and Year of such Renewal, (such Seal to be provided and kept for that Purpose at the Office of the Masters of the Court out of which such Writ

> issued,) or by such Party giving a written Notice of Renewal to such Sheriff, signed by the Party or his Attorney, and bearing the like Seal of the Court; and a Writ of Execution so renewed shall have effect, and be entitled to Priority, according to the Time of the original Delivery thereof.

In Alberta section 28 of the Execution Creditors Act[86] requires the creditor to notify the sheriff of any change in the amount owing on the execution:

> If
>
> (a) an execution creditor
>
> (i) receives any money on account of an execution debt, or
>
> (ii) receives anything by way of satisfaction, either wholly or in part, of an execution debt, or
>
> (iii) enters into an agreement whereby proceedings under a writ of execution are to be stayed or suspended,
>
> or
>
> (b) an order is made staying the execution,
>
> the execution creditor shall immediately thereafter deliver to each sheriff to whom the writ of execution has been delivered a notice in writing setting out with particularity each payment, satisfaction or agreement, or a certified copy of each order, as the case may be.

Section 29 then provides that the sheriff shall disregard every writ of execution after one year from the time he received it, or after one year from the time he received a statement under section 28, or after one year after he received a statement from the creditor of the amount owing under the writ:

> (1) The sheriff shall disregard every writ of execution that is in his hands, as the case may be,

(a) after the expiration of the period of one year from the time of the delivery of the writ of execution to him, or

(b) after the expiration of the period of one year

(i) from the date of the delivery of the last statement made pursuant to section 28 with respect to the execution, or

(ii) after the delivery to him of a notice in writing by the creditor or his agent setting out the amount leviable under the writ of execution.

(2) Each writ that the sheriff by this section is directed to disregard shall be deemed not to be a subsisting execution.

(3) The sheriff upon receipt of any notice referred to in this section shall make an entry with respect thereto as if it were a statement given under section 28.

Presumably, these sections of the Execution Creditors Act have, by implication, repealed section 124 of the Common Law Procedure Act, 1852. Actually the former Act seems less restrictive of the creditor's rights than the latter since the failure to renew the writ under the Seizures Act only results in its being disregarded by the sheriff until it is renewed while under the Common Law Procedure Act it expired if not renewed in time.

Specifically with respect to execution against land there is a further limitation on the duration of a writ of execution imposed by section 128(3) of the Land Titles Act.[87] Under this section every writ or renewal thereof ceases to bind or effect land at the expiration of six years from its receipt by the Registrar of Titles

unless it is renewed in the meantime:

> Every writ or renewal thereof ceases to bind or affect land at the expiration of six years from the date of the receipt thereof by the Registrar of the district in which the land is situated, unless before the expiration of such period of six years a renewal of the writ is registered with the Registrar in the same manner as the original is required to be registered with him.

There is an obvious conflict between the provisions of section 128(3) of the Land Titles Act and sections 28 and 29 of the Execution Creditors Act.

Must the creditor simultaneously satisfy the requirements of both Acts or if he is only interested in maintaining his writ against the land is he entitled to disregard the Execution Creditors Act? If he is bound by the latter Act if he fails to renew his writ annually with the sheriff as required by that Act does that mean that the writ is no longer subsisting for the purposes of the Land Titles Act as well as the Execution Creditors Act? Can the debtor get a court order that the writ has expired and register this under section 129 of the Land Titles Act?:

> Upon the satisfaction or withdrawal from his hands of ~~any~~ writ, the sheriff or other duly qualified officer shall on payment to him of his proper fee forthwith transmit to the Registrar a certificate under his official seal, if any, to that effect, and upon the production and delivery to the Registrar of the certificate, or of a judge's order, showing the expiration, satisfaction or withdrawal of the writ as against the whole or any portion of the land so bound, the Registrar shall make a memorandum upon the certificate of title to that effect if the land has been brought under the provisions of this Act, and, if not, upon or opposite

> to the entry of the writ in the execution register, and thenceforth the land of the debtor or portion of land, as the case may be, shall be deemed to be absolutely released and discharged from the writ.

In any event, it may be that, as the more specific legislation, in a direct conflict the Land Titles Act would prevail. This, at least, would cause no problems if there were no other creditors.

But the intent of the Execution Creditors Act is that all creditors share ratably in the proceeds of an execution without any of them having a preference. If the sheriff has funds in his hands arising from an execution against lands, then in disbursing the proceeds to creditors how can the sheriff both disregard a writ which was not annually renewed with him as required by the Execution Creditors Act and yet observe the rights, if any, of the creditor under that writ if the creditor has kept his writ in force against that land as required by the Land Titles Act.

These questions are not easily answered. The reason for the conflict seems to be that there is no rational connection between the provisions of the Execution Creditors Act and the Land Titles Act to make it clear whether the proceeds of executions against land are to be treated separately from the proceeds of executions against goods. It is suggested that there is room for improvement in the existing legislation in this area to

adequately define the obligations of the execution creditor against land under these Acts.

Finally, as to the duration of writs of execution, it is not the intention of this paper to consider the effect of the Limitation of Actions Act[88] but it seems that a writ of execution may not be effective past the date on which an action on the original judgment can be brought under section 5(1) (f) of that Act.[89]

Whether or not an execution ceases to be effective at such time, if the creditor sues on the original judgment, obtains a new judgment and execution thereon and registers his new writ under section 128(4) of the Land Titles Act[90] his new writ has priority from the same date as his first writ had:

> If an action is brought upon a judgment before the date when the taking of such action would be barred by The Limitation of Actions Act, and there is at the time when the action is brought on file in the office of a Registrar of Land Titles a certified copy of a writ of execution that is still in force and issued upon the said judgment and if, while the said judgment is still in force or would be in force but for the obtaining of a judgment based thereon, the execution creditor files in the office of the Registrar a certified copy of a writ of execution issued upon a judgment in the said action, the last mentioned writ of execution has the same priority as affecting lands situated within the land registration district as the writ of execution first hereinbefore mentioned and the Registrar shall endorse upon it and enter in the execution register a memorandum to such effect.

D. The Amount the Creditor is Entitled to Recover under the Writ

(1) The Amount of the Judgment

It is usually assumed that at common law the creditor could recover under execution the amount of any judgment in his favour for the payment to him or recovery by him of a sum of money whether the judgment was in a damage action or a debt action.[91]

But the right to recover the amount of a judgment in either a debt or damage action is also founded on a statute. Chapter 18 of the Statute of Westminster the Second, 1285[92] provided that when "debt is recovered or knowledged in the King's Court, or Damages awarded" the creditor could take out a writ of fieri facias to collect the sum due.

(2) Costs

At common law no costs of the action were recoverable by either a plaintiff or a defendant so that all rights to such costs are based on particular statutes.[93]

Orkin, in his Law of Costs,[94] suggests that under the Judicature Act the Court has the power to award costs as it sees fit:

> The Judicature Acts of Ontario and other provinces, while not granting any new power to award costs, made all costs in the discretion of the court which now has full power in all cases to determine by whom and to what extent costs are to be paid. A successful litigant has therefore, a reasonable expectation of receiving an award of costs, but this is subject to the court's absolute and unfettered discretion to award or withhold costs.

Our Judicature Act[95] does not seem to contain (as, possibly, it should contain) any express provision of the kind mentioned by Orkin so it may be that in Alberta the source of the court's power to award costs in an action is still the applicable English statutes. There are many of these. Chitty's Collection of Statutes[96] is a good source for finding them and their history. It is not the intention of this paper to consider the Territorial Ordinances in this area but some of these may also be applicable.

In any event, if a creditor received an award of costs he was entitled to recover these under the execution.[97]

But in England, and probably in Alberta now, the costs of the action were limited to the costs recovered by him in the judgment in the action. He was therefore not entitled to collect any costs for carrying out the execution or for sheriff's fees or poundage.[98]

Therefore the right to recover the costs of the execution, as well as the costs of the judgment, depended upon a statute.

It was only in 1803 that a plaintiff who was an execution creditor was able to recover the costs of the execution[99] and in 1852 that section 123 of the Common Law Procedure Act[100] permitted all execution creditors to recover such costs:

> In every Case of Execution, the Party entitled to Execution may levy the Poundage, Fees and Expenses of the Execution, over and above the

Sum recovered.

This Act is presumably still in force in Alberta now since there is no provincial legislation which expressly permits the recovery of such costs under execution.[101]

(3) Interest

At common law a judgment creditor was not entitled to collect any interest on the judgme debt. This right was only given in 1838 by section 17 of the Judgments Act[102] under which the creditor was entitled to collect under the execution interest on the judgment including costs[103] at the rate of four per cent per year computed from the day on which the judgment was signed and entered of record:[104]

> And be it enacted, That every Judgment Debt shall carry Interest at the Rate of Four Pounds per Centum per Annum from the Time of entering up the Judgment...until the same shall be satisfied, and such Interest may be levied under a Writ of Execution on such Judgment.

In Alberta the Judgments Act has presumably been repealed by implication by sections 13 to 15 of the Interest Act[105] by which judgment debts including costs bear interest at the rate of five per cent per annum from the date of the giving of the judgment:

> Every judgment debt shall bear interest at the rate of five per cent per annum until it is satisfied.
>
> Unless it is otherwise ordered by the court, such interest shall be calculated from the time of the rendering of the verdict or of

> the giving of the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same court or in appeal.
>
> Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any court whatever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt.

It is interesting that section 17 of the Judgments Act expressly provided that interest was recoverable under the execution while the Interest Act makes no such provision.

Rule 366 of the Supreme Court Rules[106] states that under an execution interest may be levied on the amount recovered under the judgment. It may be that this rule is a matter of procedure which is within the scope of the Rules of Court as provided in section 39 of the Judicature Act;[107] but on the other hand might the authority for this rule be founded on section 17 of the Judgments Act which to this extent may not have been repealed by the Interest Act?

E. The Creditor's Right to Execution Against Land under Fi. Fa.

(1) At Common Law

As indicated in the form of the English writ of fi. fa. only goods and chattels were subject to execution under this writ at common law.

In Alberta, the writ of fi. fa. has always been used against lands as well as against goods. Since at

common law lands (apart from chattels real) were not bound by fi. fa. it is necessary to find some other authority under which lands in Alberta can be taken in execution under this writ.

(2) The Act 5 Geo.2, c.7 (1732)

Historically, at least, the origin of the use of the writ of fieri facias against lands in Alberta was the Act (Imp.) 5 Geo.2, c.7 entitled "An Act for the more easy Recovery of Debts in his Majesty's Plantations and Colonies in America, 1732".[108] This Act is usually referred to as 5 Geo.2, c.7, probably because of its unwieldy title.

Only the preamble and section four of the Act were relevant to execution. The preamble stated the need for reform to the law governing the recovery of debts in the American colonies:

> Whereas his Majesty's subjects trading to the British Plantations[109] in America lie under great difficulties, for want of more easy Methods of proving, recovering and levying of Debts due to them, than are now used in some of the said Plantations; and whereas it will tend very much to the retrieving of the Credit formerly given by the trading subjects of Great Britain to the Natives and Inhabitants of the said Plantations, and to the advancing of the Trade of this Kingdom thither, if such Inconveniencies were remedied...

Section four then provided that in the American colonies real property should be subject to the same remedies for recovering debts as personal property was:

> And be it further enacted by the Authority aforesaid, That from and after the said twenty-ninth Day of September one Thousand seven hundred and thirty-two, the Houses, Lands, Negroes, and other Hereditaments and real Estates, situate or being within any of the said Plantations belonging to any Person indebted, shall be liable to and chargeable with all just Debts, Duties and Demands of what Nature or Kind soever, owing by any such Person to his Majesty, or any of his Subjects, and shall and may be Assets for the Satisfaction thereof, in like Manner as Real Estates are by the Law of England liable to the Satisfaction of Debts due by Bond or other Specialty, and shall be subject to the like Remedies, Proceedings and Process in any Court of Law or Equity, in any of the said Plantations respectively, for seizing, extending, selling or disposing of any such Houses, Lands, Negroes, and other Hereditaments and Real Estates, towards the Satisfaction of such Debts, Duties and Demands, and in like Manner as Personal Estates in any of the said Plantations respectively are seized, extended, sold or disposed of, for the Satisfaction of Debts.

Since, in the Colonies at that time, the usual method of execution against personal property was under the writ of fieri facias the effect of the Act was to make lands in the Colonies subject to execution under the same writ.[110]

Riddell in his article Fi. Fa. Lands in Upper Canada[111] and Dunlop in his article Execution Against Real Property in British Columbia[112] point out that this statute was enacted as a result of complaints from the colonists about the difficulties in enforcing judgments. Neither writer gave a source for this suggestion but possibly the fact that the colonists complained was

inferred from the wording of the preamble to the Act which is set out above.

In any event, if complaints there were from the American colonists, identical complaints must have come from the colonists of New South Wales about 80 years later because in 1813 an Act almost identical in its title, preamble and section 4 was enacted by the Imperial Parliament with respect to the colony of New South Wales.[113]

The reference to "Negroes" in section 4 of the Act 5 Geo.2, c.7 (1732) is significant. At that time, under the laws of England, a slave was real property of his owner and not personal property.[114] Thus on the death of his owner the ownership of the slave passed to the heirs and not to the personal representative of the deceased.[115]

The usual method of execution against a debtor's goods in England (and its colonies prior to 1732) was to have the sheriff sell the debtor's goods, but not his lands, under the writ of fieri facias and to pay the proceeds to the creditor in satisfaction of the debt. Since the Negro slave was real property he could therefore not be seized and sold under this writ. One of the consequences of this statute was that a Negro slave (but not a slave of another racial origin) in the American colonies, but not in England or anywhere

else, could be seized and sold in an execution against his owner under a writ of fieri facias.[116]

In so far as the Act 5 Geo.2, c.7 (1732) applied to Negroes it was repealed in 1797 by an Act entitled "An act to repeal so much of an act, made in the fifth year of the reign of his late majesty King George the Second, intituled, An Act for the more easy recovery of debts in his Majesty's plantations and colonies in America, as makes negroes chattels for the payment of debts."[117]

The operative words of the repealing Act of 1797 were:

> That so much of the said in part recited act, as relates to negroes in his Majesty's plantations, is hereby repealed and made void, and shall be of no effect in future; anything in the above act, or any other act, to the contrary thereof in anywise notwithstanding.

Riddell, in his article The Slave in Canada,[118] said of the Act of 1797:

> Remembering that the Act of 1732 was intended to change the common law of England which did not allow the sale of land under a writ of execution, fieri facias, it should probably be considered that the sole effect of the Act as regards Negroes was to exempt them from sale under fieri facias, without affecting their status.

In this article Riddell also points out that until the Slave Emancipation Act, 1833,[119] slavery was not uncommon in Upper and Lower Canada and the Maritimes and that many slaves escaped from Canada to the United States. He also points out that there were slaves in Canada of native

Indian origin as well as Negro slaves. As noted earlier the Act of 1732 referred only to Negroes and not to slaves of other origins.

The whole of the Act 5 Geo.2, c.7 (1732), was repealed by the Imperial Statute Law Revision Act, 1887.[120]

Historically the Act 5 Geo.2, c.7 was also of fundamental importance to the development of the law of execution in Canada. In fact it seems that it was the existence of this Act, and only this, which resulted in the permanent difference between the law of England and the American Colonies; that is, in England, lands have never been bound by fi. fa. while in the American Colonies lands have been bound by this writ since 1732.

The leading case on the nature of the application of this Act in the Colonies seems to be McIntosh v. McDonell,[121] decided in 1835 by the full court of King's Bench of Upper Canada. The decisions in this case seem to make it clear that this Act was not a law of England and that although it was in force in Upper Canada it was in force because it was a statute proprio vigore and not as a law of England.

In considering the question of the application of this Act in Upper Canada Sherwood, J., quoted at length from a judgment given by him in an earlier case. The following are some of the relevant portions of his judgment:

> I think the common law of England and the statute Westminster 2nd are in force here; besides which, we have the 5 Geo. II. ch.7, which they have not in England.[122]
>
> It appears to me that when the British parliament framed the statute 5 Geo. II. it designed to give an entirely new remedy to the creditor for the recovery of debts due in the colonies, and at the same time leaving it at his election to proceed under that act or under the local laws of the colonies. The preamble and enacting words of the act appear to me to point out a distinct remedy is nowise grafted on the English law or on any colonial institution.[123]
>
> It appears to me that the statute West.2nd is in force in this province, because it forms a part of the law of England relative to property and civil rights; and I also think the 5 Geo.II. is in force here ipso facto, because Upper Canada is one of the British American Colonies, in which this statute by its own terms is to operate. There is another reason for alleging that the 5 Geo.II. was not introduced into this province as part of the law of England. The 14 Geo.III. ch.83, sec.18, expressly declares that all acts of the British parliament before that time, concerning or respecting the colonies and plantations in America, should be in force in the late province of Quebec, which then comprised Upper Canada; and the 31 Geo.III. ch.31, sec.33, declares that all laws and statutes which were in force in the province of Quebec should be in force in this province till altered by an Act of the legislature. The 5 Geo.II. was therefore the law of the province for about eighteen years before the statute West.2nd became a part of the laws of this colony. The rules of human action which govern the members of civil society in England are called the law of England; and, in my opinion, the 5 Geo.II. is no more a part of that law than any act of the British parliament made for the government of our possessions in Asia or Africa.[124]

Robinson, J., delivered a separate judgment in which he referred with approval to the earlier judgment by

Sherwood, J.[125]

The last of the three judgments was delivered by Macaulay, J., who stated that:

> [When] the English law was introduced here, the 5 Geo.2 may be supposed to have prevailed or to have come into simultaneous operation.[126]

The judgments in this case persuasively suggest that if the Act 5 Geo.2, c.7, never formed part of the laws of England then it was never introduced into the Territories or into Alberta (as the case also says was not introduced into Upper Canada) as part of the laws of England as of July 15, 1870 or of any other date.

Assuming, on the other hand, that the Act 5 Geo. 2, c.7 was introduced into the Northwest Territories as part of the laws of England as of July 15, 1870 then it is suggested that the Statute Law Revision Act, 1887,[127] which repealed the 1732 Act, was an "Act of the Parliament of the United Kingdom applicable to the Territories" within the meaning of section 11 of the Northwest Territories Act.[128] Upon its repeal in 1887 the Act of 1732 then ceased to be part of the laws of England in force in the Territories, if it ever had been in force.

To say that the repeal of 5 Geo.2, c.7 in 1887 was not applicable to the Territories and the rest of Canada would seem to leave the repeal devoid of meaning, since the Act itself was obviously applicable to, and only to, the colonies in America and it is difficult to conceive

of any meaning for the repeal of the Act unless it applied to those same colonies and all of them.

However the correct position seems to be that the Act 5 Geo.2, c.7 (1732) was in force in the Territories until 1887, not as a law of England, but because it was a statute in force in the Territories, as in Upper Canada, proprio vigore. As such there seems to be no doubt that when it was repealed in 1887 it ceased to be in force in the Territories at all. Consequently the Act of 1732 never was part of the law of Alberta.

The application of the Act 5 Geo.2, c.7 in Canada has also been dealt with in other cases and articles.[129]

La Forest in his article Some Aspects of the Writ of Fieri Facias[130] suggested that the Act might well still be in force in New Brunswick,[131] but in the absence of legislation of that province to that effect it would seem that the application of the Act to that province ceased when it was repealed in 1887 upon the grounds given above. However presumably if the Act ever had been in force in New Brunswick it would have been in force from the commencement of the colony on October 3, 1758[132] until 1887.

Similarly Dunlop, in his article Execution Against Real Property in British Columbia[133] suggested that until 1899 the Act was in force in British Columbia

"either directly or by virtue of the English Law Act."[134] Again, it is suggested that in 1887 the Act 5 Geo.2, c.7, ceased to be in force proprio vigore in British Columbia if it ever had been so in force (presumably if it had been in force proprio vigore in British Columbia it was only from the commencement of the colony on November 19, 1858);[135] and, as in Ontario, it could not have been introduced into British Columbia as part of the laws of England since it never was a law of England. In 1899 the writ of fieri facias against land, but not the fi. fa. against goods, in British Columbia was abolished[136] thus seemingly doing away with the remaining significance, if any, of the Act 5 Geo.2, c.7 in that province.

In Manitoba the writ of fieri facias against lands was also abolished, in 1889.[137] The Manitaba Court of Appeal in Bejko v. Robson[138] in 1934 seemed to take it for granted that the Act 5 Geo.2, c.7 had been in force in Manitoba until 1889 but that it was repealed by implication by the Act of that year.[139] The court also seemed to assume that the Act had been introduced into the province as of July 15, 1870 as part of the laws of England. Once again, it is suggested that this assumption is not warranted, on the grounds given above.

Finally, the Act 5 Geo.2, c.7 has been considered in at least two Alberta cases but in each case by the same judge.

Thus, in Traunweiser v. Johnson,[140] in 1915,

Stuart, J., said that the Act 5 Geo.2, c.7 "is in force in Alberta"[141] but two years later in delivering one of the judgments of the Court of Appeal in Seay v. Sommerville Hardware Co. Ltd.[142] he changed his mind and said the Act was probably not in force here.[143]

Unfortunately Stuart, J., did not, in either of these cases, consider the effect in the Territories and in Alberta of the 1887 repeal of 5 Geo.2, c.7. Rather he seemed only to be concerned whether 5 Geo.2, c.7, was in force as being a law of England as of July 15, 1870 which was applicable in Alberta.

Nonetheless the conclusion seems compelling, from the arguments given above, that: (1) the Act 5 Geo.2, c.7 was never part of the laws of England and therefore was never introduced into this province as part of those laws; (2) further, even if in spite of the above the Act was introduced into the Territories as part of the laws of England then it was repealed by the Imperial Act of 1887 which it seems must have been applicable to the Territories; and (3) finally that if the Act were ever in force proprio vigore in the Territories (which it seems it was) then it ceased to be so in force when it was repealed by the Imperial Parliament in 1887 and was therefore never in force in the province proprio vigore.

The conclusion that must be drawn from all of the above is that although historically the right in Canada to sell land in execution under fieri facias was founded on

the Act 5 Geo.2, c.7 (1732) the right, if any, to sell land in Alberta under this writ is not derived from this statute.

(3) Ordinances of the Northwest Territories and Statutes of Canada

In so far as the law of execution is concerned, one of the effects of section 16(1) of the Alberta Act, 1905,[144] in combination with section 11 of the Northwest Territories Act,[145] is that ordinances of the Northwest Territories and statutes of Canada made prior to, and in force in, 1905 are to remain in force in Alberta until repealed, abolished or altered by the Legislature of the province.

The question then is whether there were any such ordinances or statutes which authorized execution against land under fieri facias and if there were whether they are still in force in Alberta.

In fact there was such an ordinance and it expressly provided that a judgment creditor had the right to execution by fieri facias against his debtor's lands.

This was the Judicature Ordinance, 1898.[146] Rule 355 of the Ordinance provided that every writ of execution should be in form B of the schedule thereto where appropriate:

> Every writ of execution shall follow form B in the schedule hereto adapted to the circumstances of each case and where form B is not appropriate the form shall be settled by the judge on ex parte application.

The form of writ of execution prescribed by form B of the Judicature Ordinance was the common law writ of fieri facias except that the sheriff was commanded to cause the debt to be made from "the goods (or lands as the case may be)" [emphasis as in original] of the debtor rather than from the goods and chattels of the debtor as at common law.

To the extent form B was directed against goods it did not differ from the common law writ. Because form B omitted the word chattels in its directions to the sheriff it may have been a restriction of the common law to the extent, if any, that "chattels" included property not covered by "goods". To the extent it commanded the sheriff to make the debt from the debtor's land form B was an extension of the common law.

The express authority to use fieri facias against land was contained in, and the reason for the use of the disjunctive "or" in the command to the sheriff in form B was made clear by, rule 364(1) of the Ordinance. This rule expressly stated that a judgment creditor was entitled to issue a writ of execution against the debtor's lands, but also stated that there was to be one writ of execution against goods and a separate writ against lands;

> Any person who becomes entitled to issue a writ of execution against goods may at or after the time of issuing the same issue a writ of execution against the lands of the person liable in any judicial district provided that not less than $50 remain due and unpaid on the judgment and deliver the same to the sheriff

> of the district named in the writ and charged with the execution of the writ of execution against goods at or after the time of delivery to him of the writ against goods and either before or after any return thereof; but such officer shall not sell the said lands within less than one year from the day on which the writ against lands is delivered to him nor until three months' notice of such sale has been posted in a conspicuous place in the sheriff's and clerk's offices respectively and published two months in the newspaper nearest the lands to be sold.

Rule 364 of the Judicature Ordinance was a direct statutory replacement for the Act (Imp.) 5 Geo.2, c.7 (1732) which as stated above had been repealed in 1887.

This rule was still in force in 1905 when Alberta became a province. After the Alberta Consolidated Rules of Court were promulgated in 1914[147] there was some doubt expressed as to whether rule 364 was then in force here,[148] but any uncertainty vanished when the Judicature Ordinance, 1898, was repealed by the proclamation on August 15, 1921 of the Judicature Act of 1919.[149]

(4) Statutes of Alberta

There is presently in Alberta no express statutory replacement for the Act (Imp.) 5 Geo.2, c.7 (1732) or for rule 364 of the Judicature Ordinance, 1898, both of which permitted execution against land by the writ of fieri facias.

In fact in Alberta this subject is only expressly dealt with in rule 347 of the Supreme Court Rules[150] which states that every "writ of fieri facias shall be issued against both the goods and lands of the Debtor."

Probably the intent of this rule is to eliminate the separate writs against goods and lands which had been required in the Territories. Unfortunately the draftsman appears to have copied our form[151] of the writ of execution from form B of the Judicature Ordinance, 1898. That is, our form of writ commands the sheriff to make the debt from "the goods or [emphasis added] lands of" the debtor rather than the goods and lands as stated in rule 347.

It is suggested that the word "or" in our writ should be replaced by "and" since the word "or" was used in the Territories form of the writ (of which our form appears in part to be a copy) because in the Territories separate writs were used against the goods and lands of the debtor and the "or" in the form simply indicated that the inapplicable word should be struck out according to whether the writ was against the goods or lands.

As it is our form of writ apparently [illegible]ts the execution to either the goods or the chattels of the debtor but not both although this was not the meaning of form B of the Judicature Ordinance on which our form is based nor is it apparently the intention of rule 347.

The problem which arises from this dearth of Alberta legislation directly stating that fieri facias can be used against lands is to find whether the right might be given by implication by some provincial statute.

One possible source of such authority is sections

131, 132 and 133 of the Land Titles Act[152] which prescribe that any sale of land under process of law must be confirmed by the court, that the transfer of land must be registered within two months from the date of such confirmation and that any person interested in the sale may make the application for confirmation. It is suggested, however, that these sections do not give a right to take land in execution under fieri facias. They merely state rules which must be followed when land can be sold under judicial process. They do not state that execution under fieri facias is one of the methods, or perhaps the only method, of selling land under judicial process.

Similarly section 15 of the Seizures Act[153] states that no land may be sold under a writ of execution unless there has been a return nulla bona and until after the Registrar of Titles has had a copy of the writ for one year. This section makes it clear that it is taken for granted that lands may be taken in execution under a writ of execution and sold, but, by itself it does not give the right to such execution, nor does it necessarily imply that the method of execution contemplated by it is fieri facias.

Consequently it seems that if the right to execution against lands by fieri facias is conferred by some Alberta legislation some other source must be looked for.

The best possibility seems to be section 128(2) of the Land Titles Act[154] which states that all legal and equitable interests of a debtor in land registered in his name, including his interest as an unpaid vendor, are bound by a writ of execution upon and from the Registrar's receipt of a copy of it and that no instrument executed by the debtor after that time is effectual except subject to the rights of the execution creditor:

> Upon and from the receipt by the Registrar of the copy of the writ, all legal and equitable interests of the execution debtor in any lands there or thereafter registered in his name and including his interest, if any, as an unpaid vendor of the land, are bound by the execution, and from and after the receipt by the Registrar of the copy, no certificate of title shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of the land is effectual except subject to the rights of the execution creditor under the writ while it is legally in force, and the Registrar, on granting a certificate of title and on registering any transfer, mortgage or other instrument executed by the debtor affecting the land, shall, by memorandum upon the certificate of title in the register and on the duplicate issued by him, express that the certificate, transfer, mortgage, or other instrument is subject to such rights.

Significantly, section 128(2) does not define what a writ of execution is; that is, it is not explicit in this section that it is referring to a writ of fieri facias. Likewise no where else in the Land Titles Act is there such a definition.

Accordingly the only way of implying from this section that it confers a right of execution against land

by fi. fa. seems to be by finding that the statement that all lands are bound by a writ of execution means that such lands are subject to execution by fieri facias. The above comments indicate that an investigation of the meaning of the word "bound" may be in order.

Until 1676, by the common law, a debtor's goods were bound by a writ of fieri facias from the teste of the writ. This was altered in 1676 by section 16 of the Statute of Frauds[155] which provided that "no writ of fieri facias or other writ of execution shall bind the property of the goods" of the debtor "but from the time that such writ shall be delivered to the sheriff...to be executed."

It is immediately apparent from the words of section 16 that to say that property was bound by a writ of execution did not exclusively refer to writs of fieri facias. In fact there were several other kinds of writs of execution which could be used against goods. Two examples were the writ of elegit and the writ of levari facias.[156]

Furthermore the statement that goods were bound by a writ was not a definition of or the source of the rights which the creditor had under the writ. Rather all that the statement meant was that once goods were bound by the writ the creditor could enforce his rights against the debtor and also against any person claiming the goods under an assignment from the debtor after the

goods were bound by the writ.

In Payne v. Drewe[157] in 1804 Lord Ellenborough said that the:

> sense in which, and extent to which goods are in either case [i.e., "by the award of an execution before the Statute of Frauds and by the delivery of the writ of execution since that statute"] said to be bound is that it binds the property as against the party himself and all claiming by assignment from, or representation through or under him.[158]

And in Lowthal v. Tonkins[159] Lord Hardwicke said the effect of the Act is:

> That after the writ is so delivered, if the defendant makes an assignment of his goods, except in market overt, the sheriff may take them in execution.[160]

In 1896 the Territorial Court, in Limoges v. Campbell[161] had to consider the meaning of section 94 of the Territories Real Property Act[162] which provided that no land should be bound by any writ until a copy of it had been delivered to the registrar. At that time execution creditors were expressly permitted, by an ordinance of the Territories,[163] to issue a writ of fieri facias against land.

In Limoges v. Campbell Scott, J., in effect held that the only effect of section 94 was that any person who acquired an interest in the debtor's land after the delivery of a writ to the registrar was subject to the execution:

> The reasonable construction of s.94 is that it merely provides that in case of any dealing

> with the land by the execution debtor the person acquiring an interest from him would take such interest subject only to those executions of which copies have been delivered to the registrar.[164]

In the same case the court considered the meaning of the statement that goods are bound by a writ.

Scott, J., said that this meant that the sheriff could take goods in execution from any person who acquired them from the debtor after the goods were bound:

> The meaning of the words "that the goods shall be bound by the delivery of the writ to the Sheriff" is that after the writ is so delivered, if the defendant makes an assignment of the goods even for a valuable consideration, unless in market overt, the sheriff may take them in execution. The binding both in case of the Crown and a private person relates only to the debtor himself and his acts, so as to vacate any itermediate assignment by him otherwise than in market overt, but the property in the goods is not altered until execution and sale by the Sheriff.[165]

The meaning of the words "bind" and "bound" in respect of garnishees were considered in Holmes v. Tutton,[166] where Lord Campbell said:

> We construe the word "bound" as not changing the property or giving even an equitable property either by way of mortgage or of lien, but as putting the debt in the same situation as the goods when the writ was delivered to the sheriff. We take the word "bind" to mean that the debtor, or those claiming under him, shall not have power to convey, or to do any act, as against the right of the party in whose favour the debt is bound; and we construe it as not giving any property in the debt, in the nature of a mortgage or lien, but a mere right to have the security enforced.[167]

It is apparent that the service of a garnishee order bound a debt in the same way as a writ of execution bound goods, that is in either case it meant that the debtor, and any person claiming under him after the property was bound, was subject to the rights of the creditor.

It is suggested that all of the above indicates that the meaning of section 128(2) of the Land Titles Act is only this: that after a writ of execution is delivered to the Registrar, the interest of the debtor in any land, and the interest of any third party in the land arising under an assignment from the debtor to the third party made after the delivery of the writ to the Registrar is bound by the execution.

But what section 128(2) does not say is what kind of execution can be used against land nor what the rights of the execution creditor are under that kind of execution.[168] In order to find out what kind of execution a creditor can use against land we have to look to rule 347 of the Supreme Court Rules[169] because only there is there a description of the kind of execution, i.e., fieri facias, and not some other kind of execution, that a creditor can use against land.

In other words we know from section 128(2) of the Land Titles Act that land is bound by a writ of execution from the time the Registrar receives a copy of

it; we know from rule 347 that the kind of execution to be used against land is fieri facias; and we know from the common law (as modified by statute) what the rights of an execution creditor under fi. fa. are.

The difficulty is that probably the right to obtain execution against land by fieri facias must be based on a statute and that it can not be given by the Rules of Court.[170]

Stuart, J., commented on this problem in Traunweiser v. Johnson[171] in 1915:

> The matter is one of some difficulty, and I think it is quite obvious that the root of the difficulty lies in the absence of any very definite legislation as to the right to sell lands under a writ of execution. Apparently we now have nothing but r.584 which says:
>
> every writ of fi. fa. shall be issued against both the goods and land of the debtor.
>
> The old r.364, which was statutory, did, of course, enact that a writ of execution might issue against lands. And I do not say that there is not a right to sell lands under execution, but I point out that such a right was clearly at one time looked upon as a matter of substantive law and not a matter of procedure, because both in England and in Ontario a statute was required before it could be done. Yet with us the legislation on the subject has apparently dwindled down to the bald terms of r.584. The Land Titles Act deals only with matters of registration and the confirmation of sales and there is no doubt that the right to seize and sell lands is assumed to exist independently of that Act. It may be that in the last resort, the law of England as it stood in 1870 may be resorted to, although at that date there was no fi. fa. lands in England nor is there even now. But there is certainly no statute of our own definitely establishing the right

> to sell lands to satisfy a judgment. We have not the advantage of any definition of the term "lands" in any such Act, or even to throw light on r.584. The definition of the term "land" in The Land Titles Act will certainly not apply because the question is what the word "lands" in the writ includes and The Land Titles Act does not interpret that.[172]

The reasoning behind Stuart, J's., statement "that the right to seize and sell lands is assumed to exist independently of" the Land Titles Act may have been the historical background discussed earlier.

As shown above, in the Territories, the right to seize and sell land under fi. fa. was first given by the Act (Imp.) 5 Geo.2, c.7 (1732), which was repealed in 1887. But the right was continued by statute under section 345 of Ordinance No. 6 of 1893 and by rule 364 of the Judicature Ordinance, 1898. The parallel in the Territories of our present section 128(2) of the Land Titles Act was first enacted in 1886 as section 94 of the Territories Real Property Act, 1886.[173] This section was superceded by section 92 of the Land Titles Act, 1894.[174]

Therefore, in the Northwest Territories, section 92 of the Land Titles Act, 1894, which was the equivalent of section 128(2) of our Land Titles Act, existed simultaneously with rule 364 of the Judicature Ordinance, 1898, which gave an express statutory right to execution against land by fi. fa. in the Territories.

Whether by oversight or otherwise, when Alberta became a province it enacted section 77 of the Land Titles

Act, 1906,[175] to replace section 92 of the Land Titles Act, 1894 but it did not enact a statutory provision equivalent to section 364 of the Judicature Ordinance, 1898, to give statutory right to execution against land. Section 364 of the Judicature Ordinance, 1898, is not in force in Alberta and the only express right to execution against land by fieri facias in Alberta is now given by rule 347 of the Supreme Court Rules and this rule has not been given the force of a statute.

If the concerns expressed by Stuart, J., are well founded the very right to execution against land in Alberta by fieri facias is questionable.

Notwithstanding the above it is of course possible that section 128 might be considered to be the source of the right to execution against land by fi. fa. However if there is any doubt that the right to execution against land in Alberta is properly established by section 128 it is submitted that this doubt should be removed by legislation. This could easily be done either by giving rule 347 of the Supreme Court Rules the force of statute or by enacting it as a section of the Seizures Act or the Land Titles Act.

F. The Method of Obtaining Execution under Fieri Facias

(1) Commencing the Execution by a Seizure

At common law as soon as an execution creditor had delivered his writ to the sheriff he was entitled to require the sheriff to seize whatever of the debtor's

goods and chattels were bound by the writ.

The seizure of goods by the sheriff was the inception or commencement of the execution against them. Thus the mere obtaining by the creditor of a writ of fieri facias was not the beginning of the execution against them, nor was it started by the delivery of the writ to the sheriff for execution.

This point was considered by the House of Lords in 1832 in Giles v. Grover.[176] In one of the majority opinions delivered to the House of Lords, Patteson, J., said:

> I apprehend that seizure under an extendi facias is the inception of the execution, and so is seizure under a fieri facias.[177]

Similarly, in the same case Taunton, J., held that "the delivery of the writ to the sheriff is no execution thereof"[178] and Vaughn, J., said that the seizure of goods is the inception of the execution against them.[179]

There was one exception to the rule that the sheriff had to seize goods in order to commence the execution against them. This was in relation to leasehold interests. The execution against such interests could be commenced either by a seizure of the lease or by a sale of the term by the sheriff without a prior seizure.[180]

The obvious question with respect to fi. fa. against lands then is whether the sheriff must seize them

in order to commence the execution against them.

This question was the subject of many early cases in Upper Canada and the consensus of all[181] was that a seizure was required in order to commence an execution against lands under fi. fa. just as it was required in order to commence an execution against goods.

The only difficulty which arose was the determination of what was required in order to seize lands because obviously the sheriff could not physically remove lands as could be done with chattels.

The following were variously described as methods by which the sheriff could seize land: (1) an entry by the sheriff on land owned by the debtor with the intention of seizing it and any other land owned by the debtor whether the sheriff expressly stated this or not;[182] (2) taking title deeds;[183] (3) a symbolic act such as laying hold of the knock of the door or the limb of a tree;[184] (4) an inquest by a sheriff's jury;[185] (5) a constructive seizure by some "open and notorious proceeding towards the execution of the writ...as perhaps the public advertisement of the lands"[186] though to be a constructive seizure the advertisement would have to be in the official Gazette and not in a local newspaper;[187] and (6) the filing of a bill to declare that a deed of land executed by a debtor to a third party was void as against an execution creditor.[188]

The existence of all of these possibilities

created uncertainty "as to what was a sufficient inception of an execution against lands to enable the sheriff to complete it by sale and conveyance".[189] This doubt was removed by the Execution Act, 1877,[190] which stated that an advertisement of land for sale in the Gazette was a sufficient inception of the execution to permit the sheriff to sell it. But apparently this was only a statutory declaration of what the law had always been deemed to be and did not mean that such advertising was the only method of seizing land.[191]

In Alberta we have no such explanatory legislation. We do have section 15(2) of the Seizures Act[192] which says that notice of the sale of land must be given by advertising or otherwise as may be ordered by a judge.

But this section does not state that the obtaining of directions from a judge or that the giving of the notice required by the judge is equivalent to a seizure nor that it is a sufficient inception of an execution against lands to permit the sheriff to sell them.

In the absence of legislation to the contrary it must be assumed that a seizure of lands in some form is still necessary in Alberta. The only question is whether the obtaining of directions or the giving of the notice required by section 15(2) of the Seizures Act is either one way, or possibly the only way, of making such a seizure.

That the giving of the notice is necessary is clear; that it is even a method of effecting the required seizure, let alone the only way of doing so, is not so clear. At least as early as 1822 an Ontario statute[193] required the sheriff to advertise land in the official Gazette before selling it. As in the present Alberta Seizures Act there was no mention in the Act of 1822 of the necessity of a seizure of land before selling it nor was there any mention of whether the advertising was a sufficient inception of the execution to permit the sheriff to sell the land.[194]

But despite the Act of 1822 it is obvious that the Ontario courts considered that a seizure of land was necessary, although they also considered that a constructive seizure probably resulted from the publishing of the advertisement required by the Act. Again, the Execution Act of 1877[195] was passed specifically to remove any doubt as to whether such an advertisement was sufficient as a seizure.

Consequently, it seems that in Alberta the giving of the notice required by section 15(2) of the Seizures Act may be, but is not necessarily, equivalent to a constructive seizure of the land described in the notice; but also that the giving of that notice is not the only way of seizing land. In other words it is possible that a seizure of land can, and possibly should, be made before

the giving of the notice of the sale. In that case the giving of the notice would be a necessary condition for a sale but would not be the inception of the execution. The enactment of explanatory legislation in this area is just as desirable in Alberta now, it is suggested, as it was in Ontario in 1822.

In practice, if the giving of the notice (or even some earlier step in the proceedings to obtain directions for the manner of giving notice) amounts to a seizure of the land then there is little point in carrying out an independent seizure. But on the other hand any execution creditor who wishes to ensure no complaint can be made by the debtor as to the validity of proceedings for the sale of land might be wise to have a seizure carried out by having the sheriff enter on the land for the purpose of seizing it in addition to giving the required notice of sale.

Furthermore, if a creditor intends to rely on the giving of notice under section 15(2) of the Seizures Act as being a constructive seizure of the debtor's land it is suggested that such notice should be given by the sheriff and not by the creditor. To do otherwise would be taking a risk that there is not even a constructive seizure of the land by the sheriff unless the creditor can establish he is acting on behalf of the sheriff.

(2) The Manner in which the Sheriff holds the Property under Seizure

At common law, by making a seizure of goods the sheriff acquired a special property in them which gave him the right to maintain an action of trespass or trover against any person (including the debtor) who wrongfully took them away.[196] This special property was for the sheriff's benefit and not for the benefit of the creditor under whose writ the seizure was made.[197]

It is difficult to say if this special property exists after a seizure of land. Since obviously lands cannot be removed as goods can there may be no need to give the sheriff this privilege. On the other hand possibly cases might arise where it would be necessary for the sheriff to obtain an order removing a trespasser from land before selling it.

Another consequence of a seizure of goods at common law was that the goods were thereby placed in the custody of the law. This legal custody which the sheriff had was for the sheriff's benefit and for the benefit of the person ultimately entitled to the goods whether that person was the seizing creditor or someone else. Thus a seizure was not for the benefit of the creditor alone but for the benefit of every one who then or thereafter might be entitled to the goods. The reason for the rule was that even if a sheriff had seized goods for one creditor a second creditor or other claimant with a higher priority might come along before the goods were sold. The sheriff was then to hold the goods for that person and not the

original creditor.[198]

There is no reason to suppose that this rule of common law which applies in cases of the seizure of goods does not also apply in cases of the seizure of lands.

(3) Completing the Execution by a Sale

At common law, after a seizure the sheriff had a duty to sell[199] and could be compelled by the creditor to sell[200] the goods which had been seized by the sheriff and which were bound by the writ.

It is plain from the provisions of the Alberta Land Titles Act and the Seizures Act that a sale of land is expected under execution in Alberta, and in Doe Tiffany v. Miller[201] in 1850 Macaulay, J., said of an execution against lands that the seizure gave the sheriff the power to sell them.

As mentioned earlier a condition precedent to a sale of land in Alberta is that notice of the sale be given as required by section 15(2) of the Seizures Act.[202] This section does not specify to whom such notice is to be given but only that it shall be as directed by a judge:

> No lands shall be sold under a writ of execution until after the giving of such notice of the sale by advertising or otherwise as may be directed by a judge.

Furthermore by section 15(1) of the above Act, unless otherwise ordered by a judge, no lands are to be sold until after a return nulla bona against the debtor's

goods and until after the Registrar of land titles has had a copy of the writ for one year:

> No sale of lands shall, unless a judge otherwise orders, be had under a writ of execution
>
> (a) until after a return nulla bona in whole or in part, and
>
> (b) until after the expiration of one year from the date of the receipt by the Registrar of the appropriate land titles office of the copy of the writ of execution.

At common law there was no requirement that the sale be by a public auction and the sheriff could sell the goods to anyone, including the execution creditor.[203]

In Alberta the intent of section 15(3) of the Seizures Act[204] is presumably that lands are to be sold at a public auction, but it does not expressly say so:

> When at any sale by auction held by a sheriff of land taken in execution
>
> (a) there are no bidders, or
>
> (b) the sheriff receives for the land no bid that he deems sufficient,
>
> the sheriff may from time to time adjourn the sale to a date to be subsequently fixed by the sheriff and either to the same or a different place and, in any other case, notice of the adjourned sale shall be given in the manner prescribed by section 14.

In fact there seems to be no Alberta legislation which expressly requires that a sale of lands be by either a public sale or auction whereas there is such provision with respect to goods.[205] This situation may, it is suggested, be an oversight which should be remedied by legislation.

There is a further statutory requirement in Alberta in the case of the sale of lands under execution. By section 131 of the Land Titles Act[206] no such sale of registered land by a sheriff is valid unless it has been confirmed by the court:

> No sale by a sheriff or other officer, under process of law, of any land for which a certificate of title has been granted or of any lease thereof or any mortgage or encumbrance thereon is of any effect until it has been confirmed by the court or a judge, but when any such land is sold under the process of law, the Registrar, upon the production to him of the transfer of the same, in Form 32 in the Schedule, with proof of the due execution thereof, and with an order of the confirmation of the sale endorsed upon the transfer or attached thereto, shall, after the expiration of four weeks after receiving it, register the transfer, cancel the existing certificate of title wholly or in part, if less than the whole of the land comprised therein is sold, grant a certificate of title to the transferee, and issue to him a duplicate certificate in the prescribed form, unless the registration is in the meantime stayed by the order of the court or judge, and in that case the registration shall not be made except according to the order and direction of the court or judge.

At common law, after selling land[207] or after selling a leasehold interest in land,[208] in order to satisfy the requirements of the Statute of Frauds, the sheriff was required to execute a conveyance of the land or the lease and to deliver the conveyance to the purchaser. Section 131 does not seem to have altered or added to this duty on the sheriff but rather imposes a duty on the Registrar to register such a conveyance.

By section 133 of the Land Titles Act[209] any

person interested in the sale can apply for the order of confirmation:

> The application for confirmation of a sale of the land made under any process of law may be made by the sheriff or other officer making the sale or by any person interested in the sale, on notice to the owner, unless the judge to whom the application is made dispenses with the notice, and if the sale is confirmed the costs of confirmation shall be borne and paid out of the purchase money, or as the judge directs, but in case the sale is not confirmed the purchase money paid by him shall be refunded to the purchaser, and the judge may make such order as to the costs of all parties to the sale and of the application for its confirmation as he thinks just.

And finally by section 132 any such transfer of land and order confirming sale are invalid unless registered within two months of the date of the order, unless otherwise ordered:

> A transfer of land sold under process of law shall be registered within a period of two months of the date of the order of confirmation, unless this period is extended by an order of the court or a judge filed with the Registrar, and if not registered within that period or within the time fixed by the order, ceases to be valid as against the owner of the land sold and any person or persons claiming by, from or through him.

At common law an execution against goods was completed, or executed by their sale by the sheriff.[210] This it seems was also the common law rule with respect to executions against land.[211] It may be supposed, however, that in Alberta now the sale itself is only completed when it has been confirmed by a judge as required by the Land Titles Act.

In principle, there seems to be no reason why the completion of the sale should wait upon the registration of the transfer of land after the order of confirmation has been granted since the decision as to when to register should belong to the purchaser from the sheriff and there is no reason why the time of completion of the execution should depend upon his whim. In this case the sheriff should pay out the proceeds of the sale if the purchaser chooses not to register his transfer.

This would lead to the possibility that the purchaser could pay the purchase price to the sheriff, the sheriff could pay the creditor and yet the purchaser could still lose his interest in the land if he did not register his transfer within the two month period. It is suggested that there is no obvious reason why this consequence should be required and that possibly section 132 should be removed from the Land Titles Act or at least amended to prevent this kind of situation from occurring.

G. Interests in Land Bound by the Writ of Fi. Fa.

(1) General Principles

(a) Some of the Rules of the Common Law as to the kinds of Goods which were Bound by Fieri Facias.

(i) The Debtor's Interest in the Goods had to be either Legal or the entire Equitable Interest therein.

Because execution under the writ of *fieri facias* was a common law remedy, only legal, and not equitable, interests in goods could be seized and sold under it.[212]

The sole exception was in the case where the debtor owned the entire beneficial interest in the goods.[213]

(ii) Only Goods which were Seizable were Bound at Common Law

At common law no goods were bound by a writ of execution unless they were capable of being taken in possession by the sheriff. The reason for this rule was apparently that in order to execute the writ the sheriff had to physically hand the goods to the person who bought them from him. Any goods, or interest in goods, which could not thus be handed over could not be seized either and therefore were not bound by the writ.

This point was made by Lord Ellenborough, C.J., in Scott v. Scholey,[214] where in deciding on the exigibility of an equitable interest in a lease he said:

> The language of these writs and return evidently imports, that the goods and chattels, which are the object of them, are properly of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such also as are conveniently capable of sale and transfer by the sheriff to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, and also in respect of the instrument by which the term is created and secured, (both of which are capable of delivery to a vendee), has been always held to answer the description of the writ, and to be saleable thereunder.[215]

(iii) Only Goods in the Possession of the Debtor were Bound at Common Law

At common law the sheriff could generally only exercise his power to seize goods against the debtor himself.

In other words the sheriff usually could not seize goods which were in the possession of a third party in cases where the debtor himself had no right of possession.

Thus the sheriff could not seize from a third party goods which that party had rented or leased from the debtor[216] nor which the third party held as mortgagor under a legal mortgage to the debtor.[217]

Likewise it was held that the sheriff could not seize goods from a third party held by that party as a purchaser under a conditional sales agreement with the debtor as vendor.[218]

It must be noted that this requirement that the debtor have possession of the goods is related to the requirement that the goods be seizable. That is why in the absence of legislation to the contrary it was not possible under fi. fa. to seize the interest of, say, a conditional vendor. His interest was not a tangible thing capable of manual seizure and delivery to a purchaser from the sheriff. On the other hand, the tangible thing, which was seizable as such, could not be seized in fact because the debtor did not have possession of it or the right to possess it.

There were two fundamental exceptions to the rule that the sheriff could not seize goods from a third party if the debtor had no right to possession as against that third party. These exceptions were in the case of

third parties who had acquired the goods under a fraudulent conveyance and in the case of some third parties who acquired the goods under a conveyance made by the debtor after his property was bound by the execution. In either case the sheriff could seize the goods from the possessi of the third party. Both of these cases will be described in greater detail later.[219]

There are also cases where the debtor does not have possession of his goods but where he is entitled to get possession. Thus if a third party held the debtor's goods under a common law lien or an innkeeper's lien the debtor had a right to regain possession upon payment of the amount secured by the lien. The sheriff could seize such goods from the possession of the third party but the goods were still subject to the lien and the sheriff was liable to pay the amount of the lien if he sold the goods.[220]

(iv) Only Saleable Goods were Bound at Common Law

In Legg v. Evans,[221] Parke, B., said that the "general rule of law is that the sheriff can seize only such things as he can sell."[222]

Examples of goods which at common law could not be sold by the debtor and which the sheriff could not seize were: (1) goods owned by a third party and possessed by the debtor under a common law lien;[223] (2) goods owned by a third person and possessed by the debtor as a borrower or depositee;[224] (3) goods owned by a third party and possessed

by the debtor as a rentee if his interest were not saleable[225] or had terminated before the seizure[226] or as a result of the seizure;[227] (4) choses in action;[228] (5) money;[229] and (6) goods owned by a third party and possessed by the debtor as a pledgee under a pledge unless the debtor had a power to sell as a result of the failure of the pledgor to redeem the goods.[230]

(v) The Application of the Above Common Law Rules of Execution Against Goods to Execution Against Land

The question which arises from the above discussion of the principles followed by the common law, in determining whether goods were or were not bound by a writ of fieri facias, is whether all or any of these rules apply to execution against land under the same writ.

There is no positive answer to this question. The best that can be said is that the courts have not pronounced a different set of rules to apply to execution against land; but on the other hand neither have the courts said that these rules do apply in such cases.

Some cases have refused execution against land in factual situations where this result could be interpreted to be consistent with an application of one or more of the common law rules. Unfortunately in none of these cases was the refusal to allow execution accompanied by an express statement that one of the common law rules of execution against goods was being applied. Any

interpretation of the cases as being supportive of the application to execution against land of the common law rules of execution against goods must therefore be regarded as equivocal.

Two kinds of cases support the proposition that an interest in land is not bound by a writ unless the interest is of a kind which can be seized by the sheriff. The first of these are the cases which have stated that an execution against land is commenced by a seizure of the land.[231] This requirement suggests, without proving, that a writ of execution only binds interests in land if the sheriff can physically or constructively take possession of the land itself.

The second kind of cases which deals with the seizability of the debtor's interest in the land involves cases in which the debtor is a mortgagee or unpaid vendor. In Loder v. Creighton[232] it was held that the interest of a mortgagee of land was not bound by a writ of fieri facias and in Traunweiser v. Johnson[233] and Merchants Bank v. Stocks[234] it was held that the interest of an unpaid vendor of land who was registered as the owner of land was not bound by a writ.[235]

One interpretation of these cases is that the reason the interests of the debtors were not bound was that they were not capable of being seized. In addition, since the interest that was capable of being seized, that is,

the land itself, was not in the possession of the debtors but of the mortgagors or purchasers the result is also consistent with the common law rule that only goods which were in possession of the debtor were bound by a writ against the owner. Clearly, it is only a supposition that these cases indicate that the common law rules applicable to goods also apply to land. The strength of the supposition is mainly that the results of the cases are not inconsistent with it.

Today the interest of an unpaid vendor of land can be bound by a writ under section 128 of the Land Titles Act[236] and the interest of a mortgagee of land can be bound under section 8 of the Seizures Act.[237] The results of the above cases would not be the same now but the principles generally established by them may still be the same. For example in Barnes v. Sharpe[238] it was held that a writ does not bind land registered in a debtor's name where his actual interest is as an assignor of an unpaid vendor's interest even if he is entitled to a re-assignment to him upon payment to the assignee of a debt for which the assignment was given as security. And in Marble v. Sullan and Ludgate,[239] in Saskatchewan, it was held that the interest of a registered mortgagee of land is not bound by a writ if the debtor has, before an attempted seizure of the mortgage, assigned his interest to a third party as security for the payment of a debt even if the debtor is entitled to a re-assignment upon

the payment of the debt. The results of these cases are consistent with the application to this kind of property of the common law rules of execution against goods.

One final example of a case which may have relevance to the application to execution against land of the common law rules regarding execution against goods is Johnsen v. Johnsen.[240] In that case, in one of the judgments of the Alberta Court of Appeal, Stuart, J. A., stated that the execution creditor could sell what the debtor could sell, and this was the whole interest in the land subject to the contingent dower estate of the debtor's wife.[241] This case was decided when the legislation permitted a person to dispose of his homestead but subject to the dower rights of his spouse.[242] Our present legislation of course absolutely prohibits a transfer of a homestead without consent or a judge's order.[243]

An inference could be drawn from the Johnsen case that if the creditor can sell only what the debtor can sell, then a writ does not bind land that that debtor can not sell. This is not a necessary implication but it is a reasonable one since if a writ does not bind goods if a debtor can not sell them on what grounds should a writ bind land which can not be sold by the debtor? In the case of land subject to dower, if the spouse consents to a sale by a debtor or if a judge

orders the land to be sold then the debtor could sell his and the land would then be bound by the writ and could be sold by the creditor. But unless a debtor has a power of sale the law may now be that while land is not saleable by him it is not bound by a writ against him.[244]

(b) The Effect of Section 128 of the Land Titles Act

(i) The Requirement that the Debtor's Interest in the Land be Registered in his Name

The first Torrens type of land legislation in force in the Territories was the Territories Real Property Act, 1886.[245] In 1894 it was replaced by the Land Titles Act.[246] Neither of these acts limited the effect of a writ of execution to lands registered in the name of the execution debtor.

Torrens legislation in Alberta started with the Land Titles Act, 1906[247] which also did not state that registered interests in land were bound by a writ of execution.

But even in the absence of such express legislation the courts said that only registered interests were bound:

Thus Harvey, C. J., said in Adanac Oil Co. v. Stocks[248] in 1916:

> It seems clear that the provision of the Act contemplates the execution affecting the interest of a registered owner and no one else.[249]

Similarly in 1917 Beck, J., said in Seay v. Sommerville Hardware Co. Ltd.:[250]

> So far then as these provisions extend it seems to be clear that an execution deposited with the registrar "binds" only lands standing in the name of the execution debtor as registered owner.[251]

It was only in 1921 that an amendment added the express statement that a writ bound lands registered in the name of the debtor. This is now part of section 128(2) of the Land Titles Act.[252]

This amendment may have been made to confirm the statements made in the Adanac and Seay cases and to make it clear that the conflicting decision of the Saskatchewan Court of Appeal in 1919 in Ruttle v. Rowe[253] was not the law of Alberta.

In the Ruttle case the Court held that a filed writ bound a debtor's interest in land owned by him but not registered in his name so that if after the writ were filed the debtor assigned his entire interest to a third party and if after the assignment the land were registered in the debtor's name then even if, as between the debtor and the third party, the debtor were a bare trustee for the third party yet the interest of the third party was bound by the writ. The Saskatchewan Land Titles Act[254] at that time was similar to the co-existing Alberta legislation in that it did not require that land be registered in a debtor's name to be bound by a writ.

Regardless of the reason for the 1921 amendment to the Alberta Land Titles Act the effect of the Act since, and possibly before, the amendment is to limit the effect a writ of execution would have in its absence.

The Land Titles Act limits a creditor's rights against land because by it only registered legal interests are bound by a writ whereas at common law all legal interests were bound. Further, it is a reduction of the common law because by it a writ does not bind an unregistered equitable interest in land even if the debtor owns the entire beneficial interest (eg. under a bare trust for the debtor) but such an interest would have been bound at common law.

(ii) The Effect of the Provision that a Writ Binds all Legal and Equitable Interests including the Interest of an Unpaid Vendor

Introduction

The broad terminology of section 128 of the Land Titles Act prompts the question whether there is any scope for the application to execution against land of the common law rules relating to execution against goods.

In the first place it seems that section 128 in part extends a creditor's rights under fi. fa. at common law. It is an extension because by section 128 all equitable interests of a debtor in land registered in his name are bound by a writ whereas at common law only equitable interests where the debtor owned the

entire beneficial interest were bound.

Section 128 is also an extension of the common law rules because by it the interest of an unpaid vendor in land registered in his name is bound whereas if the common law rules relating to goods applied to land then such an interest would not be bound.

Further, section 128 says that all registered legal and equitable interests in land are bound. Does this provision entirely dispose of the common law rules which applied to execution against goods?

There is no direct or positive answer to the question. One way of answering the question is by inference from the few cases which may have some relevance.

In Barnes v. Sharp,[255] decided in 1924, the debtor was at all material times the registered owner of certain land. Before a writ was registered against him he sold the land by agreement for sale and then assigned his interest as unpaid vendor to a third party as security for the payment of a debt owing to the third party. The execution debtor was entitled to a re-assignment to him of his interest as unpaid vendor upon payment of the debt to the third party. The execution creditor then registered his writ of execution.

Section 112(1) of the Land Titles Act, 1922,[256] was substantially the same as the present section 128(2).

It provided that:

> [upon] and from the receipt by the Registrar of such copy, all legal and equitable interests of the execution debtor in any lands there or thereafter registered in his name and including any interest of the said debtor as an unpaid vendor of such land, shall be bound by such execution...

Notwithstanding the apparent comprehensive language of section 112(1) it was held that the purchaser under the agreement for sale was entitled to have a clear title where he became entitled to receive, and registered, a transfer of land to him after the writ was filed but before the debt to the third party was paid.

This result suggests that if the common law rules of execution would apply to land in the absence of section 128(2) of the Land Titles Act then these rules are not in general superceded by that section.

In Johnsen v. Johnsen,[257] decided in the Alberta Appellate Division, in 1922, the execution debtor was the registered owner of land in which his wife at all material times had a dower interest. The Court held that the land could be sold under the writ but subject to the wife's contingent right to a life estate on the death of the debtor. But the judgment also seemed to indicate that a writ would only bind land which the debtor had the power to sell, even if the land were registered in the debtor's name.

When this case was decided section 77 of the

Land Titles Act, 1906,[258] was in force. It was also substantially the same as the present section 128.

The statements in the Johnsen case also suggest that the common law rules of execution, if they apply to land at all, are not in general displaced by section 128.

Another way of answering the question of whether section 128 disposes of the common law rules is to compare this section with other statutes in which broad powers of execution are given and to see what the courts have said about those statutes.

Comparison of Section 128 of the Land Titles Act with Section 12 of the Judgments Act, 1838

Section 12 of the Judgments Act, 1838[259] extended the kinds of chattels which could be taken in execution under fi. fa. beyond those allowed at common law. It authorized the sheriff to "seize and take any Money or Bank Notes...and any Cheques, Bills of Exchange, Promissory Notes, Bonds, Specialties or other Securities for money, belonging to the debtor."[260]

Except that it did not state that all "legal and equitable interests" in such chattels could be seized this section was similar to section 128(2) of the Land Titles Act; that is section 12 of the Judgments Act authorized the sheriff to seize any of these chattels that belonged to the debtor while section 128(2) of the Land Titles Act says that all legal and equitable interest

in land registered in a debtor's name are bound by a writ.

The question then is whether, under section 12 of the Judgments Act, the sole criterion of whether property was seizable was whether it belonged to the debtor, that is, whether in fact it meant that all such property belonging to the debtor was bound by a writ. The courts held that the broad words of the Judgments Act did not exclude the common law rule that goods could generally not be seized unless they were in the possession of the debtor.

It was held that if a sheriff had money in his hands payable to a debtor that money was not seizable by the execution creditor;[261] nor could the sheriff seize money in court which belonged to the debtor,[262] nor money which a third party held in trust for the debtor,[263] nor money in the hands of an auctioneer on which the auctioneer had a lien;[264] nor could he seize a cheque in the possession of the drawer payable to the debtor[265] or a cheque in the possession of the debtor's banker[266] and the same rule might also apply to the seizure of bills of exchange.[267]

Similarly, it was held that goods owned by a third party but in the possession of the debtor under a common law lien were not seizable from the debtor as being "other securities for money, belonging to the debtor." This followed not because the lien was not a kind of security or because it did not belong to the

debtor but because the interest of the debtor was a personal right which could not be acquired, even in equity it seems, by another person and therefore it could not be sold by the sheriff either.[268]

The significance of these comparisons is that if the old rules of common law still applied to the seizure and sale of chattels under the strong provisions of section 12 of the Judgments Act, 1838, these same rules may also apply in cases of the seizure and sale of land under the equally strong provisions of section 128(2) of the Land Titles Act.

Comparison with the Sale of Goods Act, 1893

The words of section 128(2) of the Land Titles Act respecting the binding effect of a writ against land may be compared to section 26(1) of the Sale of Goods Act, 1893:[269]

> A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the debtor as from the time when the writ is delivered to the sheriff to be executed...

Goods were defined by section 62 "to include all chattels personal other than things in action and money."

In effect, then, the Sale of Goods Act, 1893, provided that all chattels personal except things in action and money owned by a debtor were bound by a writ from the time of its delivery to the sheriff. These words are very similar to those in section 128(2) of the Land

Titles Act.

But notwithstanding the apparent meaning of section 26(1) of the Sale of Goods Act that all goods owned by a debtor were bound by a writ in fact this was not the case. That is, this enactment was not an alteration of the common law, so that even if goods were owned by a debtor they were not bound by a writ unless the debtor's interest were legal, seizable and saleable and unless they were in his possession.[270]

Conclusion

The conclusion to be derived from the foregoing, it is suggested, is that while section 128(2) of the Land Titles Act states that all legal and equitable interests in land registered in the name of a debtor are bound by a writ the actual binding effect is not so broad.

That is, based on the comparison with the Judgments Act and the Sale of Goods Act there is no necessary implication from section 128 that it abolishes pre-existing rules of common law except where this is expressly stated.

The section does expressly extend the binding effect of a writ to include registered equitable interests and the interests of unpaid vendors, both of which would not be bound if the rules relating to goods also apply to land.

But if the remaining common law rules ever did apply to land they may not be excluded by section 128.

If there is a possibility, as it seems there is, that these rules did and still do apply to execution against land they should certainly be kept in mind in pursuing an execution against a debtor's land. Several situations in which the common law rules, if they apply to land, might affect the outcome of an execution against land will be mentioned later in this paper.

(c) The Debtor's Rights over his Land during Execution

At common law, until a seizure by the sheriff of goods under seizure the debtor continued to own them[271] and could in fact until that time convey them to others,[272] although, as shown later the goods might still be bound in the hands of the person who acquired them from him.

In Lowthal v. Tonkins,[273] Lord Hardwicke said:

> [N]either before the Statute of Frauds, nor since, is the property in the goods altered, but continues in the defendant until the execution executed.[274]

One effect of a seizure of a debtor's goods was that it conditionally discharged him of the debt to the extent of the value of the goods so long as the seizure continued and so long as the execution was not avoided.[275] But the risk that his goods would be damaged or destroyed by unavoidable accident before their sale remained the debtor's.[276] Once the sale by the sheriff was made the debtor was absolutely discharged of the debt to the amount of the proceeds of the sale[277] and he was entitled to

bring an action for trover against the sheriff if he sold more than enough goods to satisfy the debt.[278]

Finally until the goods were sold by the sheriff the debtor could suspend the sale, stay the execution and regain the goods by payment of the debt. If he made such a payment it was not necessary or possible for either the creditor or the sheriff to give a bill of sale for the goods, or to sell the goods, to the debtor since until their sale by the sheriff under the writ the debtor always retained title to them.[279]

There are few cases which have considered the application of these common law rules to execution against land. However there seems to be no reason to suppose that rules of common law do not apply in such cases as well.

(d) The Creditor's Rights over the Land

(i) The Creditor has no Interest in the Debtor's Land

At common law the rights of the creditor in an execution were limited to the right to have the sheriff seize certain of the debtor's goods, the right to have the sheriff sell such of these goods as were bound by the writ and the right to have the sheriff pay the proceeds of the sale to the creditor.[280]

In particular at no time during proceedings under fi. fa., either by obtaining the judgment or the writ, or by delivering the writ to the sheriff for execution, or by

having the property seized and sold or at any other time did the creditor acquire any property in the debtor's goods or was any interest in those goods transferred to or held by the creditor.

In Giles v. Grover,[281] decided by the House of Lords in 1832, Patteson, J., said:

> It seems to me to be clear from these cases that the seizure of goods by the sheriff... will not vest any property whatever in the creditor under whose writ the seizure is made, in the cases of common persons.[282]

In the same case Alderson, J., said that "no property passes by the seizure from the original debtor to the creditor"[283] and also "that at no period of time does the execution creditor obtain any property whatever in the goods themselves."[284]

Vaughan, J., said of goods under seizure:

> The sheriff had indeed seized them under a fieri facias, but the plaintiff acquired no property in them by the sheriff's seizure.[285]

Similarly, per Tindal, L. C. J.,:

> It appears to me that the property in the goods seized under the fi. fa. is not in any manner altered by the seizure, but that it still continues in the debtor until the actual transfer thereof by the sheriff's sale under the writ to a stranger. If the property is changed by the seizure, it must be transferred either to the judgment creditor or to the sheriff; but there are no words in the writ to give it to either.[286]

And finally Lord Tenterden said that:

> it is perfectly clear, upon consideration of the subject, that the judgment creditor has no property in the goods while they remain in the hands of the sheriff...but [the goods] still remain the property of the debtor to whom they originally belonged.[287]

It is suggested that these rules of common law probably apply to execution against land as well as to execution against goods.

(ii) Execution as a Lien

Some kinds of claims or rights which one person has against property belonging to another person are called liens. Liens may be created voluntarily, by act of the owner of the property, or involuntarily, by operation of law.

A right against property created by operation of law is only a lien if it is made a lien by statute or if it is one of the particular kinds of rights which are described as a common law lien or as an equitable lien. Plainly, if an execution creditor has a lien, it is one which is created by operation of law and not by a voluntary act of the debtor. No Alberta statute expressly gives a lien to an execution creditor and no cases have held that a creditor under fi. fa. has an equitable lien on his debtor's property. Therefore it is submitted that if an execution creditor has a lien at all the lien must be a common law lien.

The common law lien, as stated by Park, B., in Legg v. Evans,[288] is a possessory lien which "continues only so long as the possessor has the goods."[289] An execution creditor however does not possess and does not have the right to possess the debtor's property.

This point was made in Giles v. Grover,[291] in 1832, where Taunton, J., said of the creditor's status

after a seizure of goods:

> Neither had the judgment creditor in this instance any lien on the goods.[292]

The learned judge, in support of his statement, then demonstrated that a lien could only exist where the claimant had possession of the goods but in the case of fieri facias the sheriff, and not the creditor, had the possession of the goods under seizure.

This conclusion seems equally applicable to lands as to goods; that is, an execution creditor does not have a lien on his debtor's lands.

Notwithstanding the above, there have been many Ontario cases[293] in which it has been said than an execution creditor whose writ has been registered does have a lien on his debtor's lands. To the extent, if any, that the lien referred to in these cases is a common law lien, it is suggested that they are incorrect on the grounds given in Giles v. Grover. Furthermore, none of these cases gave any grounds for suggesting that the creditor has an equitable lien on the debtor's lands. To the extent they are based on a statute, if any, which provides that an execution creditor has a lien on his debtor's lands there is certainly no legislation in Alberta which expressly states that the creditor has a lien on his debtor's lands.

In Alberta and the Territories some judgments have referred to the execution as a lien but usually not

in situations where the existence or nonexistence of a lien was relevant.[294]

In Deering v. Gibbon,[295] decided in 1907, Beck, J., held that in an execution against goods delivery of a writ to be executed created a lien on the debtor's property. This, he said,[296] resulted from the force of the word "bind" in rule 356 of the Judicature Ordinance, 1898,[297] which stated that a writ from the time of its delivery to the sheriff would bind all of the debtor's goods.

Actually, in order for Beck, J., to reach the decision he did in that case it was not necessary for him to decide that the creditor had a lien on the debtor's goods. All he had to find was that the execution creditor had the right to have the sheriff seize and sell goods from the possession of a third party (in that case an assignee for the general benefit of creditors under an Act[298] which had not come into force until after the creditor had delivered his writ to the sheriff) who acquired the goods from the debtor after the delivery of the creditor's writ to the sheriff.

Beck, J., held that the creditor had this right. However he then added, unnecessarily it is suggested, that this right was a lien. The correct situation, it seems, is rather that the right which the creditor under an execution has against his debtor's goods and the right

which a common law lienor has against his debtor's goods are each independent of and unrelated to the other.

This statement is supported by the judgments in Giles v. Grover[299] mentioned above and also by the judgment in Holmes v. Tutton[300] in which, in connection with garnishees, the court specifically stated that a judgment creditor who had served a garnishee summons on a garnishee did not have either a legal or equitable lien on the debt owing by the garnishee to the debtor even though the effect of a garnishee was to bind such a debt. In fact the court said a creditor under a garnishee had the same rights against a debt owing to his debtor as a creditor under a writ of fieri facias, had against goods owned by his debtor; that is, the right to enforce his rights even against third parties who acquired the property from the debtor after it was bound by the writ or garnishee:

> We construe the word "bound" as not changing the property or giving even an equitable property either by way of mortgage or of lien, but as putting the debt in the same situation as the goods when the writ was delivered to the sheriff. We take the word "bind" to mean that the debtor, or those claiming under him, shall not have power to convey, or to do any act, as against the right of the party in whose favour the debt is bound; and we construe it as not giving any property in the debt, in the nature of a mortgage or lien, but a mere right to have the security enforced.[301]

Therefore it seems that in order to explain the rights which a creditor under fi. fa. has against his debtor's goods it is not necessary to compare them to a lien and it is not necessary to say that the creditor has

a lien. The creditor's rights under fi. fa. are a special kind of rights against property given by the common law; these rights stand by themselves, apart from the other class of rights given by the common law to the lienor.

The first of the, and one of the few, cases in Alberta in which the court not only held that an execution creditor had a lien on his debtor's lands but also in which the existence or nonexistence of the lien was vital to the outcome of the case was Merchants Bank of Canada v. Amundsen[302] in 1920.

That case depended upon the interpretation of section 44 of the Trustee Ordinance, 1898,[303] which provided that upon a person's death all his debts should be paid pari passu without preference or priority but without prejudice to any lien existing during the lifetime of the deceased on any of his real or personal estate.

Hyndman, J., held that execution creditors who had filed their writs against land prior to the debtor's death had such a lien and were therefore entitled to priority over unsecured creditors and creditors whose writs were not filed until after the death of the debtor.[304] He based his decision on Deering v. Gibbon.

In 1935 the Alberta Appellate Division had to re-consider the same issue in Toole Peet Trust Company v. London Life Insurance Company.[305]

Under the Trustee Act,[306] which had replaced the

Trustee Ordinance,[307] all creditors of a deceased were to share ratably in his assets, except again without prejudice to liens existing during the lifetime of the deceased.

The Court of Appeal expressly overruled Merchants Bank of Canada v. Amundsen.[308] The judgment of the court in the Toole Peet case was given by Clark, J. A., who said that an execution creditor, even after registering his writ, had no lien, at least within the meaning of the Trustee Act:

> Language may be found in judgments and in some statutes to the effect that the execution creates a lien but I think that the preponderance of legal opinion is that it does not create a lien within the meaning of sec.43 of The Trustee Act.[309]

Section 43 of the Trustee Act is now section 44 of the Administration of Estates Act.[310] The Toole Peet case shows that execution creditors with registered writs lose all direct claims against the lands of the execution debtor when the debtor dies.

The decision in this case that an execution creditor does not have a lien within the meaning of the Administration of Estates Act is consistent with the requirement that a creditor cannot have a common law lien unless he has possession of the liened property.[311] But it may be that the legislature does intend more creditors to have a priority in winding up an estate than just those who have liens within the strict meaning of that word. If this is the case one way to

avoid the uncertainty of the meaning of the word "lien" would be to replace this word with "charge" which is wider in meaning, or probably better yet by "security". However, as will be shown later,[312] the rights of an execution creditor can possibly be described as a charge or security so that if the legislature does not wish a registered writ holder to have a preference over unsecured creditors this class of creditors should probably be expressly excluded from having such a preference.[313]

The results in the Toole Peet case may be compared with the English case of Gore v. Bowser[314] in which Stuart, V. C., specifically said he did not have to determine if an execution creditor had a legal lien on his debtor's goods or not. He held, however, that the creditor in that case was entitled, in equity, to claim the proceeds of the sale of an equitable interest in a leasehold interest.

Also many English cases have described a creditor as having a lien but these cases generally are not concerned with the rights of a creditor under fi. fa. but with the creditors rights under the writ of elegit[315] or with the creditors rights to an equitable lien not on the goods themselves but on the proceeds of the sale of equitable interests in goods.[316]

Furthermore, section 13 of the Judgments Act, 1838[317] which gave judgment creditors a specific equitable

charge on a debtor's land may have had some influence in those English cases in which the creditor's rights were described as being a lien. Under this section the creditor was entitled to bring an application in equity to enforce the charge given to him. Possibly the charge given by section 13 may have led to an execution creditor's rights being described as a lien; that is, the Act gave a judgment creditor a charge which could be enforced by an order for sale in equity and since a creditor who had an equitable lien could also obtain an order for sale in equity[318] the equitable charge created by the Judgments Act was, in effect, the same thing as an equitable lien.

But section 13 of the Judgments Act has never been held to be in force in Alberta or possibly anywhere else in Canada[319] and therefore the English cases based on it cannot be used to demonstrate that an execution creditor in Alberta has a lien against land which is bound by a writ.

Results similar to that in the Toole Peet case have been reached by Canadian courts in interpreting section 50(1) of the Bankruptcy Act[320] and its predecessors. Under this section a secured creditor (but not an execution creditor unless his execution has been completely executed by payment to him) has a preference in a bankruptcy. Section 2 defines a secured creditor as including a person holding a lien on the debtor's property.

The decisions of the courts as to whether an

execution creditor has or has not a lien on his debtor's property have been uniform in saying that he has no lien within the meaning of the Bankruptcy Act.[321]

In conclusion, on principle and on the basis of the judicial decisions which are most relevant to Alberta, it is suggested that in Alberta an execution creditor who has registered his writ (or who has not registered) does not have a lien on his debtor's lands.

(iii) Execution as a Charge

Some kinds of claims or rights which one person has against property belonging to another are called charges.[322] Like a lien, a charge can be created by a voluntary act of the owner of the property[323] or involuntarily by operation of law. If a claim or right against property is created voluntarily then in many, if not in all, cases the right can be called either a lien or charge as the words seem almost identical in these cases. It seems apparent that any charge which an execution creditor has is created by operation of law and not voluntarily.

Charges created by operation of law may be common law charges, equitable charges or statutory charges. One example of a common law charge is the special property which a sheriff has in goods after he seizes them. In Giles v. Grover,[324] in 1832, Patteson, J., said that this charge is created against the will of the debtor and differs in this way from charges created by the debtor himself.[325]

Liens and charges created by operation of law differ in that it seems that every such lien is also a charge[326] whereas not all such charges are also liens. For example, the rights which an execution creditor has against his debtor's property at common law can be described as a charge against the property although, as described earlier, it seems that the creditor has no lien on the property.

In Woodland v. Fuller,[327] Patteson, J., in giving one of four judgments, referred to a writ as a charge which is in the ordinary way enforced by a seizure. But he also said that neither the writ nor a seizure under it changes the property in the goods.[328]

It is suggested that to say that a writ is a charge against a debtor's property simply means that by operation of law the creditor under the writ has certain rights against the debtor's property. Under fi. fa. the creditor's rights against the property are to have the sheriff seize and sell the property and to pay the proceeds of the sale to the creditor in satisfaction of the debt. These rights are a kind of charge which is described by saying that a writ binds the debtor's property. As indicated by Patteson, J., the charge does not involve any change of ownership.

Notwithstanding the above, Canadian Courts have shown a tendency to equate liens and charges and to

suppose that if a creditor has a charge he must therefore have a lien.[329]

In Wilkie v. Jellett,[330] Strong, C. J., in giving the judgment of the Supreme Court of Canada spoke of the creditor being able to make his execution a charge on the debtor's land.[331] But he also said that the writ was a lien, without indicating how the lien arose or whether the creditor under such a lien had any greater or different rights in respect of the debtor's property than he would at common law under which as noted earlier it seems the creditor does not have a lien.[332]

In Deering v. Gibbon,[333] Beck, J., expressly held that an execution creditor had a lien on the debtor's goods but in so holding he referred to the judgment of Patteson, J., in Woodland v. Fuller[334] and seemed to be of the opinion that a lien and a charge were synonymous. As suggested earlier, this belief does not seem warranted in fact.

In conclusion it seems that the right which an execution creditor has against his debtor's lands can properly be called a charge. It is a charge in the sense that it is a right which the creditor has by operation of law and not by an act of the debtor.

It therefore differs from an ordinary charge created by the debtor in that it can only be enforced in the way the law provides, that is, by seizure and sale, and it gives the creditor no interest in the debtor's

property as he would have by virtue of a charge created by the debtor.

(iv) Execution as a Security

The rights which an execution creditor has over his debtor's goods after their seizure have been described as a security upon the debtor's property.

This came about because of the provisions of section 12 of the Bankruptcy Act, 1869[335] (re-enacting in clearer language section 9 of the Bankruptcy Act 1623[336]) under which only creditors "holding a security upon the property of the bankrupt" at the time of the bankruptcy were to have any preference in a bankruptcy.

In looking at the rights of an execution creditor in a bankruptcy, in Slater v. Pinder,[337] it was held that once goods were seized by the sheriff the creditor had a security while in Re Davies, ex parte Williams[338] it was held that the creditor had no security before the seizure.

The nature of the security which the creditor got by a seizure was considered by the House of Lords in Giles v. Grover[339] where it was stated that the security was limited to the purposes of the Bankruptcy Act, 1623, and that the creditor had no security for any other purpose.[340]

By inference in Alberta today a creditor does not, by having a debtor's property seized, have a security for any purpose because by section 50 of the Bankruptcy Act[341] no execution creditor has a preference in a bank-

ruptcy unless his execution has been completely executed by payment to him or his agent.

(e) The Time from which Land is Bound by a Writ

At common law a writ of execution took effect from its teste so that it bound the debtor's goods from that time.[342]

Assuming this rule of common law would also apply to land, in the absence of legislation to the contrary, the only legislation in Alberta which alters the rule is section 128(2) of the Land Titles Act[343] which states that lands are bound from the time the Registrar of land titles receives a writ of execution against them.

Section 128(2) is similar to section 26(1) of the Sale of Goods Act, 1893[344] which in turn was, in effect, a re-enactment of section 16 of the Statute of Frauds, 1676[345] which said that no writ should bind goods until the writ had been delivered to the sheriff for execution.

The reason for this enactment was to eliminate the common law rule that a writ took effect from its teste because this rule:

> produced inconvenience and uncertainty in trade: "for men abused the notion of the retrospect of the goods being bound by the teste of the writ to make sales uncertain; for they took out writs one under the other without delivering them to the sheriff, by which they bound the goods of their debtors, and consequently made their sales and all

commerce uncertain". (Gilbert on Executions, p. 14).[346]

This "inconvenience and uncertainty" was remedied to some extent by section 16 of the Statute of Frauds.

But right from the beginning section 16 did not have a universal application. In the first place, the Act did not apply to the Crown so that a fi. fa. by the Crown continued to bind the debtor's goods from its teste.[347]

In the second place section 16 of the Statute of Frauds (and, by inference, section 128(2) of the Land Titles Act) was not enacted for the benefit of the debtor but rather for the benefit of third parties so that as against the debtor (and his personal representatives if he died after the teste of the writ) a writ of execution continued to bind his property from its teste.[348]

It is possible that these principles which applied in England to execution against goods also apply in Alberta to execution against land. If this is in fact the case then in Alberta a debtor's land may possibly be bound by a writ of fieri facias issued by the Crown in right of Canada from its teste regardless of whether or not the writ has been registered at the land titles office! Presumably this would not hold true of the Crown in right of Alberta on the assumption that section 128 applies to the Crown in right of the province.

A further interesting consequence of the above

is that in order to seize and sell a debtor's land under fi. fa. a creditor might theoretically not have to register his writ as long as no third parties have claims against the land.

Thus, at common law, a writ took effect from its teste and by delivering the writ to the sheriff the creditor could seize any of the debtor's property bound since the teste. If the Land Titles Act does not apply to the debtor himself, but is only for the benefit of third parties, then it follows that to be able to seize and sell a debtor's land, where no third parties are concerned, all the creditor should have to do is deliver his writ to the sheriff and the writ would not have to be registered at the Lant Titles Office at all!

(f) The Status of a Purchaser of Land from the Sheriff under Fi. Fa.

At common law the ownership of goods being sold under a writ of fi. fa. was wholly changed from the debtor (and from any person claiming under the debtor whose interest was also bound by the writ) to the purchaser from the sheriff at the time of the sale by the sheriff.[349]

In the case of the purchase of a leasehold interest or of land the purchaser was entitled to a conveyance from the sheriff sufficient to satisfy the Statute of Frauds;[350] and, presumably, in Alberta the purchaser is entitled to a registrable transfer of the land sold to him.[351]

As the purchaser from the sheriff gets every

interest in the land that was bound by the writ it follows that he should then be entitled to the possession of the lands to the extent a right to possession was sold to him and also that he should be entitled to receive any future rents and profits of the land.

This conclusion would seem to follow from the common law rule that the property became the purchaser's upon the sale. This may be part of the source of the authority for and the intent of rule 495 of the Supreme Court Rules[352] which permits the court to compel any person who is bound by an order for sale of land to deliver up the possession or receipts to the purchaser:

> Where in any proceeding relating to any real estate it is necessary or expedient that the real estate, or any part thereof be sold, the court may order it to be sold and any party bound by the order and in possession of the real estate or in receipt of the rents and profits thereof may be compelled to deliver up the possession or receipts to the purchaser or such other person as the court directs.

(g) Exemptions and their Effect

At common law, in respect of goods, all of a debtor's goods but his wearing apparel could be taken by a sheriff, and if the debtor had two "gowns" the sheriff could take one of them.[353]

As to lands, in Alberta, a homestead of an execution debtor (but not more than 160 acres) actually occupied by him and a lot and house (not exceeding $8,000.00 in value) actually occupied by a debtor are made exempt

from seizure by sections 2(j) and 2(k) of the Exemptions Act:[354]

> 2. The following real and personal property of an execution debtor is exempt from seizure under any writ of execution:...
>
> (j) the homestead of an execution debtor actually occupied by him, provided it is not more than 160 acres, but if it is more, the surplus may be sold subject to any lien or encumbrance thereon;
>
> (k) The house actually occupied by the execution debtor and buildings used in connection therewith, and the lot or lots on which the house and buildings are situated according to the registered plan thereof, if the value of the house, building and the lot or lots does not exceed $8,000, but if the value does exceed $8,000, the house, building and lot or lots may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds $8,000 the property shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and shall until then be exempt from seizure under any legal process, but no such sale shall be carried out or possession given to any person thereunder until the execution debtor has received $8,000;

The effect of this enactment is that any lands which are so exempt from seizure are not bound by any writ of execution.

In Gilmore v. Callies,[355] Harvey, C. J. said:

> The Registrar enters it and under the Act it binds all lands of the execution debtor subject to it. If this land is free, it does not bind this land, and the creditor does not get any advantage from it, so long as it does not bind this land.[356]

However, even if a debtor's land is exempt from seizure, if there is a writ of execution registered against his name then while he owns the land he is not entitled to

a court order declaring that the writ is not a charge on the lands and directing the registrar to remove the writ insofar as it affects his land. This is because the exemption might be lost at any time and the creditor is entitled to the benefit of maintaining the registration of the writ in case that happens.[357]

But if an execution debtor sells and receives full payment for land while it is exempt from seizure then the purchaser is entitled to be given a certificate of title free of the writ. In this respect Idington, J., said in Northwest Threshing Co. v. Fredericks:[358]

> The exemption, by law, of the lands here in question freed them, and was intended to free them, from the operation of any writ of execution against the lands of the appellants' debtor. The debtor was, therefore, entitled to dispose of them as he saw fit. Hence the respondent was entitled to receive a conveyance thereof from the debtor as free from the operation of such writs of execution as he was to hold them. It follows that she became entitled to have the certificate of title cleared from any such apparent charge.[359]

It is not necessary for an execution debtor to dispose of his entire interest in the land for the person who acquires an interest from the debtor to take free of the writ.

In John Deere Plow Co. v. McEachran[360] it was held that a mortgagee who takes a mortgage from an execution debtor while the land is exempt from seizure takes priority over a writ registered prior to the granting of the mortgage. But in Re Love and Bilodeau[361] it was

held that the mortgagee's priority only extends to the value of the monies advanced under the mortgage while the land continued to be exempt.

While a writ of execution is registered against the name of an execution debtor the registrar has a duty to treat the writ as a charge upon the land with priority according to the date of its registration. The question as to whether a writ binds land or not is only for the court to decide.[362]

An execution creditor normally is entitled to maintain the registration of his writ at the land titles office. Therefore only in a simple case where proof is given to him before action that certain land is exempt from a writ is the creditor liable to remove it. Otherwise, the debtor must obtain an order, at his cost, directing this to be done. Beck, J., said in Hart v. Rye:[363]

> As to the costs, the defendant Rye, the execution creditor, was entitled to lodge his execution in the land titles office and was under no obligation to go to any expense to prevent it appearing as a charge against any property standing in the name of the execution debtor, which could only, by reason of extraneous facts, be shown not to be properly a charge. I think the whole burden of proof and expense lies in such a case upon the execution debtor. In a simple case if clear proof were presented to the execution creditor by affidavit or otherwise before action, that land apparently affected was in reality not so, I think he would be bound, at the expense of the execution debtor, to do what would be necessary to remove the cloud.
>
> In the present case it is obvious that only by such a motion as this could the question

> of the execution creditor's duty be determined, and I think, therefore, he should not be at any expense in connection with this inquiry.[364]

But in any event neither the execution debtor nor anyone else is entitled to an order removing an execution as a charge against land unless the execution debtor conveyed all of his interest in it to a third party while it was exempt.

Therefore if a debtor has sold his exempt land by an agreement for sale and gives possession to the purchaser before he has received full payment then his interest as unpaid vendor is bound by the writ. This was exemplified in John Deere Plow Co. v. McEachran[365] in which Walsh, J., held:

> The statute only extends the exemption to "the homestead of an execution debtor actually occupied by him."
>
> It is well-settled law in this jurisdiction that a permanent abandonment of its occupation by him results in the loss of its immunity from seizure under execution. When this defendant gave up possession of this land to his purchaser it lost its character as an exemption and the interest that he retained in it under his agreement of sale became liable to the claims of his creditors.[366]

(2) The Effect of Claims by Specific Third Parties Against Land Registered or Formerly Registered in the Name of the Debtor

(a) Third Party Rights Generally

At common law, in general, a writ of fieri facias did not have a retroactive effect. This meant that, although at common law a writ bound a debtor's goods from

its teste, the rights of the creditor and the rights of any purchaser of the goods from the sheriff in a sale under the execution, were subject to any legal or equitable rights which a third party had in the goods before the teste of the writ.[367]

This is the same as the well known rule, with respect to execution against land, expressed by the Supreme Court of Canada in Wilkie v. Jellett[368] in 1896 with the exception that lands are bound by a writ from the receipt of a copy of it by the Registrar of Titles rather than from its teste so that a creditor can only take a debtor's lands in execution subject to claims existing prior to that time:

> It follows therefore that the rights of prior parties remain as they were before the execution was registered, and these entitled the respondents to have their transfers registered without any reference being made in the certificate to the execution and to have the sheriff's sale restrained.[369]

At common law[370] and by the Fraudulent Conveyances Act, 1570,[371] there was one exception to the rule that a writ did not have a retroactive effect. This was in the case of fraudulent conveyances. This meant that a fraudulent conveyance was bound by a writ of execution tested after the date of the fraudulent conveyance. It seems that this exception should still hold true today.[372] Although the common law had no restrictions against fraudulent preferences these are now in some cases made

void by statute as against other creditors.[373] This may also be a modern exception to the rule that a writ of execution has no retroactive effect.[374]

In some cases, as shown earlier in this paper,[375] the existence of third party claims which arose prior to the registration of a writ, may result in the writ not binding the land at all. In these cases, the result of such third party claims is not merely that the sheriff can only sell the debtor's interest in the land subject to the rights of the third parties; the result is, rather, that the sheriff cannot sell the debtor's interest in the land at all.[376]

A further result of the binding effect of the writ was that, in general, at common law the sheriff could take goods in execution from any person who acquired them by assignment from or representation under the debtor made after the teste of the writ.[377]

There were two common law exceptions to this rule. Firstly, goods sold to a purchaser in market overt before they were sold by the sheriff were not bound by a prior writ.[378] There seems to be no analogue for this in the case of lands so that it is probably not relevant to execution against land.

But the second exception was that the Crown was not bound by any writ against goods bought by the Crown before they were sold by the sheriff under the execution.[379]

Possibly there may be cases in which such a situation could still occur in cases of execution against land and it might be possible for the Crown to buy land after a writ is registered against it and yet to acquire it free of the writ.

Now there are two additional statutory exceptions to the common law rule that persons who acquire lands from a debtor are bound by a writ of execution registered prior to their acquisition. These are in the case of lands acquired by a debtor's personal representative upon the debtor's death[380] and lands acquired by a trustee in bankruptcy upon a voluntary assignment (or involuntary receiving order) in bankruptcy.[381]

The common law rule as to the effect of a writ on subsequent assignees is, in effect, reproduced in the latter part of section 128(2) of the Land Titles Act.[382] To be consistent with the common law the meaning of this section must be taken to be that if a person (subject to the exceptions mentioned above), who acquires land from a debtor after a writ is filed, registers a transfer or other instrument in his name then the sheriff can still seize the land from him and sell it. Further it seems that in such a case the sheriff must be able to execute a transfer of land in favour of a purchaser from him notwithstanding that the land is not registered in the name of the debtor.

(b) Fraudulent Conveyances and Creditors under Fraudulent Preferences

At common law[383] and by the Fraudulent Conveyances Act, 1570,[384] a fraudulent conveyance was a conveyance made to delay, hinder or defraud creditors of their just debts.

Sections 1, 2 and 6 of the Fraudulent Conveyances Act are relevant:

> For the Avoiding and Abolishing of feigned, covinous and fraudulent Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions, as well of Lands and Tenements as of Goods and Chattels, more commonly used and practised in these Days than hath been seen or heard of heretofore: (2) Which Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions, have been and are devised and contrived of Malice, Fraud, Covin, Collution or Guile, to the End Purpose and Intent, to delay, hinder or defraud Creditors and others of their just and lawful actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, not only to the Let or Hinderance of the due Course and Execution of Law and Justice, but also to the Overthrow of all true and plain Dealing, Bargaining and Chevisance between Man and Man, without the which no Commonwealth or civel Society can be maintained or continued:
>
> (2) Be it therefore declared, ordained and enacted by the Authority of this present Parliament, That all and every Feoffment, Gift, Grant, Alienation, Bargain and Conveyance of Lands, Tenements, Hereditaments, Goods and Chattels, or any of them, or of any Lease, Rent, Common or other Profit or Charge out of the same Lands, Tenements, Hereditaments, Goods and Chattels, or any of them, by Writing or otherwise, (2) and all and every Bond, Suit, Judgment and Execution, at any Time had or made sithence the Beginning of the Queen's Majesty's Reign that now is, or

> at any Time hereafter to be had or made, (3) to or for any Intent or Purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that Person or Persons, his or their Heirs, Successors, Executors, Administrators and Assigns, and every of them whose Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, by such guileful covinous or fraudulent Devices and Practices, as is aforesaid, are, shall or might be in any ways disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none Effect; any Pretence, Colours, feigned Consideration, expressing of Use, or any other Matter or Thing to the contrary notwithstanding.
>
> (6) Provided also, and be it enacted by the Authority aforesaid, That this Act, or any Thing therein contained, shall not extend to any Estate or Interest in Lands, Tenements, Hereditaments, Leases, Rents, Commons, Profits, Goods or Chattels, had, made, conveyed or assured, or hereafter to be had, made conveyed or assured, which Estate or Interest is or shall be upon good Consideration and bona fide lawfully conveyed or assured to any Person or Persons, or Bodies Politick or Corporate, not having at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion as is aforesaid; any Thing before mentioned to the contrary hereof notwithstanding.

It is possible that these sections are in force in Alberta[385] although they have probably been repealed by implication by sections 2, 7 and 11(1) of the Fraudulent Preferences Act:[386]

> 2. Subject to sections 7, 8, 9, and 10, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

> (a) by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, and
>
> (b) with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them,
>
> is utterly void as against any creditor or creditors injured, delayed or prejudiced.
>
> 7. Nothing in sections 2 to 6 applies to
>
> (a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or
>
> (b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money,
>
> if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.
>
> 11.(1) One or more creditors may, for the benefit of creditors generally or for the benefit of those creditors who have been injured, delayed, prejudiced or postponed by the impeached transaction, sue for the rescission of, or to have declared void, agreements, deeds, instruments or other transactions made or entered into in fraud of creditors or in violation of this Act or thereby declared void.

Section 11(1) of the Fraudulent Preferences Act is presumably the authority on which rule 383(1) of the Supreme Court Rules[387] is based. This rule permits a creditor, who alleges that a fraudulent conveyance has been made to bring a motion for an order to sell the property:

> Where it is alleged that there has been a conveyance of property to delay, hinder or defraud creditors or a creditor it is not necessary to commence an action to set aside the conveyance but the court may, on motion by the judgment creditor served upon the judgment debtor and upon the persons to whom it is alleged the property was conveyed, order the property or part thereof sold to realize the amount to be levied under execution.

The procedure established by rule 383(1) is different from that at common law under which the sheriff was entitled to seize from a fraudulent conveyancee and to sell directly under the writ of fi. fa. any property which had been fraudulently conveyed before the debtor's property was bound by the writ.[388]

It is apparent that an important effect of these acts is to give an execution creditor an opportunity to set aside a conveyance of land which took place even before the registration of his writ and to enable the land to be sold in execution in satisfaction of his claim. Thus in such a case the writ of execution can, in effect, be made to bind the interest of a third party which arose before the registration of the writ even if, as between the debtor and the conveyancee, the debtor had no interest, even beneficial, in the land at the time of registration of the writ.

It should be noted, further, that the creditor to bind the land by the writ must still file the writ while the land is registered in the name of the fraudulent conveyancor. If the writ is filed after the land is

registered in the name of the fraudulent conveyancor it seems that the conveyance can still be set aside but the land will not in the meantime be bound by the writ. In such a case the creditor would probably be able to obtain an injunction restraining the conveyancee from disposing of the land until the application to set aside the conveyance has been dealt with.

At common law creditors had no protection against fraudulent preferences given to other creditors. It seems that under the Fraudulent Preferences Act[389] creditors now have the same rights in respect of fraudulent preferences as they have with fraudulent conveyances. Thus by sections 3 and 4 (in combination with section 11(1) discussed above) a creditor, within one year after a fraudulent preference by way of the grant of an interest in land has been made, can apply to have the transaction set aside and thus leave the debtor's unencumbered land available to execution proceedings by the non-preferred creditors:

> 3. Subject to sections 7, 8, 9 and 10, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
>
> (a) by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, and
>
> (b) to or for a creditor with intent to give

that creditor preference over the other creditors of the debtor or over a any one or more of them,

is utterly void as against the creditor or creditors injured,delayed, prejudiced or postponed.

4. Subject to sections 7, 8, 9 and 10, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, and

(b) to or for a creditor and having the effect of giving that creditor a preference over the other creditors of the debtor or overy any one or more of them,

is, in and with respect to any action that within one year thereafter is brought, had or taken to impeach or set aside the transaction, utterly void as against the creditor or creditors injured, delayed, prejudiced or postponed.

(c) Purchasers and Transferees

(i) Agreements made Before the Registration of a Writ

Bona Fide Purchasers who have made Full Payment

It seems certain that if a bona fide third party for value buys land from an execution debtor and pays for it in full before the registration of a writ of execution against the debtor that the purchaser or unregistered transferee is entitled to obtain title in his name free and clear of the writ.[390]

Purchasers who have not made Full Payment

In practice it happens frequently that an execution creditor files a writ against a vendor of land after a bona fide agreement for sale has been made but before the purchaser has paid the full purchase price. The history of the development of the present section 128 of the Land Titles Act,[391] which expressly states that a writ binds the interest of such an unpaid vendor, is interesting.

The Land Titles Act, 1906[392] did not state that all registered legal or equitable interests in land including a debtor's interest as unpaid vendor were bound by a writ. In fact section 77(1) of that Act merely provided that "no land shall be bound by any such writ until the receipt by the registrar...of a copy thereof."

In 1917 section 77(1) was amended[393] to provid that "upon and from the receipt by the registrar of such copy all lands and interests in lands whether such interests be legal or equitable and any interest of an unpaid vendor of land shall be bound by such execution." The reason for the amendment was probably a judicial difference of opinion among different justices of the Supreme Court.

In Traunweiser v. Johnson,[394] Stuart, J., held that a registered owner of land who was an unpaid vendor, under an agreement for sale made prior to the registration of a writ against him, had a legal interest in the land,

namely he was the registered owner of the fee, but that because the purchaser had a prior right, upon payment of the purchase money, to obtain the legal estate, the creditor would be restrained in equity from selling this.[395]

Stuart, J., then held that because no legislation gave the sheriff the right to seize a vendor's equitable lien for unpaid purchase money that this could not be sold either:

> The fact that the debtor is registered owner of the fee simple is the only thing that gives me difficulty, but there is no doubt, as I have pointed out, that the execution creditor could not sell the fee. He might do so at law, but certainly in equity would be restrained. Then, can he sell the mere interest of the vendor, his equitable lien for unpaid purchase money? In my opinion he cannot for the simple reason that there is no legislation which gives the right to seize such an interest under a common law fi. fa.[396]

A year earlier, in Merchants Bank v. Price,[397] a case with similar facts, Walsh, J., had reached the same conclusion as Stuart, J.

The conflict arose as a result of the judgment of Harvey, C. J., in Adanac Oil Co. v. Stocks in 1916.[398] In that case Harvey, C. J., held that since the unpaid vendor while he was registered as owner still held the legal title his interest in the land could be sold without difficulty by the sheriff subject to the purchaser's rights:

> There seems no difficulty, therefore in transferring by sheriff's sale or otherwise the rights of the registered owner subject to the

rights of the purchaser.[399]

The next year, in Seay v. Sommerville Hardware Co. Ltd.[400] in one of the judgments of the Court of Appeal, Beck, J., in dicta, seemed to support the view of Stuart, J., as to the exigibility of the unpaid vendor's interest in land:

> In my opinion, therefore, what remains to the vendor after an agreement for sale is not an estate or interest but a right to money for the payment of which he has a lien upon the land and as security for which he holds the legal estate, in respect of which he is a trustee for the purchaser, subject to his own rights and that, inasmuch as The Land Titles Act provides no means, as of course it might have done, of attaching that "interest" of the vendor the execution creditor's only remedy is by some other method of execution, the usual and perhaps the only one being the appointment of a receiver.[401]

It was following the Seay case that the 1917 amendment to the Land Titles Act was made. Obviously Harvey, C. J., got the last word in this controversy through legislation.

The leading Alberta case on the rights of a purchaser from a vendor who becomes a judgment debtor seems to be Morton and Cowell v. Hoffert.[402] The facts in that case were that at all material times Smith was the registered owner of certain land. On August 24, 1918 he made an agreement with Carlson for the sale of the land. On November 27, 1920, Morton, and on March 3, 1921, Cowell, registered a Writ of execution against Smith. On May 10,

1921 and on July 9, 1921 Smith made separate assignments to Hoffert of his interest as unpaid vendor under the agreement with Carlson. The assignments were for security for money Smith owed Hoffert. On July 10, 1921 Hoffert notified Carlson of the assignment and on November 1, 1921, one of the execution creditors notified Carlson of the registration of the writs. On October 12, 1922 Carlson paid into court the balance of the money owing by him under his agreement with Smith.

Tweedie, J., held that the purchaser could not be compelled under the writ, to pay the purchase money to anyone but the vendor until the vendor's interest had been sold by the sheriff:

> As to the enforcement of the execution: While it is true that the writ binds the vendor's interest including the right to receive the unpaid purchase price the writ itself doesn't give the execution creditor the right to proceed directly against the purchaser for the amount owing. The usual procedure is for the sheriff to sell the vendor's interest and transfer the legal title to the purchaser, who may be the execution creditor, and such purchaser having acquired the legal title acquires the vendor's interest and is in a position to enforce payment of the unpaid purchase price subject to any defences legal or equitable which the purchaser may be entitled to rely upon. The purchaser cannot be required to make payment in satisfaction of the execution nor any payment to the execution creditor or any other person until he or such other person has acquired the vendor's rights.[403]

But Tweedie, J., then went on to say that if the purchaser had in fact, after actual notice of the

executions, paid the money to the debtor he would afterwards have had to pay the same amount again to any person who bought the debtor's interest under a sheriff's sale:

> ...The purchaser having received, before the payment over of the money, actual notice that the executions were duly delivered to the Registrar and filed in the land titles office was bound to pay any person who had or might acquire under the execution the vendor's interest and if he had made payment of the amount after notice to the defendant he would be bound to pay the same amount over again to the person who acquired that interest.[404]

It is suggested that this latter part of Tweedie, J.'s, judgment, on principle, is wrong.

As shown earlier in this paper to state that a debtor's land is bound by a writ means simply that the debtor cannot afterwards convey the land to a third party except subject to the rights of that third party being bound by the writ. On the other hand a writ specifically does not bind any interest or rights in the property acquired by a third party before the property is bound.[405]

If the third party is a purchaser under an agreement for sale made prior to the registration of a writ then what new rights does the purchaser get from the execution debtor if the purchaser makes additional payments to the debtor after such registration?

It may be that by making payments the purchaser adds to the value of his interest in the land. But, it is suggested, these rights do not arise from any assignment

or act of the debtor made after the registration of the writ. To the contrary all the rights conveyed by the debtor were given prior to that time at the time the agreement for sale was made.

Therefore it is submitted that the purchaser's rights in the land, being founded only on an assignment made by the debtor before the registration of the writ and not on any assignment or conveyance made by the debtor after that time, are not bound at all or subject to the writ.

If this is the case then what support is there for Tweedie, J.'s statement that if a purchaser, after he has actual notice of a registered writ, makes payment to a debtor, then he is liable to pay the same amount over again to whoever buys the unpaid vendor's interest from the sheriff.

One possibility is that Tweedie, J., considered that the registration of the writ operated as an assignment in law of the execution debtor's right to receive the balance of the purchase moneys and that by having actual notice of the assignment the purchaser was bound to pay not the debtor, but the person entitled to the benefit of that assignment.

But this implies that when an interest in land becomes bound by a writ there is a change in the ownership of the property from the debtor to someone else, say the

creditor, or perhaps the sheriff, on behalf of any person to whom the sheriff may ultimately sell the land.

This however is totally inconsistent with the rules of common law discussed earlier which make it clear that there is no change of the general property from the debtor to anyone else until the sheriff sells the land under the execution.[406]

Therefore, it is submitted that, at least from a consideration of the effect of a writ as an assignment, the purchaser cannot be compelled to pay, and indeed is not entitled to pay, anyone else but the debtor the balance of the purchase money, unless, and only to the amount then owing, the sheriff has sold the execution debtor's interest prior to full payment of the purchase money.

Another possibility is that Tweedie, J., may have considered that the effect of a purchaser having notice of a writ is equivalent to the purchaser having been served with a garnishee summons by the execution debtor or to the creditor having obtained and served the purchaser with a receivership order and that therefore notice of the writ binds the debt payable by the purchaser to the execution debtor.

However neither at common law nor at statute has a debt ever been bound by a writ of fieri facias;[407]

yet this is in effect the meaning of Tweedie, J.'s judgment if we eliminate the possibility that the writ operates as a legal assignment of the debtor's interest.

This problem was also considered in Weidman v. McClary Manufacturing Co.[408] in 1917 by the Saskatchewan Supreme Court En Banc which had to consider the effec of section 118 of the Saskatchewan Land Titles Act[409] which provided that a writ when filed should "bind and form a lien and charge on all the lands of the execution debtor."

In that case Dootoff was the registered owner of a quarter section. In 1911 by an agreement for sale he agreed to sell the land to Feinstein. In 1911 Feinstein assigned all of his interest to the plaintiffs who registered a caveat against Dootoff's title in 1912. In 1913 the defendants filed a writ of execution against Dootoff. Later the plaintiff, without actual notice of the execution, paid Dootoff the balance of the purchase money and obtained and registered a transfer of land, subject to the writ of execution. The plaintiffs claimed an order removing the writ from their title.

Obviously this case may be easily distinguished from Morton and Cowell v. Hoffert in that in the latter case the purchaser had actual notice of the writ.

But it is submitted that neither by the common law nor by section 128(2) of the Land Titles Act is the

existence or non-existence of notice relevant to whether or not lands are bound as against third parties. To the contrary, as shown earlier,[410] at common law to say that lands were bound by a writ simply meant that the creditor could enforce his claim against the debtor and any assignee from the debtor subsequent to the time at which the lands were bound by the writ.

So far was the binding effect on third parties not dependent upon their having notice that at common law the creditor could even take goods away from bona fide purchasers for value without notice[411] and the only change made to this rule by section 128(2) of the Land Titles Act is to postpone the time at which a debtor's lands are bound by a writ so that lands are only bound from the time the writ is delivered to the land titles office rather than from the teste of the writ as at common law.[412]

Therefore it is suggested that the decision in the Weidman case can be of direct relevance to the law in Alberta.

After first deciding that the interest of an unpaid vendor was bound by a writ filed with the land titles office the court in the Weidman case then turned to the question of whether the unpaid purchase money was bound.

Haultain, C. J., looked at the question from

two points of view. First he said that the writ gave the creditor a bare right to sell the vendor's interest.[413] This is also what Tweedie, J., said the creditor could do in the Morton case. But Haultain, C. J., then said that:

> in such a case...the only way in which the creditor can get at unpaid purchase money is by garnishee proceedings or equitable execution.[414]

As noted above the Saskatchewan Land Titles Act also said that a creditor had a lien and charge on the debtor's lands. From this second point of view Haultain, C. J., said that the charge given by the statute did not bind or affect the purchase money[415] and that the charge was equivalent to an equitable mortgage.[416] Just as an equitable mortgagee has no legal right to receive rents and cannot obtain that right by giving notice to tenants but must have a receiver appointed, the execution creditor is not entitled to the purchase money until the right thereto passes to a receiver in equitable execution on notice to the purchaser.[417]

In a separate judgment Newlands, J., said that:

> the plaintiff not only had the right, but it was his duty to continue making the payments on the agreement even after notice.[418]

It is suggested that the decison in the Weidman case is more in accord with the principles of the common law applicable to fi. fa. than is the judgment of Tweedie, J.,

in the Morton case.

In conclusion, it is submitted that, based on the principles of the common law applicable to fieri facias and provided he is not garnisheed or notified of a receivership order, a purchaser under an agreement for sale of land made before the registration of a writ of execution against the vendor should not be bound by or affected by the writ until the sheriff has sold the vendor's interest in execution and that all the purchaser should then be liable to pay to the purchaser from the sheriff is anything which he still owes the debtor under the agreement. Until then the purchaser should be able to pay, and should be bound to pay the debtor, and no one else, the payments due under the agreement for sale.

However, regardless of the above arguments, the judgment of Tweedie, J., must in fact be observed and any purchaser with actual notice of a writ should obviously, for his own protection, pay all unpaid money into court and not to the debtor.

In view of the difference between Tweedie, J.'s judgment and the arguments given above it is suggested that there is still room for legislative improvement in this area of the law of execution against land.

(ii) Agreements Made After the Registration of a Writ

For a person to agree to buy land that is subject to a prior writ and to pay the execution creditor

out of the proceeds of the sale is not uncommon. Probably it is uncommon for a purchaser to buy land that is subject to a writ, to make improvements on the land and then to offer to pay the execution creditor a sum less than that owing under the writ.

These are, however, the facts of Nova Holdings Ltd. v. Western Factors Limited.[419] After the improvements had been begun the purchaser tendered the creditor the actual value of the land at the time of the sale. The creditor refused, contending that it was entitled to the land and the improvements because its writ was a prior charge to the title of the purchaser.

This argument was rejected by the Alberta Appellate Division which held that the writ only bound the interest of the debtor in the land. Since the debtor had no interest in the improvements they were not bound by the writ. All the creditor was entitled to was either the land or its fair market value. Having been tendered the latter the creditor was entitled to nothing more.

This result is, it is suggested fully in accord with the principles of the common law and the applicable statutes.

As pointed out earlier[420] until his goods were sold under a writ the debtor continued to own them and until the sheriff's sale the debtor had the right to sell

them to a third person. The third person then became the owner but the sheriff could then take the goods from the third person in satisfaction of the debt.

The result of the Nova Holdings case seems to fit in perfectly with the above principles. What the writ bound was the land. What the purchaser was subject to was to have the land taken from him. But although the land was subject to the writ because it had belonged to the debtor, the debtor never had any interest or ownership in the improvements on the land.

To make the improvements subject to the writ would be to make property which a debtor never owned liable to be taken in execution. There seems to be no justification in law or statutes for taking this step and more justification for limiting the creditor's recovery to that which was actually bound by the writ, namely the land itself.

(d) Mortgagees

(i) Subsequent Mortgagees

It may be restated at the outset that the usual rule, that a person who acquires an interest in land from an execution debtor after the registration of a writ is bound by the writ, also applies in the case of subsequent mortgagees.[421]

(ii) Prior Mortgagees who have given Full Consideration

On the other hand, if a mortgage, whether statutory or equitable, and whether registered or not, has been granted before, and full consideration given by the mortgagee before the registration of a writ, then the execution does not affect the interest of the mortgagee in the land but the land is bound by the writ subject to the mortgage.[422]

Although obviously uncommon in practice it still possible to create a mortgage by the delivery to the mortgagee of a transfer of land absolute in form and for this to be registered by the mortgagee. If, after such a transfer is given to the mortgagee but before it is registered, a writ of execution is filed against the debtor, then the debtor's interest in the land is bound by the writ. If the mortgagee afterwards registers the transfer he is entitled to priority over the execution creditor but he is not entitled to have his title free of the writ.[423]

(iii) Mortgagees who have not given Full Consideration When a Writ is Filed

The above leaves a grey area in respect of mortgages granted before the registration of a writ but under which full consideration is not given by the mortgagee until after that time. In this situation it

seems that the mortgagee is entitled to priority over a registered writ of execution only to the amount advanced by the mortgagee before he has received notice of the writ.[424]

This result, which depends upon the mortgagee having actual notice of the existence of a writ, seems inconsistent with the principle of common law that the binding effect of a writ is not dependent upon whether a third party has notice of it or not.

Further, to the extent that the mortgagee is bound by a contract made before the registration of the writ to make future advances it would seem that the mortgagee's rights even in respect of money advanced after the registration of a writ should not, on principle, be bound by it because a writ in general does not affect rights which arise before the registration of the writ.

Notwithstanding these comments based on the general principles applicable to execution under fieri facias it is obvious that, in view of the decided cases, a mortgagee can only advance funds after notice of a writ at his peril.

(e) Assignees of the Interests of Unpaid Vendors

In Barnes v. Sharpe[425] an unpaid vendor of land assigned his interest in the land to a creditor as security for payment of a debt. The interest was re-assignable upon the payment of the debt and the title continued to

be registered in the name of the unpaid vendor. Subsequently a writ of execution was registered against the unpaid vendor.

The Alberta Court of Appeal held that, notwithstanding that the title was registered in the name of the execution debtor and that he had a right to the re-assignment of his interest as unpaid vendor upon payment of his debt to the other creditor, the writ of execution did not bind his interest.

This situation is a clear example of a case which shows that a writ will not necessarily bind land just because land is registered in the name of the execution debtor even if he has some contingent beneficial interest in it.

(f) Tenants

There is no Alberta jurisprudence which discusses whether a writ of execution binds land which before and after the registration of the writ is in the possession of a tenant.

It may therefore not be too startling to suggest that the interest of the execution debtor in land leased or rented by him prior to the registration of a writ of execution may not be bound by the writ.

The foundation for this proposition is that at the common law only property which was in the possession of the debtor could be seized and sold.

If, as suggested earlier in this paper,[426] this common law principle holds true in Alberta, then it follows that while the debtor has no possession of his land under a contract which predates the registration of the writ then the property cannot be seized by the sheriff because the landlord has no land which can be physically taken from him and the sheriff has no right to seize the property from the possession of a third party.

It is clear that if this proposition is correct then it is an obvious case for remedial legislation. There is no reason why the interest of a landlord should not be saleable in execution by the sheriff in just the same way as the interest of an unpaid vendor can be by an express provision of the Land Titles Act.[427]

(g) Lienors

It would seem that in respect of land there is no equivalent of the common law lien against chattels under which the lienee has physical possession of the liened chattel.

Thus, unless it is proper to describe the interest which a purchaser of land has as a lien, it seems that the only liens which attach to land are statutory or the unpaid vendor's lien in equity.

Under the Builder's Lien Act[428] certain persons who provide services or material in respect of an improvement

on land are entitled to a lien on the land.[429]

This lien differs from the common law lien in that the lienor under the Builders' Lien Act is not entitled to possess the property whereas the common law lienor is so entitled and also in that the builder's lienor is entitled to obtain an order for sale of the property in satisfaction of his claim whereas the common law lienor is not so entitled.[430]

The Builders' Lien Act gives a lienor priority over all executions recovered after the lien is registered.[431] Presumably this means that a writ of execution registered before a lien is registered takes priority over the lien and also that a writ of execution registered after the registration of a lien still binds the land but only subject to the prior claim of the lienee.

(h) Co-Owners

At common law the two usual ways of co-owning land were as tenants in common or as joint tenants[432] and this is still the case in Alberta now.

Since at common law land was not subject to execution under fieri facias all of the rules relating to execution by fi. fa. against co-owned property dealt with execution against goods and not lands. However it seems that the rules themselves are of a general nature and may be applicable to execution against lands under

fi. fa. where such execution is allowed.

At common law the interest of either a joint tenant or a tenant in common of goods could be seized and sold in execution[433] and in either case the purchaser from the sheriff became a tenant in common with the remaining tenant or tenants.[434]

The Canadian jurisprudence seems to be unanimous that a joint tenancy or tenancy in common of lands is also subject to execution under fieri facias or its equivalent[435] but some cases in Ontario have concluded that co-owned land which is mortgaged cannot be taken in execution.[436]

The principle behind this seems to be that if a creditor of lands jointly mortgaged by several co-owners can have the interest of one of the mortgagors sold in execution then the purchaser would be entitled to redeem the entire mortgage and to obtain a reconveyance from the mortgagee of more than the purchaser had bought under the writ. Also the mortgagor could do the same thing and any party to the mortgage including the purchaser could compel another to indemnify him against any payment he had to pay to the mortgagee.[437]

Actually there does not seem to be any need to refuse to allow execution in such cases. Why should a purchaser from a sheriff under execution not be entitled to the same benefits and subject to the same risks as a

person who purchased the same thing directly from the mortgagor himself rather than indirectly through the sheriff?

C. R. B. Dunlop pointed out in his article Execution Against Real Property in British Columbia[438] that most recent cases have held that co-owned land is exigible under execution regardless of whether it is mortgaged or not but in view of the problem raised by the conflicting cases he suggested that the exigibility of co-owned land which is mortgaged should be expressly established by statute.[439] The same considerations would seem to apply in Alberta as well.

Another problem which arises in connection with execution against property co-owned in joint tenancy is to determine when and how the right of survivorship of the co-tenants is affected by the writ.

Surprisingly, the jurisprudence on this point is extremely limited. In Halsbury's Laws it is simply stated that a debtor's interest as a co-owner of goods "may be seized under a fieri facias unless the co-owner has become solely entitled by survival upon the death of the debtor before the delivery of the writ."[440] The authority given for the statement is "11 Vin. Abr., tit. Execution, 22 (S.A.), s.3."[441] The citation from Viner's Abridgment says:

> If two have goods jointly, and the one is condemned in damages and dies before

execution, there no execution shall be of those goods by reason of the survivor; per Chauntrel arguendo in a replevin. Br. Execution, pl.116, cites 7 H.G.2.

Viner's statement does not literally justify the statement in Halsbury's Laws that a debtor's interest in jointly owned goods could be seized unless the debtor had died before the delivery of the writ to the sheriff. On the contrary Viner said that the right of survivorship prevailed if the debtor died "before execution."

If by "execution", Viner meant the delivery of the writ to the sheriff for execution then the conclusion in Halsbury's Laws is correct. However this, it is suggested, is not the meaning of "execution". As described earlier in this paper,[442] an execution against goods is not even commenced until their seizure by the sheriff. A fortiori an execution is not commenced by the creditor's obtaining the writ or by his delivering it to the sheriff for execution. Further, an execution is not executed, or completed, until the sheriff has sold the goods.

This leaves the question of whether the phrase "before execution" used by Viner refers to the time at which an execution begins or at which it is completed. The better view, it is suggested, is that "execution" means the entire process and not just part of it.[443]

If this interpretation is correct the citation from Viner's Abridgment means that if a debtor owns goods

as a joint tenant and dies before execution, that is before the execution has been commenced by a seizure of the goods and completed by a sale of them by the sheriff, then the sheriff can not afterwards sell the goods because they are not owned by the debtor anymore but by the survivor under the joint tenancy.

That this interpretation is in fact correct is supported by comparing it with the general principles applicable to proceedings under fieri facias.

One of these principles is that a writ against goods or lands is subject to the rights of any third party acquired before the property is bound by the writ. The interest of a third party under a right of survivorship, which antedates the time when the property is bound by the writ, would therefore seem to be unaffected by the writ as long as the right of survivorship continues to exist.

Consequently, if the debtor dies while his property is simultaneously bound by a writ and subject to a right of survivorship which antedates the writ then the right of the surviving joint tenant should prevail and he should own the property free of the writ.

The above reasoning supposes that the third party's right of survivorship in the property is present at all times. But the right of survivorship can be terminated unilaterally (or severed) at any time if one joint tenant assigns or agrees to assign his interests

in the property to a third party (or to himself). If this assignment is made the assignee thereupon becomes a tenant in common with the remaining tenant or tenants.[444]

This suggests that the sheriff (or the creditor) under an execution might also be able to sever a joint tenancy by taking some action which would amount to an, involuntary of course, assignment by the debtor of his interest in the property. If this step were taken the joint tenancy would be severed, but if the debtor died before this were done then the co-tenant should thereupon own the debtor's interest free of the writ.

Such an involuntary assignment of the debtor's interest in goods, as discussed earlier in this paper, does occur in proceedings in execution but only, it seems, upon the sale of the goods by the sheriff.[445] Until that time the debtor continues to own the goods and neither the sheriff nor the creditor obtains any general property in them. Furthermore, although the creditor may acquire a charge on goods upon delivering his writ to the sheriff for execution and a security upon a seizure of the goods and although the sheriff may acquire a special property upon seizing them these rights are highly limited in their scope and still do not result in any assignment of the debtor's interest in the goods.

Therefore it is submitted that the proper conclusion to be drawn from the above reasoning is that

a writ of execution which binds a debtor's goods or lands, does not at any time bind a pre-existing right of survivorship in the property; further it is suggested that a joint tenancy of property will be severed by proceedings in execution when and only when the debtor's interest in the property is sold by the sheriff; and, finally, it follows that if a debtor dies before his interest in jointly owned property is sold by the sheriff then the surviving joint tenant will own the property free of the effect of the execution.

Once the sheriff has sold the interest of either a joint tenant or a tenant in common the purchaser will be a tenant in common with the remaining co-owners. It seems that the purchaser, but not the creditor, is then entitled to apply for a partition or sale order against the remaining tenants.[446]

There have been several Canadian, but not Alberta, cases involving execution against land owned in joint tenancy. All of the cases were concerned with the issue whether a joint tenancy is severed by the mere registration of a writ of execution or judgment. The consensus of all[447] was that this alone does not sever the tenancy.[448]

Although some of the cases indicated that an actual or constructive seizure of land might sever a joint tenancy this was only in dicta[449] and it is suggested

that a seizure, because it does not cause a change of property, does not sever the joint tenancy but that, as discussed above, the severance does not occur until the sheriff's sale.[450]

Finally, at common law goods co-owned by partners were subject to seizure and sale under execution in the same manner as any other co-owned goods.[451] But the right to execution against partnership property is now governed by section 25(1) of the Partnership Act[452] which states that no writ of execution shall issue against partnership property except on a judgment against the firm. This may, by inference, prevent a writ of execution from binding the interest of a debtor in land owned by a partnership.

By section 25(2) a judgment creditor may obtain an order charging a partner's interest in partnership property. If a debtor's interest in land owned by a partnership is not bound by a writ of execution registered against him then it would seem necessary for the creditor to obtain such an order in order to charge the debtor's interest.

(i) Spouses with Dower Rights

By section 3(1) of the Dower Act[453] no married person shall make a disposition of his homestead to take effect during his or his spouse's lifetime without his spouse's consent or without a judge's order:

> No married person shall by act inter vivos

> make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time
>
> (a) During the life of the married person, or
>
> (b) during the life of the spouse of the married person living at the date of the disposition,
>
> unless the spouse consents thereto in writing, or unless a judge has made an order dispensing with the consent of the spouse as provided for in section 11.

In Prokopchuk v. Mandryk and Mandryk,[454] in the Alberta Supreme Court in 1942, it was held that the Dower Act of 1922,[455] the terms of which were similar to section 3 of the present Dower Act, did not apply to a sale of land under execution by a sheriff. This, it was held by O'Connor, J., followed because the Dower Act only prohibited a disposition of land by a married person and a sale under execution was a disposition of the land by the sheriff rather than by the debtor.

This result seems to give to a creditor under a writ of execution a greater power over the debtor's land than the debtor has. That is, a married person cannot sell his homestead land without his spouse's consent or a judge's order dispensing with consent. But if this case is correctly decided it means that the creditor can have the sheriff sell the land without consent or an order.

The Prokopchuk case may be compared with Johnsen v. Johnsen,[456] decided by the Alberta Appellate Division in 1922. In that case the court had to consider the effect of the Dower

Act of 1917.[457]

Section 3 of that Act provided that every disposition on the homestead of a married man made without his wife's consent should, insofar as it might affect the dower interest of the wife, be null and void.

The court held that since this Act itself expressly permitted a husband to dispose of his homestead, except insofar as it might affect the interest of the wife, then the creditor could have the land sold but subject to the wife's right to a life estate if she survived her husband.

In Stuart, J.A.'s words:

> What the husband, therefore can of himself sell, the execution creditor can sell and this, I think is the whole estate subject only to the wife's right to a life estate if she survives her husband.[458]

In the same case Beck, J.A., said:

> The purchaser under the sale under execution would acquire the land and get a certificate of title for it only subject to the wife's contingent life estate.[459]

The judgments in Johnsen v. Johnsen could be interpreted to mean that an execution creditor can only have the sheriff sell land which the debtor himself can sell. This interpretation would seem to be more consistent with the usual consequences of a writ of execution that is the decision in the Prokopchuk case.

A general rule applicable to execution is that the rights of the creditor are subject to all legal and equitable rights in the debtor's land which arose before the land was bound by the creditor's writ of execution.[460]

In the specific case of dower interests, a person who has a dower interest has the right to withhold his consent to a disposition of land by his spouse. If this right existed before the land was bound by the writ then it would seem to follow the right of the execution creditor to have the land sold should also be subject to the right of the spouse to withhold consent to the disposition.

In conclusion, it is suggested that there may still be room for a final judicial interpretation of the effects of the Dower Act on the rights of execution creditors against homestead land and that the Prokopchuk case might not be followed if a case with similar facts comes before the Court again.

(j) Personal Representative of a Deceased Debtor

At common law if a debtor died after the teste of a writ, then his personal representative was bound by the writ just as the debtor would have been.[461]

To the extent this rule would otherwise be applicable to execution against land it is subject to section 44(1) of the Administration of Estates Act[462] by which, in general, all unsecured debts of a deceased person are to be paid pari passu without any priority or preference between creditors.[463]

In effect, this legislation makes the assets of a deceased person liable for the payment of his debts to all his creditors. Therefore it makes no difference whether the creditor has or has not obtained a judgment and a writ of

of execution. It would be reasonable to infer from this that a personal representative is therefore not bound by a writ of execution against the deceased because an execution creditor has no greater rights against the deceased's assets than any other unsecured creditor.

(k) Trustee in Bankruptcy

The rights which an execution creditor has under a writ of execution are subject to section 50(1) of the Bankruptcy Act[464] by which every receiving order and assignment in bankruptcy takes precedence over all executions except such as have been completely executed by payment to the creditor or his agent.

If a bankruptcy occurs before such payment has been made all the creditor is then entitled to is to receive payment of his claim pari passu with other unsecured creditors.[465]

It is suggested that these provisions of the Bankruptcy Act mean, in effect, that a trustee in bankruptcy is not bound by a writ of execution against the bankrupt debtor.

(l) Other Execution Creditors

It seems to be the intent of sections 10 to 14 of the Execution Creditors Act[466] that no creditor is to have any priority in respect of moneys realized in respect of an execution but that all creditors are to share ratably in the proceeds.

This consequence of the Execution Creditors Act is

in contrast to the rule at common law under which creditors ranked in priority according to the teste of their writs provided that only those creditors who had delivered their writs to the sheriff prior to a sale of goods under an execution were entitled to the benefit of the priority.[467] Insofar as execution against goods was concerned, the common law rule was changed by section 16 of the Statute of Frauds, 1676, as a result of which execution creditors ranked in priority according to the date of delivery of their writs to the sheriff for execution.[468] However, both before and after the Statute of Frauds the Crown was entitled to priority over all other execution creditors regardless of the teste of the Crown's writ provided the writ had been delivered to the sheriff for execution prior to the sale of goods by the sheriff under another execution.[469] This may still be true in the case of execution against land.

The real meaning of the Execution Creditors Act is made somewhat ambiguous by the conflict [470] between section 128 of the Land Titles Act[471] and section 29 of the Execution Creditors Act as to determining whether a writ of execution is subsisting or not so as to entitle the creditor to take proceedings under it and to receive the proceeds of a sale under execution. These Acts also leave doubt as to which execution creditors are entitled to share in the proceeds of the sale of land under execution. Should the sheriff sell the land on behalf of all execution creditors whose writs are filed at the land titles office or just on

behalf of such of those creditors whose writs are also filed with that sheriff? Should he sell only for creditors with registered writs or should he include creditors who have filed writs with him but not with the land titles office?

Apart from the above difficulties created by the inconsistencies between these two statutes there is a further way in which the scheme of distribution set out in the Execution Creditors Act may not apply equally to all creditors.

This was exemplified in Edmonton Mortgage Co. v. Gross[472] in which there were three writs of execution registered against a debtor's land, subject to a prior first mortgage. Subsequently, there was a second mortgage registered against the title and still later several other writs of execution were registered. The first mortgagee obtained a judicial sale of the land and after payment of the first mortgage there was a surplus sufficient to pay the second mortgage and the three writs registered before the second mortgage but not to pay the other creditors.

Beck, J., held that, notwithstanding the provisions of the legislation then in force, under which, like the Execution Creditors Act, all creditors were to share ratably in the proceeds of an execution, the three prior execution creditors were entitled to be paid in priority to the subsequent writ holders:

> The second mortgage, therefore, was a specific Charge of the interest of the execution debtor subject to, and, for the purpose of the question

> under consideration, it seems to me, with the same effect as if expressed to be subject to the rights of the then execution creditors. A new and different interest from that to which the three prior executions attached was thus carved out of the debtor's interest, and specifically charged with the second mortgage, leaving again a new and different interest subject to be charged or bound, voluntarily or involuntarily, by the act or default of the debtor; and it is, in my opinion, only this latter interest that became affected by the subsequent executions. The law anterior to the Creditors' Relief Act gave Execution creditors priority as between themselves in the order of the time of their being placed in the hands of the sheriff for execution, and under the Land Titles Act of their being lodged in the land titles office. This law stands, so far as it is not displaced by the provisions of the Creditors' Relief Act. That Act seems never to have contemplated such a case as the present. To bring the three prior executions in the same position as those separated from them by the intervening second mortgage would be to introduce and apply the equitable doctrine of the marshalling of securities for the benefit of the subsequent execution creditors, a thing, as I think, not contemplated by the Act, and effecting as I think an "enlargement" of the rights not of all the execution creditors, but of those of one class against those of the other. Section 22 of the Act contemplates, I think, one "fund". Here I think there are two funds -- one representing the amount necessary to satisfy the three intervening executions -- the other the ultimate residue. There is nothing to indicate that the first should be thrown in with the other so as to make a single fund.[473]

Another way of reaching the same result as that of Beck, J., is to look at the common law rule that a writ of execution binds the debtor's goods as against the debtor himself and as against every person claiming the goods under an assignment from the debtor made after the goods are bound by the writ.

It might with justification be said that when the three prior execution creditors in Edmonton Mortgage Co. v. Gross were realizing their claims, it was not against the interest of the debtor that they were proceeding but against the interest of the second mortgagee whose claim to the land could only become effective after he and not the execution debtor had satisfied the rights of the execution creditors to which his rights were subject.

If this supposition is correct, then it seems that in any case where a debtor conveys an interest in his land subject to prior executions then the creditors are entitled to be paid their claims out of the interest of the assignee rather than from the debtor because the assignee now owns something the debtor previously owned and the assignee is liable to pay the creditors in order to perfect his own rights.

This concept would seem to apply equally in the case of bankruptcy and in the administration of estates so that execution creditors in this position might be entitled to priority over other creditors, not because they are taking any asset of the debtor but because they have a right against an assignee from the debtor of an interest which formerly belonged to the debtor.

One final observation concerning priorities between execution creditors is that as a result of the Fraudulent Conveyances Act, 1570,[474] the sheriff is required to disregard any writ in his hands which is void against other

creditors because it was in effect a fraudulent conveyance.[475] This may still be the law under section 2 of the Fraudulent Preferences Act.[476]

(3) Execution Against Leasehold Interests Owned by a Debtor

Although a tenant of land has an interest in land[477] his interest is also a chattel real, which if it is a legal interest, could be taken in execution under fieri facias at common law.[478]

This common law right is also expressly codified in section 5 of the Seizures Act:[479]

> (1) By virtue of a writ of execution the sheriff charged with the execution thereof may seize and sell any equitable or other right, property, estate, interest of the debtor in or in respect of any goods or other personal property and any equity of redemption of the debtor therein, and also any leasehold interests in land and any other chattels real that are the property of the debtor.
>
> (2) Upon the sheriff making a sale of any such property, whatever equitable or other right, property, interest or equity of redemption the debtor had or was entitled to in or in respect of the goods or other personal property so sold at the time of the seizure thereof under the writ of execution, vests in the purchaser.

Section 5(1) is apparently an extension of the common law in that it permits equitable, as well as legal, leasehold interests to be seized and sold under fi. fa.

But it is interesting that section 5(2) states that the interest of the debtor in the leasehold interest at the time of its seizure is vested in the purchaser from the sheriff.

The preceding section 4 states that goods are bound

by a writ from the date of its delivery to the sheriff for execution except as against a purchaser for value without notice.

As the more specific clause, it must be assumed that section 5 is intended to prevail over section 4, at least in respect to an execution against a leasehold interest. But why is there a difference? Why are goods bound under section 4 from the date of delivery of a writ to the sheriff and leasehold interests bound from the date of their seizure?

One consequence of the inconsistency between the two sections is that it seems that a debtor, after a writ of execution has been delivered against him but before a seizure thereunder, can sell a leasehold interest to a third party who has notice of the writ. Apparently the third party will not be subject to the writ as a result of section 5, whereas if section 4 applied the third party would have been bound.

On the other hand if after a seizure of a leasehold interest a debtor sells his interest to a purchaser for value without notice the interest the purchaser buys from the debtor can be seized and sold by the sheriff whereas the purchaser would have been protected if section 4 applied.

It is suggested that there is no apparent reason for this inconsistency between sections 4 and 5 of the Seizures Act and that one or both of them may be worthy of remedial legislation.

In some cases a tenant can obtain a leasehold title

registered in his name under the Land Titles Act. If a writ of execution is registered at the land titles office against the tenant, is the tenant's interest bound by the writ under section 128(2) of the Land Titles Act or will it only be bound if it is seized under section 5 of the Seizures Act?

As the more specific legislation, it may be that the Seizures Act would prevail. But the answer is not certain. To obviate the difficulty, possibly the Seizures Act should specifically provide that no registered leasehold interest is bound by a writ of execution except in accordance with the terms of the Seizures Act, in a manner similar to that provided for in the seizure of registered mortgages.[480]

(4) Execution Against a Mortgagee of Land

At common law the interest of a mortgagee of chattels was not bound by a writ of fieri facias[481] because the mortgagee did not have possession of the goods. Likewise, in the absence of express enabling legislation, neither was the interest of a mortgagee of land liable to execution under fi. fa.[482] even though such a mortgagee has an interest in the land.[483]

Consequently, it seems that the registration of a writ of execution at the land titles office does not bind the interest even of a registered mortgagee. This common law restriction has to a certain extent been removed by sections 8 and 9 of the Seizures Act.[484]

By section 8 the sheriff may seize a registered mortgage and upon receipt of notice of the seizure, the

mortgagor is liable to make further payments thereunder to the sheriff:

> (1) A sheriff charged with the execution of a writ of execution may seize thereunder any registered mortgage of or encumbrance on lands or chattels of which the debtor is the owner, by delivering a notice in writing of the seizure to the proper officer in the office in which the mortgage or encumbrance is registered.
>
> (2) No mortgage or encumbrance is affected or charged by any writ of execution until delivery of the notice.
>
> (3) Upon receipt of any such notice by the proper officer, he shall make an entry thereof in the register or other book in which the mortgage or encumbrance is registered, and the proper officer is entitled to receive a fee of $1 for so doing.
>
> (4) No person who is liable to pay any money under any mortgage or encumbrance seized pursuant to this section is affected by the seizure thereof until
>
> (a) notice in writing of the seizure has been served upon him personally, or
>
> (b) he has otherwise acquired actual knowledge of the seizure.
>
> (5) Any payments made by that person to the debtor after service of the notice of the seizure or after acquiring actual knowledge of the seizure are of no effect as against the sheriff and the creditor.

By section 9 the creditor may also obtain an order for the sale of a mortgage seized by the sheriff;

> No mortgage or other security for money seized under a writ of execution shall be sold except upon the order of a judge and then only upon such conditions as the judge thinks fit to prescribe.

Although a registered mortgage may be seized under these provisions of the Seizures Act, it seems that it is not

sufficient for the debtor to be registered as a mortgagee. He must also be a mortgagee. In Marble v. Sullan and Ludgate[485] the debtor was a registered mortgagee. Before an attempted seizure [redacted] mortgage he assigned his interest therein as securi[redacted] debt. It was held that all the debtor then owned [redacted] re equitable right to have the mortgage re-assign[redacted] him upon payment of the debt. This interest, it was held could not be seized by the execution creditor.

Chapter IV

EQUITABLE EXECUTION

A. General Principles

One of the meanings of the process described as equitable execution is that it is the assistance given by a court of equity to a judgment creditor to enforce a judgment for the recovery of money given by a court of law.[486]

This kind of equitable execution may be awarded to an execution creditor in two situations. In the first place the remedy may always be given where the debtor has an interest in property which is "such that it cannot be reached at law".[487] This is based on "the well known principle that a Court of Equity would give relief where a legal right existed and there were legal difficulties which prevented the party from enforcing that right at law."[488]

In the second place, under section 34(9) of the Judicature Act,[489] execution by way of a receivership order and by an injunction (but not other kinds of equitable execution) may be awarded "in all cases in which it appears to the court or judge to be just or convenient that the order be made". This means, for example, that a receivership order or an injunction can be given even in a case where the creditor can reach a debtor's property at law but where it is just or convenient that the creditor be granted the equitable relief anyway.[490]

Equitable execution, including equitable execution by way of a receivership order or an injunction under the

Judicature Act, is not intended to expand the field of execution so that a creditor may obtain relief by equitable execution in all cases in which there is no remedy at law. In other words, equitable execution is not a method of getting execution in equity against kinds of property which are not capable of being reached at law; rather, it is a method of getting execution against specific property which is of a kind which can be reached under execution at law but where the debtor's interest in the property is such that it is not subject (or in the case of receivership orders and injunctions, it is not conveniently subject) to execution at law.

This means that if the debtor's interest in property is legal but the property is of a kind which is not subject to execution at law then neither is the property liable to equitable execution. Likewise, if the debtor's interest in property is equitable, but the property is of a kind which could not have been reached by execution at law if the debtor's interest had been legal rather than equitable, then the property cannot be reached by equitable execution either.

In Holmes v. Millage,[491] decided in the English Court of Appeal in 1883, the execution creditor had obtained, in the lower court, an order appointing a receiver of the future earnings of the debtor. The debtor appealed against this order.

Lindley, L.J., pointed out that before the Judica-

ture Acts it was clear that a judgment creditor had no right to attach future income of his debtor, either under writs of execution, or garnishment or by the statutory process of charging orders.[492]

He then said that although there was a difficulty in enforcing payment of the judgment by ordinary legal methods, the difficulty arose "from the fact that future earnings are not by law attachable by any process of execution direct or indirect"[493] and that while receivers were in some cases "appointed of a debtor's interest in personal property ... the property there in question was of a kind which the execution creditor had a right to reach."[494]

Lindley, L.J., said that the principle, both before and after the Judicature Acts, is that equitable execution will only be granted against kinds of property against which a legal right exists but where legal difficulties prevent the enforcement of that right:

> It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity. But the mistake, though old and often pointed out, is sometimes inadvertently made even now. Courts of equity proceeded upon well-known principles capable of great expansion; but the principles themselves must not be lost sight of. The principle on which alone the order in this case could be supported before the Judicature Acts is ... that Courts of Equity gave relief where a legal right existed, and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction.[495]

In equity an execution creditor who sought the remedy of equitable execution first had to obtain a judgment

at law, then he had to sue out his execution at law,[496] and finally, if execution at law was not possible, he had to bring a separate action in a court of equity to obtain an order for equitable execution.[497]

This procedure has now been changed in some respects by the Judicature Act.[498] Section 34(9) permits the court to make an interlocutory order to appoint a receiver or to grant an injunction. Therefore equitable execution by way of receivership or by an injunction can now be granted in the original action either before or after judgment.[499]

Section 32(k) directs the court to grant the parties in an action all legal and equitable remedies to which they may be entitled so that as far as possible all matters in controversy between them can be completely determined. One of the effects of this section may be that it permits an execution creditor, after he has obtained his judgment at law, to bring a motion for equitable execution in the original action instead of his having to bring a separate action for this purpose as he was required to do before the Judicature Acts.[500]

There seems to be doubt as to whether it is still necessary for an execution creditor to sue out his execution at law before seeking equitable execution. For example, if an execution creditor seeks an equitable order for sale of a debtor's land, must the creditor first have issued and filed a writ of execution at the land titles office?

In Seay v. Sommerville Hardware Co. Ltd.,[501]

decided in the Alberta Appellate Division in 1917, Beck, J., commented in one of the judgments:

> Indeed at one time it was held that in order to found an action for equitable execution it was necessary to allege and prove that a writ of execution was in the hands of the sheriff at the date of the commencement of the action.

Although he raised the issue, Beck, J., made no decision on it. Consequently, it would still seem prudent, if not necessary, for an execution creditor to issue and file a writ of execution before bringing a motion against a debtor for equitable execution in aid of his execution at law.

B. Methods of Equitable Execution

(1) Granting a Receiver, Equitable Orders for Sale and Granting a Receiver-Manager

(a) General

When an execution creditor brings an application for equitable execution the ordinary way in which that relief is given is by granting a receiver.[502] The receiver is a person appointed by a court of equity to receive the income and to pay the outgoings of a debtor's property.[503] A receiver can also be appointed to take possession of the debtor's property.[504] The receiver as such is not entitled to sell or buy any property.[505]

Under a writ of fieri facias the creditor has no right to receive any income from his debtor's property. Therefore, such a creditor will not be granted a receiver of his debtor's income in aid of execution under his writ of fi. fa. However, if the debtor's property is of a kind

which is attachable by garnishee proceedings, the creditor can be granted a receiver of the profits of the property in aid of garnishment.[506]

This simply means that, although a judgment creditor may be entitled to be granted a receiver of the income of his debtor, he is entitled to such equitable relief in aid of a legal right of garnishment and not in aid of his legal rights under a writ of fieri facias.

In the case of execution against land, two examples of situations in which a judgment creditor is probably entitled to be granted a receiver are where rents are payable to a debtor as a lessor of land and where moneys are payable to a debtor as unpaid vendor under an agreement for sale.[507]

Rule 466 of the Supreme Court Rules[508] requires the court, in hearing an application for the appointment of a receiver by way of equitable execution, to have regard to the amount of the debt, the amount which may probably be obtained and the probable costs:[509]

> Where an application is made for the appointment of a receiver by way of equitable execution, the court in determining whether it is just or convenient that the appointment be made shall have regard
>
> (a) to the amount of the debt claimed by the applicant,
>
> (b) to the amount which may probably be obtained by the receiver, and
>
> (c) to the probable costs.
>
> and may direct any inquiries on these or other matters before making the appointment.

Although an execution creditor under a writ of fieri facias is not personally entitled to take possession of and to sell his debtor's property, he is entitled to have the sheriff seize and sell the debtor's exigible property and to pay the proceeds to the creditor.

If the kind of property owned by the debtor is subject to legal execution under a writ of fieri facias, but the debtor's interest therein is such that it cannot be reached by legal execution, a court of equity can grant an order for the sale of the debtor's interest in the property.[510]

This rule of equity is codified in rule 383(2) of the Supreme Court Rules.[511] The rule also states that the application for the order is to be made on motion served upon such persons as may be directed:

> Where a judgment debtor has a interest in land which cannot be sold under legal process, but can be rendered available by proceedings for equitable execution by sale for satisfaction of the judgment, the court may, upon motion served upon such persons as may be directed, order the land or the interest therein or a part thereof sold to realize the amount to be levied under execution.

When a court of equity grants an order for sale by way of equitable execution, the order itself will usually not be a conveyance of the debtor's property; rather the order will direct that the property be sold.

The normal method by which a court of equity gives a power to sell is to appoint a receiver-manager. In his capacity as a receiver, this person can receive the income

and pay the outgoings of a debtor's property, and take possession of the property. In his capacity as a manager, he is authorized to sell (and, sometimes, to buy) property.[512]

The same procedure will probably be followed by a court of equity in ordering a sale of land by way of equitable execution although there seem to be no cases which deal specifically with the procedure to be followed in carrying out such an order. Those cases which do deal with the procedure to be followed in carrying out equitable execution are concerned with orders granting a receiver and not orders for sale.[513]

(b) Unpaid Vendors

An unpaid vendor of land who has conveyed the title to the land to his purchaser has an equitable lien (the unpaid vendor's lien) on the land. An execution creditor of the vendor is entitled to obtain an order for sale in equity of the vendor's interest.[514]

The equitable lien, unlike the common law lien, confers a power to sell (by court order) upon the lienor.[515] The fact that an equitable lienor has a right to sell his interest in the property possibly explains why his interest can be sold by proceedings in equitable execution whereas the interest of a common law lienor, who is not entitled to sell his interest in his debtor's property, is not subject to execution, either at law or in equity.[516]

If the interest of the vendor is sold in equitable execution, it would seem that the purchaser of the vendor's

interest should be able to enforce payment of the unpaid purchase price from the purchaser under the agreement for sale just as a purchaser from the sheriff of an unpaid vendor's interest by a sale under fi. fa. can do.[517]

It seems that an execution creditor of an unpaid vendor has a choice of remedies he may seek in equity. Another remedy is to be granted a receiver of the profits and monies receivable by the vendor in respect of his interest in the land.[518]

This equitable remedy can be used against unpaid vendors who have not conveyed title as well as against those whose purchasers have become registered as the owner of the land.[519] The reason for this is that this remedy is in aid of execution by way of garnishee rather than in aid of execution by fi. fa. To support the application for a receiver of the income it therefore is not directly relevant whether the land is or is not registered in the debtor's name.

In appropriate cases it is likely that the creditor can combine both remedies until he decides which remedy he wishes to have in the end. Presumably a creditor will only choose to have the unpaid vendor's interest sold if the terms of the sale will result in a lump sum payment in cash or if the sale will bring in instalment payments from the purchaser through the court larger than the payments due to the unpaid vendor under the agreement for sale. Otherwise a simple receivership order would produce just as much and

as quick a benefit to the creditor in the end.

(c) Purchasers under Agreements for Sale and Unregistered Transferees

It seems that a purchaser of land under an agreement for sale of land not registered in his name has an equitable interest in the land[520] which is not bound by a writ of execution filed against him.[521]

However, it also seems that an execution creditor of such a purchaser is entitled to get an order for sale, in equity, of the purchasers interest in the same way that the debtor's interest could be sold under fi. fa. if the land were registered in his name.[522]

Presumably an execution creditor should also be able to obtain an order for equitable execution against an unregistered transferee who as transferee has the legal title to the land but whose interest in the land, because it is not registered in his name, may not be reachable by legal execution.[523]

(d) Unregistered Mortgagees

Although there are no decisions on point, it would seem that the interest of an unregistered mortgagee should be saleable under equitable execution just as the interest of a registered mortgagee can be seized and sold in execution under fi. fa.

(e) Mortgagors of Land Registered in the Name of the Mortgagee

A mortgagor of land, whose mortgagee is registered as the owner, has an equitable interest in the land under

his equity of redemption.[524]

In Wallace v. Smart,[525] in Manitoba, it was held that an execution creditor was entitled to an order for sale, in equity, of a debtor's equity of redemption.

(f) Spouses with Dower Rights

The dower rights which, under the Dower Act,[526] a person has in land owned by his spouse seem to be regarded as an interest in land, although an ill-defined kind of interest.[527]

Furthermore, in Proskurniak v. Proskurniak[528] it was held that an execution creditor of a person who had a dower interest in land owned by the debtor's spouse could file a caveat against the title of the spouse.

This decision must imply that an execution debtor's dower interest, in land owned by his spouse, is subject in some way to an execution against him.

It is suggested that to the contrary such an interest is not subject to execution at all. This statement, if correct, means that an execution creditor should not have the right to file a caveat against a homestead owned by the spouse of the execution debtor.

There are three reasons for suggesting that a dower interest is not subject to execution: (1) a dower interest, it seems, is a personal right which the owner can renounce but which he cannot convey to another person; (2) the right does not give the owner any present possession or even present right to possess the land; and (3) the right is

not something which can be manually seized by the sheriff and which he can deliver into the possession of a purchaser after a sale by the sheriff.

Any one of the above circumstances might result in dower rights not being bound by a writ of execution at law if the common law rules of execution applicable to goods also applies to execution against land as discussed earlier in this paper.[529]

Furthermore, as shown earlier, the courts of equity will not grant equitable relief in aid of execution i cases where the property is of a kind which is not exigible by execution at law.[530]

The result which may follow, it is submitted, is that an execution creditor is not entitled to any remedy under execution against dower rights and accordingly that the creditor is not entitled to file a caveat against such rights either.

In Heiden v. Huck[531] it was held that an execution creditor could not obtain execution against a dower interest. This decision was not, however, based on the reasoning suggested above but was based on the ground that the husband could release his right to dower and that in addition, the right to dower had been extinguished when the debtor and his wife were divorced. Both of these events, it was held, were sufficient to defeat the claim of the creditor.

But, on the grounds given above, it is suggested that Heiden v. Huck does not go far enough and that not only

does a creditor have no right to execution against a dower interest under the circumstances of that case but he has no right to such execution in any case.

(g) Beneficiaries of Trusts

It seems fairly certain that equity can grant an order for sale by way of equitable execution against the equitable interest of an execution debtor who is the beneficial owner of land under a trust in his favour by the legal owner.[532]

(h) Other Execution Creditors

The theoretical question may be posed as to whether an execution creditor, whose debtor is in turn an execution creditor of a third person, has any rights under his execution against lands owned by the third person.

Thus, it might be speculated that the first execution creditor might be able to sell the third person's lands under his writ, or possibly to file a caveat against the lands.

The answer to this theoretical question may be found, it is suggested, in the House of Lords case Giles v. Grover[533] in 1832 in which it was held that, unless he buys the debtor's goods from the sheriff in a sale under the execution, an execution creditor never acquires an interest in the debtor's goods which are bound by the execution.[534]

This decision must also, it is submitted, apply in the case of execution against land and means that an execution creditor of an execution creditor has no right in equity or

at law against any lands which are subject to execution by the second creditor.

(i) Fraudulent Conveyancees and Other Creditors Under Fraudulent Preferences

The consequences of the Fraudulent Preferences Act[535] at law have been discussed above.[536] There seems to be no reason why these consequences should not also apply in the case of proceedings by way of equitable execution. This suggests that if any conveyance can be set aside as a fraudulent conveyance or as a fraudulent preference then, if the property so conveyed is of a kind which is liable to execution at law but cannot be reached at law, the creditor may have the property sold by an order for sale in equity.

(2) The Creditor's Right to Redeem Prior Legal Interests

This is another method used by the courts of equity to grant equitable execution in aid of legal execution.

For example, in those cases where the debtor has an equity of redemption in property which he has legally mortgaged, the creditor may have the option of obtaining an order from equity for the direct sale of the debtor's interest or he may be able to obtain an order permitting him to redeem the mortgage and to have the legal title restored to the debtor.[537] This could then be sold in execution under the writ of fieri facias.

Presumably a creditor who chooses to thus redeem a mortgage will, in equity, assume the rights of the legal mortgagee. To redeem without such a right would seem to be

too risky otherwise.

The creditor's right to redeem prior legal encumbrances is not restricted to mortgages but exists in any case in which there is a legal interest ahead of the debtor's equitable interest and which the creditor has a right to have removed as a bar to legal execution.[538]

(3) The Creditor's Right to Compel a Trustee to Convey Legal Title to a Beneficiary

This, it seems, is a kind of equitable relief in aid of legal execution which is very similar to the right to redeem prior legal estates.

In any event, if a debtor is a beneficiary under a bare trust of property legally owned by a trustee, a court of equity can compel the trustee to convey the legal estate to the execution debtor. The creditor can then proceed to obtain execution at law under the writ of fi. fa.[539]

(4) Injunctions

The equitable remedy of granting an injunction seems to be the last of the various kindsof equitable execution which may possibly be used by an execution creditor in aid of an execution against lands.[540]

Its use is probably mainly confined to cases in which the creditor wishes to prevent the debtor from disposing of or receiving property which may be liable to another form of execution. For example, pending an application for a receiving order a creditor might be entitled to an injunction restraining a purchaser of land from paying the balance of the purchase money to the vendor who

has conveyed title before receiving full payment.

In many cases if the creditor is entitled to file and does file a caveat under section 136 of the Land Titles Act[541] there may be no need to obtain an injunction. However, it should be remembered in appropriate circumstances that this remedy is available to execution creditors.

C. Exemptions and their Effect

In any case in which a debtor's interest in land would have been exempt from seizure under a writ of execution if his interest has been exigible under legal execution, the creditor will probably not be granted relief by way of equitable execution.[542]

This is in fact just a particular instance of the general equitable rule that equity will not grant equitable execution in any case where the property is of a kind that is not liable to execution at law at all.[543]

D. The Effect of Proceedings for Equitable Execution

In equity the fact that proceedings by way of equitable execution might be taken against property did not bind the property in the way that legal interests in property were bound by a writ of execution being obtained against its owner.

One consequence of this was that the mere obtaining of a judgment or a writ of execution by a creditor did not prevent a debtor from subsequently conveying a good title to a third party, free of any potential claim in equity by the creditor, of any property owned by the debtor which was not

bound by the execution at law.

In fact, it seems that even the commencement of an action for equitable execution did not prevent the debtor from conveying good title to a third party. If the application were for a receivership order in aid of execution by the writ of elegit (a form of execution against land in England[544] by which possession of a debtor's land was delivered to the creditor until the debt had been paid out of the rents and profits of the land) it was held in Hatton v. Haywood[545] that it was only when the receiver was actually appointed by the court that a third party was bound by the equitable execution.

Similarly an order appointing a receiver otherwise than in aid of an execution under elegit only bound the debtor from the time the receiver was appointed[546] and if the creditor still needed protection against third persons who might acquire the property from the debtor even after that time the creditor was entitled to an injunction restraining such a subsequent assignee from receiving the property.[547]

There seem to be no cases which state at what point property is bound by proceedings in equity for an order for sale in aid of execution, but by analogy, it is submitted that in such cases, in equity, the debtor himself is not bound by proceedings for sale in equity until an order for sale has actually been made and that even after that if he does assign his interest the assignee will not be bound by the proceedings unless the creditor can obtain an injunction against the assignee.

E. The Creditor's Right to File and The Effect of Filing a Caveat

It is obvious from the above that third parties are not, in equity, bound to the same extent by proceedings in equitable execution as they are by legal executions, nor, when they are bound, are they bound as early as they are at common law.

This brings into consideration the meaning and effect of section 136 of the Land Title[548] which permits an execution creditor who seeks to aff[illegible], in which the execution debtor has a beneficial interest, to file a caveat against the title of the registered own[illegible]

> Any person claiming to be interested under any will, settlement or trust deed, or any instrument of transfer or transmission or under an unregistered instrument, or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially but the title to which is registered in the name of some other person, or otherwise howsoever in any land, mortgage or encumbrance, may cause to be filed on his behalf with the Registrar a caveat in Form 33 in the Schedule against the registration of any person as transferee or owner of, or of any instrument affecting, the estate or interest, unless the instrument or certificate of title is expressed to be subject to the claim of the caveator.[549]

By section 142 of the Land Titles Act no subsequent instrument is to be registered against the title to any such land unless it is expressed to be subject to the claim of the caveator:

> So long as any caveat remains in force the Registrar shall not register an instrument purporting to affect the land, mortgage or encumbrance in respect of which the caveat

> is lodged, unless the instrument is expressed to be subject to the claim of the caveator.

The question then is what is the effect of filing such a caveat. For example, does the filing of a caveat bind the debtor's interest in the land as against subsequent assignees in the same way as a filed writ binds a debtor's registered interests in land? Or does the filing of a caveat have the same effect as an injunction restraining the sale of a debtor's interest in land?

The small amount of judicial consideration that there has been concerning this issue indicates that the filing of a caveat by an execution creditor may bind a debtor's interests in lands which are not registered in his name in the same manner as the filing of a writ of execution binds his interests whichare subject to legal execution.

In Seay v. Sommerville Hardware Co. Ltd.[550] Beck, J., in delivering one of the majority judgments said:

> [The] Saskatchewan Act, as well as ours, contains the provision which I have quoted under which an execution creditor may file a caveat so as to attach the interest of an execution debtor whose estate and interest does not stand in his own name and is therefore an equitable estate and interest. I think the effect of the provision is that the equitable estate or interest is bound to a limited extent by filing of the writ with the registrar; for instance in the event of the death and the administration of the estate of the execution debtor, the execution creditor would have a preferred claim ... but that to bind it as a registered interest would be bound, the filing

> of a caveat is made necessary. The fact that inasmuch as the estate or interest of the execution debtor is equitable the Sheriff, in pursuance of the writ of execution, cannot proceed to sale, but the execution creditor must take steps by way of equitable execution, does not necessarily result in the conclusion that the execution, or the execution and the caveat founded on it combined, do not bind the estate or interest. Indeed at one time it was held that in order to found an action for equitable execution it was necessary to allege and prove that a writ of execution was in the hand of the sheriff at the date of the commencement of the action.[551]

Clearly, in the light of this judgment, in any case in which a debtor has an interest in land which can be reached by equitable execution, it is important for the creditor to file a caveat against the registered title as soon as possible in order to bind the debtor's interest in land against the claims of third parties whose claims arise after the filing of the caveat.

It does not seem to follow that a creditor must file a caveat in order to obtain relief by way of equitable execution. In other words, it seems that a creditor may choose to bring proceedings against land by way of equitable execution without filing a caveat. But the creditor then takes the risk that his rights will be defeated by a third party whose claim arises after that of the creditor.

Notwithstanding the above, it is possible that by filing a caveat under section 136 the execution creditor does not bind the debtor's land as it would be bound by a writ. In Heiden v. Huck,[552] decided in the Alberta Supreme Court in 1971, Cullen, J., said that:

> [It] will be seen that this section does not create any right to an execution creditor except the right to cause a caveat to be filed and the caveat itself creates no right, but operates merely to notify persons who propose to deal with the land of the alleged claim of the caveator.[553]

If this decision means that the mere filing of a caveat gives a creditor no new rights over his debtor's land and if the creditor has no rights against that land under a writ of fi. fa. because the land is not registered in the name of the debtor, then it seems that the only way in which the creditor can obtain rights against the land is by obtaining relief by way of equitable execution.

This result would mean that a creditor can not just sit on a caveat and expect to acquire rights against the debtor's land even as against claimants whose claims arose after the filing of the caveat.

In conclusion, it seems that it cannot be said with with any certainty exactly how far the filing of a caveat goes to help a creditor in obtaining execution against land not registered in the name of the debtor.

Chapter V

CONCLUSION

One of the striking features of execution against land in Alberta is how uncertain the remedies are that a creditor has against land.

In the first place, there is some doubt as to whether there is any actual right in Alberta to sell land in proceedings in execution. Then, even if the right to sell land under execution does exist, the requirements of the law as to how such an execution is to be commenced, by a seizure or otherwise, so as to give the creditor the right to com the execution by having the land sold cannot be said to be very satisfactorily established.

Further, except in the case of an execution against an unpaid vendor of land, it is possible that the old common law rules that require property to be simultaneously saleable, seizable and in the possession of the debtor may apply to executions against land. This leads to the possible result that a writ of execution does not bind a debtor's interest in land which is registered in the debtor's name but which is occupied by a tenant or which is subject to dower rights belonging to the debtor's spouse.

Another limitation put on the creditor under the present law is with respect to an execution against a debtor who is a co-owner of land. Some cases have suggested that execution is not even possible if the co-owners have jointly mortgaged their property. And in the case of joint tenancies,

in order for an execution creditor to avoid the operation of the right of survivorship, it is not sufficient for him merely to file his writ against the title to the land. In fact, it is possible that when and only when the sheriff has actually sold a joint tenancy in execution can the creditor be sure that he will not lose all his rights against the land as a result of the death of the debtor.

Another broad field of uncertainty occurs in connection with the conflicting requirements of the Land Titles Act and the Execution Creditors Act as to what steps a creditor must take to keep his writ in force and the related problem as to what creditors are entitled to share in the proceeds of the sale of land under execution.

The remedy of equitable execution may be just as limited as legal execution. Rather than filling in the wide gap left by the common law and allowing execution against all kinds of property which are not subject to legal execution, it seems that equity will only aid a creditor where the debtor owns property of a kind which is subject to execution at law but where the debtor's interest in the property is such that the creditor cannot obtain legal execution against it.

On the other hand, there is one situation in which the present state of the law may be too much in favour of the creditor. This is in the case of a writ of execution against an unpaid vendor of land while the land remains registered in the name of the vendor. It seems that the

purchaser in such cases is bound to pay again to the sheriff any payments he makes to the unpaid vendor after he has actual notice of the filing of a writ against the vendor. Practically, this makes it risky for a purchaser to make payments on an agreement for sale without a title search at the time of each payment. Is there any policy reason why a purchaser, whose interest in land has arisen before a writ of execution has been filed against his vendor, should be subject to these risks and why a creditor should be able to sit back and do nothing in such cases and still obtain a benefit from a third party?

It is submitted that these problems, and others discussed in this paper, may well justify some present day legislative review of the field of execution against land.

FOOTNOTES

1. 2 Tidd Practice of the Courts of King's Bench and Common Pleas 993 (9th ed., corrected, 1828).

2 3 Bacon New Abridgment of the Law 351 (7th ed., corrected, 1832), quoted with approval by Spragge, V.C., in Gamble v. Howland (1852) 3 Grant's Chancery Reports (Upper Canada) 281.

3 16 Halsbury's Laws 2 (3d ed. Simonds 1956). Also see MacGuigan, Cases and Materials on Creditors' Rights 27 (2d ed. 1967).

4 5 Encyclopedia of the Laws of England 479 (4th ed., revised, 1907).

5 Halsbury, supra n. 3.

6 Plucknett, Concise History of the Common Law 394 (5th ed. 1956).

7 Alta. Rules of Court.

8 See Halsbury, supra, n. 3 at 4 and Josling, Execution of a Judgment 11 (5th ed. 1974).

9 (Imp.) 28 & 29 Vict., c. 63.

10 (Imp.) 22 Geo. 5, c. 4.

11 See Cote, Introduction of English Law into Alberta, (1964) 3 Alta. L.R. 262, note 5.

12 Id.

13 (Imp.) 22 Geo. 5, c. 4.

14 (Imp.) 30 Vict., c. 3.

15 Id. s. 91(2).

16 Id. s. 91(19).

17 Id. s. 91(21).

18 Id. s. 92(13).

19 Id. s. 92(14).

20 See infra pp. 93, 97 and 143.

21 See infra pp. 31 - 32.

22 (Imp.) 5 Geo. 2, c. 7.

23 See infra pp. 33 - 43.

24 (Imp.) 30 Vict., c. 3, s. 46.

25 (Can.) 33 Vict., c. 3, s. 35.

26 Eg. in (Can.) 60 & 61 Vict., c. 28, An Act further to amend the Acts respecting the North-west Territories, 1897.

27 (Can.) Northwest Territories Act, R.S.C. 1906, c. 62.

28 See Cote, supra, n. 11 at 263 and Scott, Canadian Constitution Historically Explained 20 (1918).

29 (Can.) 49 Vict., c. 25.

30 (Can.) R.S.C. 1886, c. 50.

31 (Can.) 60 & 61 Vict., c. 28, An Act further to amend the Acts respecting the North-west Territories.

32 (Can.) 4 & 5 Edw. 7, c. 3.

33 See Cote, supra, n. 11.

34 See 8 Holdsworth, History of English Law 230 (1952), 2 Tidd, supra, n. 1 at 993 and 998, La Fore Some Aspects of the Writ of Fieri Facias, (1959) U.N.B.L.J. 39 and Encyclopedia, supra, n. 4 at 481.

35 See Doe ex dem McIntosh v. McDonell (1835) 4 Old Series King's Bench Reports (Upper Canada) 195 per Macaulay, J., at 209 and Bacon, supra, n. 2 at 387.

36 (Imp.) 13 Edw. 1, entitled "He that recoverth debt may sue execution by fieri facias or elegit."

37 Plucknett, supra, n. 6.

38 Id. at 391, note 1.

39 Supra, n. 2 at 387.

40 Id.

41 Id.

42 See id.

43 (Imp.) 46 & 47 Vict., c. 52, s. 146(2).

44 (Can.) R.S.C. 1886, c. 50.

45 (Alta.) R.S.A. 1970, c. 198.

46 See supra p. 1.

47 In Latin, the writ commanded the sheriff "quod fieri facias de bonis et catallis." See Bacon, supra, n. 2 at 387.

48 See Encyclopedia, supra, n. 4 at 484 for a sample of the English form of this writ.

49 See id. at 485 and Tidd, supra, n. 1 at 998 - 999.

50 But see Alta. Rules of Court 369 which permits a party to require a sheriff to make a return of a writ. Also see Pease v. [illegible]dge (191[illegible]7 W.W.R. 805 (Sask. K.B.) where it was held that if the sheriff can not sell a mortgage for a reasonable price, he should make a return that the mortgage remains on his hands for want of buyers. Also see The Seizures Act, R.S.A. 1970, c. 338, s. 15(1) which requires a return of nulla bona before land can be sold.

51 See Black's Law Dictionary 1645 (4th ed., revised, 1968).

52 Regulae Generales, Hilary (Practice), 1853, rule 72. See 3 Chitty's Collection of Statutes 795 et. seq. (3d ed. 1865).

53 See Blacks, supra, n. 51 at "goods".

54 Id.

55 Id.

56 (Imp.) 56 & 57 Vict., c. 71.

57 (Alta.) R.S.A. 1970, c. 338.

58 The use of the word "goods" in section 4 raises the question whether that word as used therein has a more restrictive meaning than the words "personal property" as used in section 5. If there is any ambiguity caused by the difference in terminology, this could easily be resolved by enacting a section to define the meaning of "goods" as was done in the (Imp.) Sale of Goods Act, 1893, 56 & 57 Vict., c. 71.

59 Alta. Rules of Court.

60 Id., Form F.

61 Compare with section 2(b) of the Execution Creditors Act, R.S.A. 1970, c. 128 which states that "'execution' means a writ of fieri facias, and every subsequent writ for giving effect to a writ of fieri facias."

62 Alta. Rules of Court, Form F.

63 Bragner v. Langmead (1796) 7 T.R. 20, 101 E.R. 834 (K.B.).

64 (Imp.) 15 & 16 Vict., c. 76.

65 Alta. Rules of Court.

66 See Rowberry v. Morgan (1854) 23 L.J. Ex. 191 and Chitty, supra, n. 52.

67 See Chitty, supra, n. 52.

68 Compare with The Statute of Frauds, 1677 (Imp.), 29 Car. 2, c. 3, s. 15 which had altered the common law as to judgments against lands only.

69 Alta. Rules of Court.

70 Id.

71 Id.

72 See Tidd, supra, n. 1 at 994.

73 See Land Credit Co. of Ireland v. Fermoy (1870) L.R. 5 Ch. 323 and Encyclopedia, supra, n. 4.

74 See Mortimer v. Piggot (1834) 2 Dowl. 615, 111 E.R. 823 and Heighington, Executions Against Land in Ontario, (1929) 7 Can. Bar R. 475.

75 (Imp.) 13 Edw. 1, c. 45, Process of Execution of Things Recorded within the Year, or after, 1285.

76 See Chitty, supra, n. 52 at 683.

77 (Imp.) 15 & 16 Vict., c. 76.

78 Alta. Rules of Court. In Arn Eastham Ltd. v. Samson (1963) 41 W.W.R. 435 (B.C.S.C.) it was held that an execution issued without leave more than six years after judgment is invalid.

79 Alta. Rules of Court.

80 (Alta.) R.S.A. 1970, c. 209, s. 5(1)(f).

81 See Doel v. Kerr (1915) 34 O.L.R. 251 and Heighington, supra, n. 74 at 476.

82 See, for example, Close, Limitation of Actions in British Columbia, (1975) 33 Advocate 427.

83 See Heighington, supra, n. 74.

84 See Jordon v. Binckes (1849) 13 Q.B. 757, 116 E.R. 1453 and Ellis v. Griffiths (1846) 16 M. & W. 106, 153 E.R. 1118.

85 (Imp.) 15 & 16 Vict., c. 76.

86 (Alta.) R.S.A. 1970, c. 128

87 (Alta.) R.S.A. 1970, c. 198. See Re Blanchard (1901) 5 Terr. L.R. 240 (C.A.).

88 (Alta.) R.S.A. 1970, c. 209.

89 See Heighington, supra, n. 74 for a discussion about the problem and see Alta. Rules of Court 363.

90 (Alta.) R.S.A. 1970, c. 198. See Mackenzie v. Wm. Gray and Sons Co. Ltd. (1914) 7 Sask. L.R. 115, 17 D.L.R. 769, 6 W.W.R. 914 (Sask. S.C.) where it was held that if an execution creditor fails to renew his original writ before its expiry it ceases to bind the interest of a purchaser whose interest arose after the filing of the original writ and before the filing of the new writ. Also see Re Land Titles Act: Re Beaver Lumber Co. Ltd. [1917] 3 W.W.R. 760 (Sask. Master of Titles) in which it was held that if a writ is not renewed before it expires, a renewal writ can still be filed but it takes effect as an independent writ.

91 See Tidd, supra, n. 1.

92 (Imp.) 13 Edw. 1.

93 See 1 Chitty's Collection of Statutes 1099 (3d ed. 1865) and Orkin, Law of Costs 1 (1968).

94 Supra, n. 93.

95 (Alta.) R.S.A. 1970, c. 193.

96 Supra, n. 93 at 1099 et. seq.

97 See Tidd, supra, n. 1.

98 See Thornton v. Merredew (1803) 3 Bos. & Pul. 362, 127 E.R. 197 and Tidd, supra, n. 1 at 997 - 998.

99 (Imp.) 43 Geo. 3, c. 46, s.5.

100 (Imp.) 15 & 16 Vict., c. 76. In Chitty, supra, n. 52 at 740 it is said that section 123 of this Act "is an extension and amendment of 43 Geo. 3, c. 46, s. 5."

101 But see (N.W.T.) Civil Justice Ordinance, Ordinance No. 2 of 1886, which might possibly be in force in Alberta and which permitted the creditor to recover the costs of the execution.

102 (Imp.) 1 & 2 Vict., c. 110.

103 See Att. Gen. v. Carrington (1843) 6 Beav. 454, 49 E.R. 901, Newton v. Conyngham (Lord) (1847) 17 L.J.C.P. 288, 136 E.R. 1073 and 2 Chitty's Collection of Statutes 895 (3d ed. 1865).

104 See Fisher v. Dudding (1841) 3 Man. & G. 238, 133 E.R. 1131, Haigh v. Jones (1843) 6 Scott N.R. 696, 134 E.R. 13, Newton v. Grand Junction Ry. Co. (1846) 16 M. & W. 139, 155 E.R. 144 and Chitty, supra, . 103.

105 (Can.) R.S.C. 1970, c. I - 18.

106 Alta. Rules of Court.

107 (Alta.) R.S.A. 1970, c. 193.

108 Repealed in part by (Imp.) 37 Geo. 3, c. 119 (1797) and in full by (Imp.) 50 & 51 Vict., c. 59, s. 1, Statute Law Revision Act, 1887.

109 I.e., colonies. See Blacks, supra, n. 51 at 1309.

110 See La Forest, supra, n. 34 at 47 - 48.

111 (1929) 7 Can. Bar Rev. 448.

112 (1973) 8 U.C.B.L. Rev. 246 at 247 - 8.

113 (Imp.) 54 Geo. 3, c. 15, An Act for the more Easy Recovery of Debts in His Majesty's Colony of New South Wales, 1813; repealed as to Victoria by (Imp.) Statute Law Revision Act, 1890 and in its entirety by (Imp.) Statute Law Revision Act, 1892.

114 See Riddell, supra, n. 111.

115 See Richards v. Att. Gen. of Jamaica (1848) 6 Moo. P.C. 381, 13 E.R. 730.

116 See Riddell, The Slave in Canada, (1920) 5 Journal of Negro History 261 and Riddell, supra, n. 111.

117 (Imp.) 37 Geo. 3, c. 119.

118 (1920) 5 Journal of Negro History 261.

119 (Imp.) 3 & 4 Will. 4, c. 73.

120 (Imp.) 50 & 51 Vict., c. 59.

121 (1835) 4 Old Series King's Bench Reports (Upper Canada) 195.

122 Id. at 199.

123 Id. at 200.

124 Id. at 203 - 204.

125 Id. at 196.

126 Id, at 218.

127 (Imp.) 50 & 51 Vict., c. 59, s. 1.

128 (Can.) R.S.C. 1886, c. 50, s. 11.

129 See, especially, Riddell, supra, n. 111 as to the early legislation and cases in Ontario concerning this Act.

130 (1959) 12 U.N.B.L.J. 39.

131 Id. at 51.

132 See Cote, supra, n. 11 at 262 - 263.

133 (1973) 8 U.B.C.L. Rev. 246.

134 Id. at 248 - 249.

135 See Scott, supra, n. 28 at 21 and Cote, supra, n. 11 at 262 - 263.

136 (B.C.) Execution Act Amendment Act, S.B.C. 1899, c. 27, s. 2.

137 (Man.) 52 Vict., c. 36.

138 (1934) 42 Man. R. 214, [1934] 4 D.L.R. 561, [1934] 2 W.W.R. 366 (Man. C.A.).

139 I.e. (Man.) 52 Vict., c. 36.

140 (1915) 11 Alta. L.R. 224, 23 D.L.R. 70, 8 W.W.R. 1028 (Alta. S.C.).

141 (1915) 8 W.W.R. 1028 at 1030.

142 (1917) 11 Alta. L.R. 201, 33 D.L.R. 508, [1917] 1 W.W.R. 1497 (Alta. A.D.).

143 [1917] 1 W.W.R. 1497 at 1501.

144 (Can.) 4 & 5 Edw. 7, c. 3.

145 (Can.) R.S.C. 1886, c. 50, as amended by (Can.) 60 & 61 Vict., c. 28 (1897).

146 (N.W.T.) C.O. 1898, c. 21. This was based on Ordinance No. 6 of 1893, s. 345 (N.W.T.)

147 See Validity of the Alberta Rules of Court, Report No. 15 of the Institute of Law Research and Reform, The University of Alberta (December, 1974) at 1.

148 See Traunweiser v. Johnson (1915) 8 W.W.R. 1028 per Stuart, J. at 1029. See Also Weidman v. McClary Manufacturing Co. [1917] 2 W.W.R. 210 (Sask. S.C. En Banc) per Haultain, C.J., at 213 where he says this ordinance was in force in Saskatchewan.

149 (Alta.) S.A. 1919, c. 3.

150 Alta. Rules of Court. But see sections 2(j) and 2(k) of the Exemptions Act, R.S.A. 1970, c. 129 which give express statutory authority to sell homesteads and houses occupied by the execution debtor in execution under a "writ of execution".

151 Alta. Rules of Court, Form F.

152 (Alta.) R.S.A. 1970, c. 198.

153 (Alta.) R.S.A. 1970, c. 338.

154 (Alta.) R.S.A. 1970, c. 198.

155 (Imp.) 29 Car. 2, c. 3.

156 See Encyclopedia, supra, n. 4 at 481 and 490.

157 4 East 523, 102 E.R. 931.

158 (1804) 102 E.R. 931 at 937.

159 (1740) 2 Eq. Cas. Abr. 380, 27 E.R. 546.

160 (1740) 27 E.R. 546 at 547 and see also Bacon, supra, n. 2 at 413 and Tidd, supra, n. 1 at 1000.

161 (1896) 2 Terr. L.R. 356 (Terr. Ct. En Banc).

162 (Can.) R.S.C. 1886, c. 50.

163 No. 6 of 1893, s. 345.

164 (1896) 2 Terr. L.R. 356 at 357.

165 Id. at 374.

166 24 L.J.Q.B. 346, 119 E.R. 405.

167 119 E.R. 405 at 411.

168 But see Foss v. Sterling Loan (1915) 8 Sask. L.R. 289, 23 D.L.R. 540, 8 W.W.R. 1092 (Sask. S.C. En Banc) in which Newlands, J., held that to say a writ would "bind" lands meant the sheriff acquired a legal right to seize the lands of the execution debtor. This statement is correct, it is suggested, only if the binding is in respect of a writ of execution, i.e. fi. fa., which is enforced by a seizure by the sheriff. It is this latter point which is not clearly established by statute in Alberta.

169 Alta. Rules of Court.

170 See also La Forest, supra, n. 34 at 47 - 48.

171 (1915) 11 Alta. L.R. 224, 23 D.L.R. 70, 8 W.W.R. 1028 (Alta. S.C. Chambers).

172 (1915) 8 W.W.R. 1028 at 1029.

173 (Can.) 49 Vict., c. 26 (1886).

174 (Can.) 57 - 58 Vict., c. 28 (1894).

175 (Alta.) S.A. 1906, c. 24.

176 (1832) 1 H.L.C. 72.

177 Id. at 89.

178 Id. at 115.

179 Id. at 145 - 146.

180 See Scott v. Scholey (1807) 8 East 467, 103 E.R. 423 and Coleman v. Rawlinson (1858) 1 F. & F. 330, 175 E.R. 750.

181 Although in Doe d. Tiffany v. Miller (1850) 6 U.C.Q.B. 426 at 448 Macaulay, J., said that lands could be sold

under fi. fa. without a seizure just as the term of a lease could be sold without a seizure at common law.

182 Id. per Robinson, C.J. at 437 - 438 and per Macaulay, J. at 456.

183 Id. at 456 per Macaulay, J.

184 Id.

185 Doe dem Miller v. Tiffany (1848) 5 U.C.Q.B. 79 per Macaulay J. at 91.

186 Leeming v. Hagerman (1836) 50 Old Series King's Bench Reports (Upper Canada) 38 per Macaulay, J., at 44.

187 Hazlitt v. Hall (1865) 24 U.C.Q.B. 485 per Draper, C.J. at 487.

188 Stevenson v. Franklin (1869) 16 Grant's Chancery Reports 139 (Ont.) per Mowat, V.C., at 140. For other cases discussing seizure in relation to execution against land see Smith v. Coburgh and Peterborough Ry. (1859) 3 P.R. 113 (Ont.), Bradbourn v. Hall (1869) 16 Gr. 518 (Ont.), Bank of Montreal v. Munro (1864) 23 U.C.Q.B. 414, Douglass v. Bradford (1854) 3 U.C.C.P. 459, Hall v. Goslee (1865) 15 U.C.C.P. 101 and Power v. Grace [1932] O.R. 357 (Ont. C.A.).

189 Merchants Bank v. Campbell (1881) 32 U.C.C.P. 170 per Osler, J., at 185 - 186.

190 (Ont.) R.S.O. 1887, c. 66, s. 42.

191 Merchants Bank v. Campbell (1881) 32 U.C.C.P. 170 per Wilson, C.J. at 176.

192 (Alta.) R.S.A. 1970, c. 338.

193 (U.C.) 2 Geo. 4, c. 1, s. 20.

194 See Doe dem Tiffany v. Miller (1852) 10 U.C.Q.B. 65 per Burns, J., at 82. In McDonald v. Dunlop (1898) 2 Terr. L.R. 238 (N.W.T.) and Re Land Titles Act, 1894 and Blanchard Estate (1901) 5 Terr. L.R. 240 (N.W.T.) it was held that the mere filing of a writ of execution at the land titles office is not a seizure of land. See also Foss v. Sterling Loan (1915) 8 Sask. L.R. 289, 23 D.L.R. 289, 8 W.W.R. 1092 (Sask. S.C. En Banc) in which the Court discussed the requirement that lands be seized in order to carry out an execution against them. In Lee v. Harrison [1917] 3 W.W.R. 570 at 572 (Alta. S.C.) it was held "that the filing of an execution by

itself is not a seizure of the land; it requires a further act on the part of the sheriff." In Cochlin v. Massey Harris Co. Ltd. (1915) 8 Alta. L.R. 392 at 397 Beck, J., (dissenting in part) said that no "actual levy - this word, I think, is identical with seizure - seems to be necessary in the case of lands." It is suggested that Beck, J., was here referring to an actual seizure in the sense of a physical seizure rather than in the sense of saying that no seizure at all was necessary.

195 (Ont.) R.S.O. 1887, c. 66, s. 42. This Act, if copied in Alberta, would make it clear how to make a seizure of land. But in Alberta there may be a further problem concerning the seizure of land. It seems that the seizure must be made by a sheriff, but by which sheriff? It would seem logical that the seizure (and sale) would have to be made by the sheriff of the judicial district in which the land is located. If the seizure can only be made by this sheriff and if the original writ filed at the Land Titles Office was directed to the sheriff of another district, then it may be that before having the land seized the creditor has to obtain an alias writ of execution directed to, and to deliver this to, the proper sheriff. Such a cumbersome procedure is certainly not desirable but in the light of our existing legislation, it may be necessary.

196 Giles v. Grover (1832) 1 H.L.C. 72 (House of Lords) per Patteson, J., at 77, per Alderson, J., at 99-100, per Taunton, J., at 100, per Vaughan, J., at 147, per Tindal, L.C.J., at 203 and per Lord Tenterden at 218.

197 Id. per Patteson, J., at 90 - 91, per Taunton, J., at 114 and 118, per Tindal, L.C.J. at 201 and per Lord Tenterden at 218. It was said by Beck, J., (dissenting in part) in Cochlin v. Massey Harris Co. Ltd. (1915) 8 Alta. L.R. 392 at 397-8 that it "was urged that a fi. fa. lands authorizes the sheriff to make a seizure by going upon the lands, which is undoubtedly correct, and having done so to remain in possession until the time for sale arrives, as in the case of goods; this latter proposition is, I think, not correct."

198 Giles v. Grover (1832) 1 H.L.C. 72 per Alderson, J., at 100 - 101, per Taunton, J., at 116 and per Tindal, L.C.J., at 204.

199 Id. per Patteson, J., at 77.

200 Id. at 95 per Vaughan, J., and see Clerk v. Withers (1704) 2 Lord Raym. 1072, 92 E.R. 211.

201 6 U.C.Q.B. 426 (U.C.)

202 (Alta.) R.S.A. 1970, c. 338.

203 Giles v. Grover (1832) 1 H.L.C. 72 at 95 per Alderson, J., and at 218 - 219 per Lord Tenterden. And see Latimer v. Batson (1825) 4 B. & C. 652, 107 E.R. 1203 and 11 Campbell Ruling Cases 669 (1897).

204 (Alta.) R.S.A. 1970, c. 338.

205 Id. s. 14(1).

206 (Alta.) R.S.A. 1970, c. 198. See Sawyer Massey Co. Ltd. v. Ethier [1920] 1 W.W.R. 869 (Sask. K.B.) where the court refused to confirm a sale where a rule as to publishing a notice of sale in a newspaper nearest the lands was not complied with.

207 Doe dem Tiffany v. Miller (1852) 10 U.C.Q.B. 65 per Burns, J., at 86. And see Doe ex dem Moffat v. Hall (1827) Taylor 510.

208 Doe dem Tiffany v. Miller (1852) 10 U.C.Q.B. 65 per Burns, J., at 81.

209 (Alta.) R.S.A. 1970, c. 198.

210 Giles v. Grover (1832) 1 H.L.C. 72 per Alderson, J., at 96 - 96 and per Vaughan, J., at 145 (House of Lords). And see Higgins v. M'Adam (1829) 3 Y. & J. 1, 148 E.R. 1068, Perkinson v. Guilford (1640) Cro. Car. 539, 79 E.R. 1064 and Lowthal v. Tonkins (1740) 2 Eq. Cas. Abr. 380, 22 E.R. 323, 27 E.R. 546.

211 See Doe d. Tiffany v. Miller (1850) 6 U.C.Q.B. 426 at 449 per Macaulay, J.

212 See Scott v. Scholey (1807) 8 East 467, 103 E.R. 423, Metcalf v. Scholey (1807) 2 Bos. & Pul. (N.S.) 461, 127 E.R. 709, Burdon v. Kennedy (1757) 3 Atk. 739, 26 E.R. 1224 and Lyster v. Dolland (1792) 1 Ves. Jun. 431, 30 E.R. 422.

213 Stevens v. Hince (1914) 110 L.T. 935.

214 (1807) 8 East 467, 103 E.R. 423.

215 (1807) 8 East 467 at 484. In effect, this principle meant that choses in possession were seizable but choses in action were not. See Norcutt v. Dodd (1841) Cr. & Ph. 100, 41 E.R. 428, Dundas v. Dutens (1790) 1 Ves. Jun. 196, 30 E.R. 298, and Barrack v. M'Culloch (1856) 3 Kay & J. 110, 69 E.R. 1043.

216 Kinnear v. Kinnear (1924) 26 O.W.N. 111 and Fraser v. Jenkins (1888) 20 N.S.R. 494. But see Tidd, supra n. 1 at 1003.

217 See Ferrie v. Cleghorn (1860) 19 U.C.Q.B. 241 and Henderson v. Fortune (1859) 18 U.C.Q.B. 520.

218 See Kinnear v. Kinnear (1924) 26 O.W.N. 111 and La Forest, supra, n. 34 at 45.

219 Infra pp. 105 - 114.

220 See Duncan v. Garratt (1824) 1 C. & P. 169, 171 E.R. 1148 and Proctor v. Nicholson (1835) 7 C. & P. 67, 173 E.R. 30. But apparently the sheriff could not seize a debtor's goods in the possession of a pledgee if the time for redemption had not yet expired. See Garstin v. Asplin (1815) 1 Madd. 150, 56 E.R. 57 and Young v. Lambert (1870) L.R. 3 P.C. 142. But possibly a debtor's goods could be seized from a pledgee after that time. See Rollason v. Rollason (1887) 34 Ch.D. 495. A debtor's goods could not be seized from a landlord who had previously seized them under a power of distress. See Haythorn v. Bush (1834) 2 Cr. & M. 689, 149 E.R. 938 and Reddell v. Stowey (1841) 2 Mood. & R. 358, 174 E.R. 316. But see also Tidd, supra, n. 1 at 1003.

221 (1840) 6 M. & W. 36, 151 E.R. 311.

222 (1840) 151 E.R. 311 at 313.

223 Id.

224 Dawson v. Wood (1810) 3 Taunt. 256, 128 E.R. 102.

225 Cooper v. Willomatt (1845) 1 C.B. 672, 135 E.R. 706.

226 Manders v. Williams (1849) 4 Exch. 339, 154 E.R. 1242.

227 Jelks v. Hayward [1905] 2 K.B. 460.

228 Francis v. Nash (1734) Lee temp. Hard 53, 95 E.R. 32. Generally, choses in action were not assignable at common law whereas choses in possession were saleable. But it seems that some choses in action, eg. bank notes, were assignable by statute; but despite their assignability, these still were not seizable at common law. See Knight v. Criddle (1807) 9 East 48, 103 E.R. 491.

229 Knight v. Criddle (1807) 9 East 48, 103 E.R. 491. But before this and other cases money had been held to be seizable. See Armistead v. Philpot (1799) 1 Dougl. 231, 99 E.R. 151. Also money was apparently regarded

as a chose in possession and not a chose in action.

230 Rollason v. Rollason (1887) 34 Ch. D. 495.

231 See supra pp. 56 - 60.

232 (1860) 9 Upper Can. Common Pleas 295. And See Doe d. Vernon v. White (1859) 9 N.B.R. 314 and LaForest, supra, n. 34 at 49. But see Dunlop, supra, n. 112 at 225 - 256.

233 (1915) 11 Alta. L.R. 224, 23 D.L.R. 70, 8 W.W.R. 1028 (Alta. S.C. Chambers).

234 (1914) 7 Alta. L.R. 344, 16 D.L.R. 104, 5 W.W.R. 1279, 27 W.L.R. 48 (Alta. S.C. Chambers).

235 But see Adanac Oil Co. v. Stocks (1916) 11 Alta. L.R. 214, 28 D.L.R. 215, 9 W.W.R. 1521 (Alta. S.C.).

236 (Alta.) R.S.A. 1970, c. 198.

237 (Alta.) R.S.A. 1970, c. 338.

238 [1924] 2 D.L.R. 1119, [1924] 2 W.W.R. 462 (Alta. A.D.).

239 [1934] 2 W.W.R. 123 (Sask. C.A.).

240 (1922) 18 Alta. L.R. 97, [1922] 2 W.W.R. 272 (Alta. A.D.).

241 [1922] 2 W.W.R. 272 at 276.

242 (Alta.) Dower Act, S.A. 1917, c. 14, s.3.

243 (Alta.) Dower Act, R.S.A. 1970, c. 114 s. 3.

244 But in the specific instance of execution against land subject to dower rights see Prokopchuk v. Mandryk and Mandryk [1942] 2 W.W.R. 577 (Alta. S.C.).

245 (Can.) 49 Vict., c. 26, s. 94; consolidated as (Can.) R.S.C. 1886, c. 51, s. 94.

246 (Can.) 57 & 58 Vict., c. 28.

247 (Alta.) S.A. 1906, c. 24.

248 11 Alta. L.R. 214, 28 D.L.R. 215, 9 W.W.R. 1521 (Alta. S.C. Chambers).

249 (1916) 9 W.W.R. 1521 at 1523.

250 11 Alta. L.R. 201, 33 D.L.R. 508, [1917] 1 W.W.R.

1497 (Alta. A.D.).

251 [1917] 1 W.W.R. 1497 at 1505. See also Can. Pac. Ry. Co. v. Silzer (1910) 3 Sask. L.R. 162, 14 W.L.R. 274.

252 (Alta.) R.S.A. 1970, c. 198.

253 (1919) 13 Sask. L.R. 79, [1919] 3 W.W.R. 1120.

254 R.S.S. 1909, c. 41, s. 118 as amended by S.S. 1912 - 13, c. 16, s. 17. It provided that a writ when filed "shall bind and form a lien and charge on all the lands of the execution debtor situate within the judicial district of the sheriff who delivers or transmits such copy as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal." It would seem that the Saskatchewan legislature did not approve of the decision in the Ruttle case that a writ bound unregistered land. The Act was quickly amended so that only registered interests were bound. By section 150(2) of the Land Titles Act, R.S.S. 1920, c. 67 "Such writ shall from and only from the receipt of a certified copy thereof by the registrar for the land registration district in which the land affected thereby is situated bind and form a lien and charge on all the lands of which the debtor may be or become the registered owner situate within the judicial district the sheriff of which transmits a copy."

255 [1924] 2 D.L.R. 1119, [1924] 2 W.W.R. 462 (Alta. A.D.).

256 (Alta.) R.S.A. 1922, c. 133.

257 (1922) 18 Alta. L.R. 97, [1922] 2 W.W.R. 272 (Alta. A. D.).

258 (Alta.) S.A. 1906, c. 24 as amended by S.A. 1914, c. 2, s. 9, S.A. 1917, c. 3, s. 40(5), S.A. 1919, c. 37, s. 6, s. 7 and s. 8, and S.A. 1921, c. 39, s. 77.

259 (Imp.) 1 & 2 Vict., c. 110.

260 This section is presumably repealed by implication by the (Alta.) Seizures Act, R.S.A. 1970, c. 338, s. 6.

261 Collingridge v. Paxton (1851) 11 C.B. 683, 138 E.R. 643 and Harrison v. Paynter (1840) 6 M. & W. 387, 151 E.R. 462.

262 France v. Campbell (1841) 9 Dowl. 914, 6 Jur. 105.

263 Robinson v. Peace (1838) 7 Dowl. 93.

264 Williams v. Millington (1788) 1 H.Bl. 81, 126 E.R. 49.

265 Courtoy v. Vincent (1852) 15 Beav. 486, 51 E.R. 626, and Squire v. Huetson (1841) 1 Q.B. 308, 113 E.R. 1149; but see Watts v. Jefferyes (1851) 3 Mac. & G. 422, 42 E.R. 324.

266 Ex parte Richdale, Re Palmer (1882) 19 Ch. D. 409, 51 L.J. Ch. 462 (Eng. C.A.).

267 Webster v. Threlfall (1825) 2 Sim. & St. 190, 57 E.R. 318.

268 Legg v. Evans (1840) 6 M. & W. 36, 151 E.R. 311.

269 (Imp.) 56 & 57 Vict., c. 71.

270 See Encyclopedia, supra, n. 4 at 482.

271 See Giles v. Grover (1832) 1 H.L.C. 72 per Tindal, L.C.J., at 201 and per Lord Tenterden at 218 - 219 and Woodland v. Fuller (1840) 11 Ad. & E. 859, 113 E.R. 641 per Patteson, J., and cf. Holmes v. Tutton (1855) 24 L.J. Q.B. 346, 119 E.R. 405.

272 Giles v. Grover (1832) 1 H.L.C. 72 per Alderson, J., at 95 - 96 and per Vaughan, J., at 146 and see also Lowthal v. Tonkins (1740) 2 Eq. Cas. Abr. 380, 22 E.R. 323, 27 E.R. 546.

273 (1740) 2 Eq. Cas. Abr. 380, 27 E.R. 546.

274 (1740) 27 E.R. 546 at 547.

275 Clerk v. Withers (1704) 2 Lord Raym. 1072, 92 E.R. 211.

276 Giles v. Grover (1832) 1 H.L.C. 72 per Alderson, J., at 75, per Taunton, J., at 114, per Vaughan, J., at 143 and per Tindal, L.C.J., at 202.

277 Id. per Alderson, J., at 96 and per Taunton, J., at 118.

278 Id. per Patteson, J., at 76.

279 Id. per Patteson, J., at 76, per Alderson, J., at 95, per Taunton, J., at 114, per Vaughan, J., at 143, per Tindal, L.C.J., at 201 and per Lord Tenterden at 219 and see also King v. Bird (1679) 2 Show. K.B. 87, 89 E.R. 811.

280 Giles v. Grover (1832) 1 H.L.C. 72 at 95 per Alderson, J.

281 Id.

282 Id. at 76.

283 Id. at 97.

284 Id. at 96.

285 Id. at 144.

286 Id. at 201.

287 Id. at 218 - 219. See also Holmes v. Tutton (1855) 24 L.J.Q.B. 346, 119 E.R. 405.

287a See Re Judgments Act, R. v. Hamilton (1962) 39 W.W.R. 545 (Man. Q.B.) per Ferguson, J., at 564 where it was said that the creditor's fundamental right is to sell the exigible lands to satisfy his judgment, both in common law and in Manitoba, and that the creditor acquires no property rights because these rights remain in the debtor until the sale is perfected and finally completed. In Cochlin v. Massey Harris Co. Ltd. (1915) 8 Alta. L.R. 392 (Alta. A.D.) at 397 Beck, J., (dissenting in part) said that a "fi. fa. land gives no authority to the sheriff to put the execution creditor into possession of the lands" and that the "tenor of the writ is that 'you cause to be made of the lands of' the execution debtor. That command, I think, can only be executed by a sale."

288 6 M. & W. 36, 151 E.R. 311.

289 151 E.R. 311 at 313.

290 Pullen v. Purbecke (1678) 1 Ld. Raym. 346, 91 E.R. 1128, and see Giles v. Grover (1832) 1 H.L.C. 72 per Alderson, J., at 96 and per Tindal, L.C.J., at 201.

291 1 H.L.C. 72 (house of Lords).

292 Id. at 119.

293 See Neil v. Almond (1897) 29 O.R. 63, Meyers v. Meyers (1872) 19 Grant's Reports 185, Re Woodall (1904) 8 O.A. R. 167, Boice v. O'Loane (1878) 3 O.A.R. 167, and Glover v. Southern Loan and Savings Co. (1901) 10 L.R. 59. Also cf. Re Scribner and Wheeler (1910) 14 W.L.R. 524 (Sask.).

294 See Evans v. Postill (1910) 3 Alta. L.R. 141 (Alta.) S.C. Chambers) and Re Claxton (1890) 1 Terr. L.R. 282 (N.W.T.). Also see Can. Pac. Ry. Co. v. Silzer (1910) 3 Sask. L.R. 162, 14 W.L.R. 274 (Sask.), Bocz v. Spiller

(1905) 1 W.L.R. 366, Aff. 2 W.L.R. 280 (Sask.) and Thom's Canadian Torrens System 419 (2d ed. Di Castri 1962).

295 (1907) 1 Alta. L.R. 7, 7 W.L.R. 178 (Alta. S.C.).

296 1 Alta. L.R. 7 at 8.

297 (N.W.T.) C.O. 1898, c. 21.

298 (Alta.) Assignments Act, S.A. 1907, c. 6, s. 8.

299 (1832) 1 H.L.C. 72 (House of Lords).

300 (1855) 24 L.J.Q.B. 346, 119 E.R. 405.

301 119 E.R. 405 at 411.

302 [1920] 2 W.W.R. 202 (Alta. S.C. Chambers).

303 (N.W.T.) C.O. 1898, c. 119.

304 [1920] 2 W.W.R. 202 at 204.

305 [1935] 3 W.W.R. 311 (Alta. A.D.).

306 (Alta.) R.S.A. 1922, c. 220, s. 43.

307 (N.W.T.) C.O. 1898, c. 119, s. 44.

308 [1920] 2 W.W.R. 202 (Alta. S.C. Chambers).

309 [1935] 3 W.W.R. 311 at 315 - 316.

310 (Alta.) R.S.A. 1970, c. 1, s.44.

311 Supra, p. 86.

312 Infra pp. 94 - 98.

313 Compare with sections 2 and 50(1) of the Bankruptcy Act, R.S.C. 1970, c. B - 3.

314 (1855) 3 Sm. & Giff. 1, 65 E.R. 537. Aff. 24 L.J. Ch. 440.

315 See Neate v. Duke of Marlborough (1838) 3 My. & Cr. 407, 40 E.R. 983.

316 Gore v. Bowser (1855) 3 Sm. & Giff 1, 65 E.R. 537, Aff. 24 L.J. Ch. 440.

317 (Imp.) 1 & 2 Vict., c. 110.

318 Neate v. Duke of Marlborough (1838) 40 E.R. 983 at 987 per Lord Cottenham.

319 In Weidman v. McClary Manufacturing Co. [1917] 2 W.W.R. 210 (Sask. S.C. En Banc) Haultain, C.J. said at p. 213 that this Act had been repealed in the Territories (presumably by implication) by several Ordinances dealing with the subject of execution.

320 (Can.) R.S.C. 1970, c. B-3.

321 See Parker-Eakins Co. v. Royal Bank of Can. (1922) 65 D.L.R. 679, 55 N.S.R. 490, 3 C.B.R. 211 (N.S.C.A.), Re London Motors Ltd. [1925] 4 D.L.R. 941, 7 C.B.R. 338 (Ont.), Can. Credit Men's Trust Assoc. v. Beaver Trucking Ltd. [1959] S.C.R. 311, 17 D.L.R. (2nd) 161, 38 C.B.R. 1, Re Peterson [1925] 4 D.L.R. 1042, [1925] 3 W.W.R. 708, 7 C.B.R. 50 (Man.) and Re Sklar and Sklar (1958) 26 W.W.R. 529 (Sask. C.A.). Also see Re Winding-up Act [1926] 1 W.W.R. 528 (Alta. S.C.) in which it was held that an execution creditor did not have a lien on land within the meaning of section 84 of the Winding-up Act, R.S.C. 1906, c. 144 as amended by S.C. 1908, c. 75. In Re Parton (1967) 61 W.W.R. 171 (Alta. S.C.) Riley, J., said that he was of the opinion that a writ of execution did not create a charge, lien or encumbrance on land to make the execution creditor a secured creditor under the Bankruptcy Act. (Id. at 179).

322 See Black, supra, n. 51 at 294.

323 See Whitworth v. Gaugain (1844) 3 Hare 416 at 424, 67 E.R. 444 at 447; Aff. 1 Ph. 728, 41 E.R. 409 and see Giles v. Grover (1832) 1 H.L.C. 72 (House of Lords) per Patteson, J., at 77.

324 1 H.L.C. 72 (house of Lords).

325 Id. at 77.

326 See Black, supra, n. 51 at 294.

327 (1840) 11 Ad. & E. 859, 113 E.R. 641.

328 (1840) 11 Ad. & E. 859 at 867 - 868. Also see Re Claxton (1890) 1 Terr. L.R. 282 (N.W.T.) per McGuire, J., at 287.

329 Cf. supra pp. 92 - 93 as to the possible influence of section 13 of the Judgments Act, 1838.

330 (1896) 26 S.C.R. 282 (S.C.C. from N.W.T.).

331 Id. at 290.

332 Id. at 291.

333 (1907) 1 Alta. L.R. 7, 7 W.L.R. 178 (Alta. S.C.).

334 (1840) 11 Ad. & E. 859, 113 E.R. 641.

335 (Imp.) 32 & 33 Vict., c. 71.

336 (Imp.) 21 Jac. 1, c. 19.

337 (1871) L.R. 6 Ex. 228.

338 (1877-8) L.R. 7 Ch. 314, 26 L.T. 303.

339 (1832) 1 H.L.C. 72.

340 Id. per Patteson, J., at 79, per Alderson, J., at 97 - 98, per Taunton, J., at 117, 120, and per Tindal, L.C.J., at 205.

341 (Can.) R.S.C. 1970, C. B-3. See Re Sklar and Sklar (1958) 26 W.W.R. 529 (Sask. C.A.) and Re Parton (1967) 61 W.W.R. 171 (Alta. S.C.).

342 Giles v. Grover (1832) 1 H.L.C. 72 (House of Lords) per Patteson, J. at 73.

343 (Alta.) R.S.A. 1970, c. 198. A writ of execution when issued by the Clerk of the Court may be directed to the sheriff of any judicial district in the Province (Alta. Rules of Court, Form F). Upon payment to him of the proper sum, this sheriff is then required by section 128 of the Land Titles Act to transmit a certified copy of the writ to the Registrar of Titles (cf. Re Land Titles Act [1918] 3 W.W.R. 90 (Sask. Master of Titles)). Since there are two land registration districts in Alberta, it seems that the creditor can have such a copy delivered to the Registrar of either or both of these districts. The writ when filed with a Registrar binds land throughout his land registration district regardless of whether or not the land is within the judicial district of the sheriff who transmitted the writ to him (Robin Hood Mills Ltd. v. Haimson (1918) 14 Alta. L.R. 196, 40 D.L.R. 328, [1918] 2 W.W.R. 58 (Alta. C.A.)) and it binds property acquired by the debtor after the writ is filed as well as land owned by the debtor at the time of filing (Lee v. Armstrong (1917) 13 Alta. L.R. 160, (1917) 37 D.L.R. 738, [1917] 3 W.W.R. 889 (Alta. C.A.) Robin Hood Mills Ltd. v. Haimson (1918) 14 Alta. L.R. 196, 40 D.L.R. 328, [1918] 2 W.W.R. 58 (Alta. C.A.) and Rogers Lumber Co. v. Smith [1913] 4 W.W.R. 441

(Sask. S.C. En Banc).

344 (Imp.) 56 & 57 Vict., c. 71.

345 (Imp.) 29 Car. 2, c. 3. In Reid v. Miller (1865) 24 U.C.Q.B. 610 (C.A.) the judgments of Draper, C.J., at 621 and Hagarty, J., at 623 (Morrison, J., concurring) indicated that, in an execution against land under the Act (Imp.) 5 Geo. 2, c. 7, the land was not bound by a writ until it was delivered to the sheriff for execution. This result would seem to be equivalent to making the provisions of section 16 of the Statute of Frauds apply by implication to execution against land although the section expressly applied only to execution against goods. If these comments were well founded, this could mean that in Alberta, in the absence of section 128 of the Land Titles Act, land might, as against third parties, be bound by a writ from the date of delivery of the writ to the sheriff for execution rather than from the teste of the writ.

346 See Encyclopedia, supra, n. 4 at 482.

347 Giles v. Grover (1832) 1 H.L.C. 72 (House of Lords) per Patteson, J., at 73 and see Bacon, supra n. 2 at 413. In Emerson v. Simpson (1962) 38 W.W.R. 466 (B.C.S.C.) it was held that the Crown in right of Canada under a writ of extent (a prerogative writ) had priority over prior execution creditors under registered judgments against land.

348 Houghton v. Rushby (1686) Skin. 257, 90 E.R. 117 and Wheatly v. Lane (1669) 1 Wms. Saund. 216, 85 E.R. 228. By Alta. Rules of Court 356 a writ of execution cannot be issued, without leave, after the death of the debtor.

349 Giles v. Grover (1832) 1 H.L.C. 72 (House of Lords) per Alderson, J., at 96. Compare with Nichol v. Pedlar and Johnston [1919] 3 W.W.R. 712 at 716 (Sask. C.A.) in which it was held that when the sheriff sells land under an execution he has "the right to sell all of the execution debtor's interest in the land" and this includes the debtor's title in fee simple, his interest as tenant of a mortgagee in possession and his leasehold interest in uncut crops planted by him on the land.

350 See Doe Tiffany v. Miller (1850) 6 U.C.Q.B. 426 (Ont.) per Burns, J., at 81 and 86.

351 Cf. (Alta.) Land Titles Act, R.S.A. 1970, c. 198, sections 131 to 133.

352 (Alta.) Rules of Court. And see Morton and Cowell v. Hoffert [1924] 3 D.L.R. 16, [1924] 2 W.W.R. 529 (Alta. A.D.) where it was held that after the sale by the sheriff of the interest of an unpaid vendor under an agreement for sale of land, the purchaser from the sheriff is in a position to enforce payment of the unpaid purchase price under the agreement for sale subject to any defences, legal or equitable, which the purchaser may be entitled to rely upon. And in Cochlin v. Massey Harris Co. Ltd. (1915) 8 Alta. L.R. 392 at 397 Beck, J., (dissenting in part) said that on "a sale and the issue of a transfer to the purchaser - and, in view of our Land Titles Act, I should say on the purchaser, also, obtaining a certificate of ownership - the purchaser may take proceedings to obtain possession."

353 Hardistey v. Barney (1696) Comb. 356, 90 E.R. 525.

354 (Alta.) R.S.A. 1970, c. 129. In some cases this Act may not apply to writs of execution by the Crown. See Straka v. Straka (1970) 73 W.W.R. 759 (Alta. S.C.) and the cases referred to therein.

355 (1911) 19 W.L.R. 545 (Alta. S.C.).

356 Id. at 547.

357 Re Conlin Estate (1914) 7 W.W.R. 187 (Alta. S.C. Chambers).

358 (1911) 44 S.C.R. 318 (S.C.C.).

359 360 Id. at 320. See also Hart v. Rye (1914) 5 W.W.R. 1280 (Alta. S.C.).

360 [1930] 1 W.W.R. 561 (Alta. Master in Chambers).

361 (1912) 3 W.W.R. 81, 22 W.L.R. 689 (Alta. S.C. Chambers).

362 Re Love and Bilodeau (1912) 3 W.W.R. 81, 22 W.L.R 689 (Alta. S.C. Chambers).

363 (1914) 5 W.W.R. 1280 (Alta. S.C.).

364 Id. at 1284.

365 [1930] 1 W.W.R. 501 (Alta. Master in Chambers).

366 Id. at 622.

367 See Whitworth v. Gaugain (1944) 3 Hare 416, 67 E.R. 444, Aff. 1 Ph. 728, 41 E.R. 409.

368 (1896) 26 S.C.R. 282 (S.C.C. from N.W.T.).

369 Id. at 291. See also Davidson v. Davidson [1946] S.C.R. 115 (S.C.C. from B.C.), and Dunlop, supra, n. 112 at 267 - 268.

370 Twyne's Case (1602) 3 Rep. 80b, 76 E.R. 809.

371 (Imp.) 13 Eliz. 1, c. 5.

372 See infra pp. 108 - 114.

373 (Alta.) Fraudulent Preferences Act, R.S.A. 1970, c. 148.

374 See infra pp. 113 - 114.

375 Supra pp. 70 - 74.

376 See also infra pp. 129 - 130 as to the effect of a conditional assignment of the interest of an unpaid vendor, infra pp. 130 - 131 as to the effect of tenants in possession, infra pp. 139-142 as to the effect of spouses with dower rights, and infra pp. 151 - 152 as to the effect of a conditional assignment of a mortgagee's interest.

377 Cf. Giles v. Grover (1832) 1 H.L.C. 72 (House of Lords) per Patteson, J., at 74, per Vaughan, J., at 143 and per Tindal, L.C.J. at 203, Lowthall v. Tonkins (1740) 2 Eq. Cas. Abr. 380, 22 E.R. 323, 27 E.R. 546, and Payne v. Drewe (1804) 102 E.R. 931 at 937.

378 Giles v. Grover (1832) 1 H.L.C. 72 at 74 per Patteson, J. (House of Lords.)

379 See Jeanes v. Wilkins (1749) 1 Ves. Sen. 195, 27 E.R. 978, R. v. Wells (1807) 16 East 278, 104 E.R. 1094 and R. v. Sloper (1818) 6 Price 114, 146 E.R. 758.

380 See infra pp. 142 - 143.

381 See infra p. 143.

382 (Alta.) R.S.A. 1970, c. 198.

383 Twyne's Case (1602) 3 Rep. 80b, 76 E.R. 809.

384 (Imp.) 13 Eliz. 1, c. 5.

385 By section 46 of the Statute Law Amendment Act, 1923 (Alta.) S.A. 1923, c. 5. See Connors v. Elgi [1924] 1 W.W.R. 1050 (Alta. A.D.) and Cote, supra, n. 11 at 281.

386 (Alta.) R.S.A. 1970, c. 148. See Re Fraudulent Preferences Act, Re Commercial Securities Corp. Ltd. [1937] 3 W.W.R. 711 (B.C.S.C.) for a case under similar British Columbia legislation.

387 (Alta.) 1969. This rule and the Fraudulent Preferences Act probably have to be read subject to the common law rule that only property of a kind which could be taken by creditors in satisfaction of their claims was subject to the Fraudulent Conveyances Act, 1570. See Norcutt v. Dodd (1841) Cr. & Ph. 100, 41 E.R. 428, Dundas v. Duten (1790) 1 Ves. Jun. 196, 30 E.R. 298, Barrack v. M'Culloch (1856) 3 Kay & J. 110, 69 E.R. 1043 and Stokoe v. Cowan (1861) 29 Beav. 637, 54 E.R. 775. For this reason most choses in action were not seizable. The same principle should probably also apply to conveyances of interests in land which are sought to be set aside so that the property can be levied in execution.

388 See Paget v. Perchard (1794) 1 Esp. 206, 170 E.R. 329, Imray v. Magnay (1843) 11 M. & W. 267, 152 E.R. 803, and Barrack v. M'Culloch (1856) 3 Kay & J. 110, 69 E.R. 1043 for the common law position.

389 (Alta.) R.S.A. 1970, c. 148. As to the fact that fraudulent preferences were not prohibited at common law and by the Fraudulent Conveyances Act, 1570, see Belliveau v. Miller (1912) 4 Alta. L.R. 108, 1 W.W.R. 588 (Alta. A.D.).

390 See Wilkie v. Jellett (1896) 26 S.C.R. 282 (S.C.C. from N.W.T.), Davidson v. Davidson [1946] S.C.R. 115 (S.C.C. from B.C.) and Condon v. Gassall (1928) 23 Sask. L.R. 272, [1928] 3 W.W.R. 719 (Sask. C.A.).

391 (Alta.) R.S.A. 1970, c. 198.

392 (Alta.) S.A. 1906, c. 62, s. 77.

393 (Alta.) Statute Law Amendment Act, S.A. 1917, c. 3, s. 40(5).

394 (1915) 11 Alta. L.R. 224, 23 D.L.R. 70, 8 W.W.R. 1028 (Alta. S.C. Chambers).

395 (1915) 8 W.W.R. 1028 at 1029. For discussion on the nature of the unpaid vendor's lien and when it exists or does not exist see Denny v. Nozick [1921] 2 W.W.R. 157 (S.C.C. from Alta.), Drager v. Robinson (1914) 7 W.W.R. 1257 (Alta. S.C.) and MacIntyre, Modern Consequences of Earlier Confusion Between a Vendor's

Lien and the Interest of a Cestui Que Trust (1952) 30 Can. Bar R. 1016.

396 (1915) 8 W.W.R. 1028 at 1031.

397 (1914) 7 Alta. L.R. 344, 16 D.L.R. 104, 5 W.W.R. 1279, 27 W.L.R. 48 (Alta. S.C. Chambers). Also see Parke v. Riley (1866) 12 Gr. 69, 3 E. & A. 215 (Ont.), Re Trusts Corp. of Ont. and Boehmer (1894) 26 O.R. 191, Re Lewis and Thorne (1887) 14 O.R. 133, Bank of Montreal v. Condon (1896) 11 Man. R. 366 (Man. Q.B.) and Dunlop, supra, n. 112 at 257.

398 (1916) 11 Alta. L.R. 214, 28 D.L.R. 215, 9 W.W.R. 1521 (Alta. S.C. Chambers).

399 (1916) 9 W.W.R. 1521 at 1527-8. See also Weidman v. McClary Manufacturing Co. (1917) 10 Sask. L.R. 142, 33 D.L.R. 672, [1917] 2 W.W.R. 210 (Sask. S.C. En Banc), which approved the Adanac case, and Robinson v. Moffatt (1916) 37 O.L.R. 52 (Ont.) and Dunlop, supra, n. 112 at 257.

400 (1917) 11 Alta. L.R. 201, 33 D.L.R. 508, [1917] 1 W.W. R. 1497 (Alta. A.D.).

401 [1917] 1 W.W.R. 1497 at 1507.

402 [1924] 3 D.L.R. 16, [1924] 2 W.W.R. 529 (Alta. A.D.). Also see Re Church [1923] 1 D.L.R. 203 (Alta. A.D.) and Re Palmer and Southwood (1975) 51 D.L.R. (3d) 315 (Alta. S.C.).

403 [1924] 2 W.W.R. 529 at 542.

404 Id. at 543.

405 Subject to the liability of a fraudulent conveyancee or creditor under a fraudulent preference as described above, supra pp. 105 - 114.

406 And see Re Judgments Act, R. v. Hamilton (1962) 39 W.W.R. 545 (Man. Q.B.) per Ferguson, J., at 564.

407 See Holmes v. Millage (1893) 1 Q.B. 551 (Eng. C.A.) per Lindley, L.J., at 555 - 556. Compare with Cochlin v. Massey Harris Co. Ltd. (1915) 8 W.W.R. 392 per Beck, J., (dissenting in part) at 398 - 399: "It seems to me that any rights in the sheriff or the execution creditor for preservation of the land in which it was at the time it became bound or was seized must be vindicated by an appeal to the powers of the Court to grant such remedies as an injunction or a receiver order, and that such remedies are remedies which are

independent of the remedy under fi.fa." Beck, J., gave the example of Kirk v. Burgess (1888) 15 O.R. 608 where it was held, "that a judgment creditor was entitled to a receiver order to collect the rents of lands of the judgment debtor prior to the time at which the sheriff was entitled to sell the lands under the fi. fa. in his hands." (Id. at 397). If we substitute "unpaid vendor" for "landlord" in these remarks, it would seem to follow that if the creditor wants to collect the unpaid purchase before the debtor's interest as unpaid vendor is sold under the fi. fa., it is necessary to get a receiver order.

408 [1917] 2 W.W.R. 210.

409 (Sask.) R.S.S. 1909, c. 41 as amended by S.S. 1912-13, c. 16, s. 17.

410 Supra pp. 47 - 52.

411 Supra pp. 97 - 98.

412 Id. But bona fide purchasers of goods without notice of a writ are now protected by section 6 of the Seizures Act, R.S.A. 1970, c. 338.

413 [1917] 2 W.W.R. 210 at 218.

414 Id.

415 Id. at 219.

416 Id. at 220.

417 Id. Elwood and McKay, J.J., concurred with Haultain, C.J.

418 Id. at 222. For analogous situations see Grace v. Kuebler [1917] 3 W.W.R. 983 (S.C.C. from Alta.) as to when a purchaser under an agreement for sale becomes liable to pay the unpaid purchase money to an assignee of the unpaid vendor and Rose v. Watson (1864) 10 H.L.C. 672, 11 E.R. 1187 (House of Lords) as to when a debtor of a mortgagor becomes liable to pay the debt to the mortgagee instead of to the mortgagor. Also the filing of a writ against an unpaid vendor can be compared with filing a writ against a landlord. In each case the debtor has an interest in land and a right to receive money from a third person in respect of that interest in land. Therefore, if a writ against an unpaid vendor binds unpaid purchase money after the purchaser has notice, then a writ against a landlord, assuming that the interest in land of a landlord is bound by a writ, should bind future rent payments

after the tenant has notice. But clearly, it is suggested, future rents will not be bound by a writ. To prevent these from being paid to the debtor until the debtor's land is actually sold in execution, the creditor will have to garnishee or obtain a receiver. The same principle should apply, it is submitted, in the case of a writ against an unpaid vendor. As to an execution creditor being granted a receiver against a purchaser under an agreement for sale see Weidman v. McClary Manufacturing Co. [1917] 2 W.W.R. 210 at 218 (Sask. S.C. En Banc). As to the creditor being able to garnishee a purchaser see id. and Bank of Montreal v. Condon (1896) 11 Man. R. 366 (Man. Q.B.).

419 (1965) 51 D.L.R. (2nd) 235, 51 W.W.R. (N.S. 385)(Alta. A.D.). Compare with Cochlin v. Massey Harris Co. Ltd. (1915) 8 Alta. L.R. 392 (Alta. A.D.) in which it was said that an execution creditor could not seize crops planted by a tenant on land which the tenant had leased from the execution debtor after a writ was filed.

420 Supra pp. 83 - 84.

421 See Edmonton Mortgage Co. v. Gross (1911) 18 W.L.R. 385 (Alta. S.C.). Also see Dunlop, supra, n. 112 at 257. For a mortgagee who lost his priority by registering a mortgage made after the registration of a writ of execution and by discharging a caveat which he had registered, before the writ was filed, to protect his interest under a defective mortgage, made before the writ was filed, see Rogers Lumber Co. v. Smith [1913] 4 W.W.R. 441 (Sask. S.C. En Banc).

422 See Sawyer and Massey Co. v. Waddell (1904) 6 Terr. L.R. 45 and see also Dunlop, supra, n. 112 at 257.

423 Quebec Bank v. Royal Bank (1916) 9 Alta. L.R. 435, 28 D.L.R. 235, 10 W.W.R. 218 (Alta. A.D.). And see Robinson v. McCauley and Gunn (1913) 5 W.W.R. 789 (Man. C.A.) in which an execution debtor transferred land to a third person as security for a debt and a certificate of title was granted to the third person before a judgment was filed against the debtor. It was held that the judgment did not bind the third person.

424 Marshall Wells Alta. Co. v. Alliance Trust Co. (1920) 15 Alta. L.R. 571, [1920] 1 W.W.R. 907, 52 D.L.R. 600 (Alta. A.D.) and see Kirkham, Priorities of Mortgage Advances, (1967 - 1968) 6 Alta. L.R. 310.

425 [1924] 2 D.L.R. 1119, [1924] 2 W.W.R. 462 (Alta. A.D.).

426 Supra pp. 70 - 74.

427 (Alta.) R.S.A. 1970, c. 198, s. 128(2).

428 (Alta.) R.S.A. 1970, c. 35.

429 Id. s. 4.

430 Of course the Possessory Liens Act, R.S.A. 1970, c. 279, now gives a right of sale, in some circumstances, of goods held under a lien.

431 Builders Lien Act, R.S.A. 1970, c. 35, s. 9(1).

432 Megarry and Wade, The Law of Real Property 391 (4th ed. 1975).

433 See Fox v. Ward (1952) 103 L.J. News 725, Bacon, supra, n. 2 at 391 and 11 Viner, General Abridgment of Law and Equity 22 (2d ed. 1792).

434 See Bacon, supra, n. 1 at 391 and Tidd, supra, n. 1 at 1001.

435 See Re Craig [1929] 1 D.L.R. 142 (Ont. C.A.), Toronto Hospital for Consumptives v. City of Toronto (1930) 38 O.W.N. 196, Power v. Grace [1932] O.R. 357 (Ont. C.A.), Kates et al v. Morrison [1951] 4 D.L.R. 260 (Ont. H.C.), Klagsbrun v. Stankeiwicz [1954] 1 D.L.R. 593 (Ont H.C.), Re Ingersoll [1956] O.W.N. 738, Sirois v. Breton (1967) 62 D.L.R. (2d) 366 (Ont.), Sunglo Lumber Ltd. v. McKenna [1974] 5 W.W.R. 572 (B.C.S.C.) and Dunlop, supra, n. 112 at 261.

436 See Re Tully and Tully and Klotz [1953] O.W.N. 661 and Dunlop, supra, n. 112 at 262.

437 See Dunlop, supra, n. 112 at 262.

438 (1973) 8 U.B.C.L. Rev. 246 at 262.

439 Id. at 263.

440 Halsbury, supra, n. 3 at 51.

441 Viner, supra, n. 433.

442 Supra pp 55 - 56.

443 Compare with Lord Abergavenny's Case (1607) 6 Co. Rep. 78b, 77 E.R. 373. This case involved an execution by elegit against a joint tenancy in land. It was held in that case that the joint tenant could not by her own act defeat the creditor's execution but that if the debtor "had died before execution, the survivor should hold it [the estate of the debtor] discharged of any execution to be sued against her." In that case the

execution by elegit had been completed by the delivery of the land in execution to the creditor. It is therefore suggested that the words "before execution" meant "before the completion of the execution" rather than "before the commencement of the execution". Robinette, in his note Joint Tenancy in Land - Severance by Writ of Execution (1931) 9 Can. Bar R. 666 at 668 suggested that a seizure of land under a writ of fieri facias should sever a joint tenancy. He made this suggestion on the assumption that the rule in the case of execution by fieri facias should be the same as in the case of execution by elegit and he also said that the rule in the case of elegit as establishedby Lord Abergavenny's Case was that a joint tenancy was severed upon a seizure under that writ. However, the Court in that case did not state that a joint tenancy was severed by a seizure. Rather what the Court said was that a survivor under a joint tenancy had priority if the debtor died "before execution". As argued above, these words probably refer to the completion of an execution, by delivery of land to the creditor under an execution by elegit or by a sale of theland by the sheriff in an execution under fi. fa., rather than to the commencement of an execution by a seizure.

444 Vaines, Personal Property 59 (4th ed. 1967). If a joint tenancy of land is severed it is suggested that the fact of severance should be forthwith endorsed on the certificate of title to protect the assignee thereof. But see Stonehouse v. Att. Gen. of B.C. [1962] S.C.R. 103 where a transfer by a joint tenant was registered after the death of the transferee and the survivor was not allowed a remedy. And see the comments on this case in Thom's, supra, n. 294 at 428 et seq. and Raney, Severance of Joint Tenancy, (1963) 41 Can. Bar R. 272.

445 Supra pp. 83 - 84.

446 See Morrow v. Eakin [1953] 2 D.L.R. 593 8 W.W.R. (N.S.) 548 (B.C.S.C.), and Re Brooklands Lumber and Hardware Ltd. and Simcoe (1956) 64 Man. R. 1, 3 D.L.R. (2d) 762, 18 W.W.R. 328 (Man. Q.B.).

447 In Re Land Registry Act; Re Application of Penn (1951-52) 4 W.W.R. (N.S.) 452 (B.C.) it was held that the registration of a judgment did sever a joint tenancy in British Columbia. But this case was later overruled in Re Young Estate (1969) 66 W.W.R. 193 (B.C. C.A.).

448 See Power v. Grace [1932] O.R. 357 (Ont. C.A.), Re Brooklands Lumber and Hardware Ltd. and Simcoe (1956) 64 Man. R.1, 3 D.L.R. (2d) 762, 18 W.W.R. 328

(Man. Q.B.), Re Young Estate (1969) 66 W.W.R. 193 (B.C.C.A.), Re McDonald (1970) 71 W.W.R. 444 (B.C.S.C.) Sunglo Lumber Ltd. v. McKenna [1974] 5 W.W.R. 572 (B.C.S.C.) and Thom's, supra, n. 294 at 428 et seq. But see Re Chisik (1969) 68 W.W.R. 431 which suggests that an assignment in bankruptcy may operate as a severance. In Power v. Grace [1932] O.R. 357 at 360 (Ont. C.A.) Grant, J.A., in delivering one of the judgments of the Court, said in dictum that a grant by one tenant of a life estate to a stranger would suspend, but not sever, the joint tenancy unless one of the joint tenants died before the life tenant. This dictum was disagreed with by Burton in his note The Severance of Joint Tenancies in Fee by the Grant of a Life Estate (1962) 20 U.T. Fac. L. Rev. 129. In Re Land Registry Act; Re Application of Penn (1951 - 52) 4 W.W. R. (N.S.) 452 (B.C.) it was held that the registration of a judgment at least suspended, if it did not actually sever, a joint tenancy of land. This judgment may have derived some foundation from the dictum of Grant, J.A., in Power v. Grace. However, the Penn case was overruled by Re Young Estate (1969) 66 W.W.R. 193 (B.C.C.A.) which however did not expressly discuss the possibility that a joint tenancy was suspended by the registration of a judgment. Notwithstanding this, there seems to be now no authority to support the proposition that a joint tenancy of land is suspended by a writ of execution being filed against the land. In the Young case, id., at 201 and 203 Maclean, J.A., in delivering one of the judgments, also discussed and rejected the possibility that the mere registration of a judgment might operate as a charge against the right of survivorship without actually severing the joint tenancy.

449 See Re Brooklands Lumber and Hardware Ltd. and Simcoe (1956) 64 Man. R. 1, 3 D.L.R. (2d) 762, 18 W.W.R. 328 (Man. Q.B.), and Power v. Grace [1932] O.R. 357, [1932] 2 D.L.R. 793 (Ont. C.A.). Also see supra, n. 443.

450 See dicta in Re Young Estate (1969) 66 W.W.R. 193 (B.C.C.A.), Power v. Grace [1932] O.R. 357 and Re Brooklands Lumber and Hardware Ltd. and Simcoe (1956) 64 Man. R. 1, 3 D.L.R. (2d) 762, 18 W.W.R. 328 (Man. Q.B.).

451 See Tidd, supra, n. 1 at 1007.

452 (Alta.) R.S.A. 1970, c. 271.

453 (Alta.) R.S.A. 1970, c. 114.

454 [1942] 2 W.W.R. 577. Also see note, Dower - Sale of Homestead under Writ of Execution (1966) 4 Alta. L.R. 506.

455 (Alta.) R.S.A. 1922, c. 135.

456 (1922) 18 Alta. L.R. 97, [1922] 2 W.W.R. 272.

457 (Alta.) S.A. 1917, c. 14. See Bowker, W.F., Reform of the Law of Dower in Alberta, (1961) 1 Alta. L.R. 501 for a history of the law of dower in Alberta.

458 [1922] 2 W.W.R. 272 at 276.

459 Id. at 278.

460 Wilkie v. Jellett (1896) 26 S.C.R. 282 (S.C.C. from N.W.T.) and Davidson v. Davidson [1946] S.C.R. 115 (S.C.C. from B.C.).

461 See Re Davies, Ex parte Williams (1872) L.R. 7 Ch. App. 314, 41 L.J. Bk. 38, 26 L.T. 303, 20 W.R. 430.

462 (Alta.) R.S.A. 1970, c. 1.

463 See supra, pp. 93 - 94 as to whether an execution creditor is entitled to a preference as being a creditor having a lien.

464 (Can.) R.S.C. 1970, c. B-3.

465 Id. s. 112.

466 (Alta.) R.S.A. 1970, c. 128.

467 Giles v. Grover (1832) 1 H.L.C. 72 (House of Lords) per Alderson, J., at 96 - 97.

468 Hutchinson v. Johnston (1787) 1 T.R. 729, 99 E.R. 1346, Jones v. Atherton (1816) 7 Taunt. 56, 129 E.R. 23 and Sawle v. Paynter (1822) 1 Dowl. & Ry. 307.

469 Giles v. Grover (1832) 1 H.L.C. 72, 6 E.R. 843. In Re Judgments Act, R. v. Hamilton (1962) 39 W.W.R. 545 at 562 (Man. Q.B.) per Ferguson, J., it was held that the Crown in right of Canada has a priority over other creditors in respect of an execution against goods in Manitoba and that it "is also clear that the same priority exists in the case of executions against lands in jurisdictions where land is taken in execution by writ of fieri facias de terris."

470 Supra pp. 23 - 28.

471 (Alta.) R.S.A. 1970, c. 198.

472 (1911) 18 W.L.R. 385 (Alta. S.C.).

473 Id. at 387. Also see S. McCord & Co. v. Chatfield [1946] O.W.N. 1, as to an execution creditor, whose writ was filed before property was sold in a mechanic's lien action, having priority over creditors whose writs were filed after the sale; Beaver Lumber Co. v. Quebec Bank (1918) 11 Sask. L.R. 320, 42 D.L.R. 779, [1918] 2 W.W.R. 1052 (Sask. C.A.) as to creditors whose writs were filed while the debtor owned land having a priority over creditors whose writs were filed with the sheriff after the sale and Donaghue v. Can. Bank of Commerce [1929] 4 D.L.R. 540, [1929] 3 W.W.R. 109 (Alta. S.C.) as to one execution creditor of three joint and several debtors having priority over an execution creditor of only one of the debtors.

474 (Imp.) 13 Eliz. 1, c. 5.

475 Imray v. Magnay (1843) 11 M. & W. 267, 152 E.R. 803.

476 (Alta.) R.S.A. 1970, c. 148.

477 See Re Land Titles Act (1913) 7 Alta. L.R. 385, (1913) 4 W.W.R. 677 (Alta. S.C. Chambers).

478 Scott v. Scholey (1807) 8 East 467, 103 E.R. 423.

479 (Alta.) R.S.A. 1970, c. 338.

480 (Alta.) Seizures Act, R.S.A. 1970, c. 338, s. 8.

481 See Ferrie v. Cleghorn (1860) 19 U.C.Q.B. 241, and Henderson v. Fortune (1859) 18 U.C.Q.B. 520.

482 Loder v. Creighton (1860) 9 Upper Can. Common Pleas 295. But see Dunlop, supra, n. 112 at 255 - 256.

483 Thompson v. Yockney (1914) 50 S.C.R. 24, 16 D.L.R. 854, 6 W.W.R. 1397 (S.C.C.), and Setter v. The Registrar (1914) 20 D.L.R. 166, 7 W.W.R. 901, 30 W.L.R. 256 (Alta. A.D.).

484 (Alta.) R.S.A. 1970, c. 338. See Pease v. Tudge (1914) 7 W.W.R. 805 (Sask. K.B.) in which it was held that the sheriff should not sell a mortgage unless he can get a reasonable price for it. If the sheriff cannot get a reasonable price the creditor can apply for an order to sell the mortgage at the best price obtainable. Also see Re Land Titles Act [1921] 3 W.W.R. 427 (Sask. Master of Titles) in which it was held that after a mortgage has been seized the registrar is justified in refusing to allow any registered dealings with the mortgage by way of transfer or discharge until the seizure is withdrawn.

485 [1934] 2 W.W.R. 123 (Sask. C.A.).

486 See Anglo-Italian Bank v. Davies (1878) 9 Ch. D. 275 (Eng. C.A.) per Cotton, L.J., at 290 - 291. And see Goodbun v. Mitchell (No.5) (1929) 38 Man. R. 395, [1930] 1 D.L.R. 580, [1929] 3 W.W.R. 622 (Man. C.A.). Also cf. Dunlop, Some Aspects of the Charging Order as a Remedy for Unsecured Creditors (1967) 3 U.B.C.L. Rev. 83 and Dunlop, Execution Against Personal Property in England and British Columbia (1972) 7 U.B.C.L. Rev. 171.

487 Anglo-Italian Bank v. Davies (1880) 9 Ch. D. 275 at 283 per Jessel, M.R. (Eng. C.A.). See also Garry Finance Corp. v. Heizman and Smith (1939) 47 Man. R. 129, [1939] 2 D.L.R. 758, [1939] 1 W.W.R. 541 (Man.).

488 Anglo-Italian Bank v. Davies (1880) 9 Ch. D. 275 at 290 per Cotton, L.J. (Eng. C.A.).

489 (Alta.) R.S.A. 1970, c. 193.

490 Re Pope (1886) 17 Q.B.D. 743 (Eng. C.A.). And see Mennopite Mutual Fire Insur. Co. v. Heinrichs [1932] 1 W.W.R. 218 (Sask.).

491 (1893) 1 Q.B.D. 551 (Eng. C.A.).

492 Id. at 554.

493 Id. at 557 - 558.

494 Id. at 558.

495 Id. at 555. Also see Kuss v. Kuss (1935) 43 Man. R. 240, [1935] 4 D.L.R. 77, [1935] 2 W.W.R. 561, Matthewson v. Stredicki (1924) 18 Sask. L.R. 482, [1924] 3 D.L.R. 1085, [1924] 2 W.W.R. 1099, and Stoehr and McPherson v. Morgan (1929) 24 Sask. L.R. 18, [1929] 4 D.L.R. 301, [1929] 2 W.W.R. 577.

496 Gore v. Bowser (1855) 3 Sm. & Giff 3 at 8, 65 E.R. 537 at 540; Aff. 24 L.J. Ch. 440, Neate v. Duke of Marlborough (1838) 3 My. & Cr. 407, 40 E.R. 983 and Anglo-Italian Bank v. Davies (1878) 9 Ch. D. 275 (Eng. C.A.). But in Ex parte Evans, Re Watkins (1879) 13 Ch. D. 252 (Eng. C.A.) it was held that it was no longer necessary for a creditor seeking equitable execution in aid of elegit to previously sue out a writ of elegit. In the absence of an express judicial statement to the contrary, it would not seem safe to rely on this decision as also applying in the case of equitable execution in aid of execution by fi. fa.

497 Anglo-Italian Bank v. Davies (1878) 9 Ch. D. 275 (Eng. C.A.).

498 (Alta.) R.S.A. 1970, c. 193.

499 Smith v. Cowell (1880) 6 Q.B.D. 75 (Eng. C.A.).

500 Cf. Holmes v. Millage (1893) 1 Q.B. 551 per Lindley, L.J., at 556 - 557. This procedure relates to applications for equitable execution of a kind other than granting a receiver or an injunction as the procedure for obtaining the latter is expressly dealt with in section 34(9) of the Judicature Act, R.S.A. 1970, c. 193.

501 [1917] 1 W.W.R. 1497 at 1506.

502 Anglo-Italian Bank v. Davies (1878) 9 Ch. D. 275 (Eng. C.A.) per Cotton, L.J. at 291.

503 See Re Manchester & Milford Ry. Co., Ex parte Cambrian Ry. Co. (1880) 14 Ch. D. 645 (Eng. C.A.) per Jessel, M.R. at 653, Neate v. Duke of Marlborough (1838) 3 My. & Cr. 407, 40 E.R. 983 and Anglo-Italian Bank v. Davies (1878) 9 Ch. D. 275 (Eng. C.A.).

504 Eg. in appointing a receiver in aid of execution under the writ of elegit. See Anglo-Italian Bank v. Davies (1878) 9 Ch. D. 275 (Eng. C.A.) at 283 per Jessel, M.R.

505 Re Manchester & Milford Ry. Co., Ex parte Cambrian Ry. Co. (1880) 14 Ch. D. 645 (Eng. C.A.) per Jessel, M.R. at 653.

506 See Holmes v. Millage (1893) 1 Q.B. 551 per Lindley, L. J. at 555 - 556 (Eng. C.A.). And see Royal Trust Co. v. Kritzwiser [1924] 3 D.L.R. 596, [1924] 2 W.W.R. 760 (Sask.).

507 See John Deere Plow Co. v. McEachran [1930] 1 W.W.R. 561 (Alta. Master in Chambers) and Weidman v. McClary Manufacturing Co. (1917) 10 Sask. L.R. 142, 33 D.L.R. 672, [1917] 2 W.W.R. 210 (Sask. S.C. En Banc) as to obtaining a receiver of purchase moneys payable to an execution debtor under an agreement for sale. See Kirk v. Burgess (1888) 15 O.R. 608 and Cochlin v. Massey Harris Co. Ltd. (1915) 8 Alta. L.R. 392 at 397 per Beck, J., (Dissenting in part) as to obtaining a receiver of rents payable to an execution debtor.

508 Alta. Rules of Court.

509 See Talbourdet v. Junker (1927) 22 Alta. L.R. 435, [1927] 2 D.L.R. 175, [1927] 1 W.W.R. 495 (Alta. A.D.).

510 Scott v. Scholey (1807) 8 East 467, 103 E.R. 423, and Gore v. Bowser (1855) 3 Sm. & Giff 1, 65 E.R. 537, Aff. 24 L.J. Ch. 440.

511 Alta. Rules of Court.

512 See Re Manchester & Milford Ry. Co., Ex parte Cambrian Ry. Co. (1880) 14 Ch. D. 645 (Eng. C.A.) per Jessel, M.R., at 653.

513 Cf. Talbourdet v. Junker (1927) 22 Alta. L.R. 435, [1927] 2 D.L.R. 175, [1927] 1 W.W.R. 495 (Alta. A.D.) and Langstaff v. Squirrell (1924) 18 Sask. L.R. 250, [1924] 1 W.W.R. 1265 (Sask.).

514 See Seay v. Sommerville Hardware Co. Ltd. [1917] 1 W.W. R. 1497 (Alta. A.D.) per Harvey, C.J. at 1498 and per Scott, J., at 1500.

515 See Neate v. Duke of Marlborough (1838) 3 My. & Cr. 407, 40 E.R. 983.

516 See Legg v. Evans (1840) 6 M. & W. 36, 151 E.R. 311.

517 See Morton and Cowell v. Hoffert [1924] 3 D.L.R. 16, [1924] 2 W.W.R. 529 (Alta. A.D.).

518 See Seay v. Sommerville Hardware Co. Ltd. [1917] 1 W.W. R. 1497 per Beck, J., at 1507 and John Deere Plow Co. v. McEachran [1930] 1 W.W.R. 561 (Alta. Master in Chambers)

519 See John Deere Plow Co. v. McEachran [1930] 1 W.W.R. 561 (Alta. Master in Chambers).

520 Hudson's Bay Co. v. Bullock Farms Ltd. [1925] 2 W.W.R. 559 (Alta. S.C. Chambers) and see also Foss v. Sterling Loan (1915) 8 Sask. L.R. 289, 23 D.L.R. 540, 8 W.W.R. 1092 (Sask. S.C. En Banc), Can. Pac. Ry. Co. v. Silzer (1910) 3 Sask. L.R. 162, 14 W.L.R. 274 (Sask.), Ranney v. Stirrett (1911) 18 W.L.R. 5 (Sask.) and Weyerhaeuser v. Scott (1924) 18 Sask. L.R. 374, [1924] 2 W.W.R. 605 (Sask. K.B. Chambers). But see Dunlop, supra, n. 112 at 257 - 258.

521 Hudson's Bay Co. v. Bullock Farms Ltd. [1925] 2 W.W.R. 559 (Alta. S.C. Chambers), Foss v. Sterling Loan (1915) 8 Sask. L.R. 289, 23 D.L.R. 540, 8 W.W.R. 1092 (Sask. S.C. En Banc), Ranney v. Stirrett (1911) 18 W.L.R. 5 (Sask.) and Weyerhaeuser v. Scott (1924) 18 Sask. L.R. 374, [1924] 2 W.W.R. 605 (Sask. K.B. Chambers). But see Dunlop, supra, n. 112 at 258, note 52.

522 Hudson's Bay Co. v. Bullock Farms Ltd. [1925] 2 W.W.R.

559 (Alta. S.C. Chambers). And cf. Can. Pac. Ry. Co. v. Silzer (1910) 3 Sask. L.R. 162, 14 W.L.R. 274 (Sask.) and Weyerhaeuser v. Scott (1924) 18 Sask. L.R. 374, [1924] 2 W.W.R. 605 (Sask. K.B. Chambers). See Hay v. McCulloch's Ltd. [1930] 1 W.W.R. 434 (Alta. A.D.) in which it was held that if a purchaser under an agreement for sale gave up all his interest in the land to the vendor the execution creditor of the purchaser could not maintain his caveat against the vendor's title even if the vendor was obligated to r sell the land and to pay the purchaser a certain sum out of the proceeds of the re-sale.

523 But see supra pp. 99 - 100 as to it being theoretically possible that, as between a creditor and a debtor, a writ may bind the debtor's interest in land from the teste of the writ. This suggests the possibility that under the present legislation the sheriff may be able to seize and sell a legal, but unregistered, interest in land under a writ of fi. fa. even if the writ is not filed at the Land Titles Office.

524 See Thom's, supra, n. 294 at 452 - 459.

525 (1912) 19 W.L.R. 787 (Man. K.B.).

526 (Alta.) R.S.A. 1970, c. 114.

527 See Rigby v. Rigby [1921] 1 W.W.R. 397 (Alta. C.A.).

528 (1959 - 60) 22 D.L.R. (2nd) 768, 30 W.W.R. .S.) 407 (Alta. S.C.). See also Heiden v. Huck [19 5 W.W.R. 446 (Alta. S.C.).

529 See supra pp. 70 - 74 and pp. 82 - 83.

530 See supra pp. 153 - 155.

531 [1971] 5 W.W.R. 446 (Alta. S.C.).

532 See Scott v. Scholey (1807) 8 East 467, 103 E.R. 423, Gore v. Bowser (1855) 3 Sm. & Giff 1, 65 E.R. 537, Aff. 24 L.J. Ch. 440 and Bain v. Pitfield (1916) 26 Man. R. 89, 28 D.L.R. 206, 9 W.W.R. 1163 (Man. K.B.). As to beneficiaries under wills see Dunlop, supra, n. 112 at 266.

533 (1832) 1 H.L.C. 72.

534 Also see Re Judgments Act, R. v. Hamilton (1962) 39 W.W.R. 545 (Man. Q.B.) per Ferguson, J., at 564.

535 (Alta.) R.S.A. 1970, c. 148.

536 Supra pp. 109 - 114.

537 See Scott v. Scholey (1807) 8 East 467, 103 E.R. 423 and Wallace v. Smart (1912) 19 WL.R. 787 (Man. K.B.).

538 See Kirby v. Dillon (1824) Coop. Pr. Cas. 504, 47 E.R. 623, Neate v. Duke of Marlborough (1838) 3 My. & Cr. 407, 40 E.R. 983, Anglo-Italian Bank v. Davies (1878) 9 Ch. D. 275 (Eng. C.A.), Beckett v. Buckley (1874) L.R. 17 Eq. 435, Wells v. Kilpin (1874) L.R. 18 Eq. 298 and Proskauer v. Siebe [1885] W.N. 159.

539 See Scott v. Scholey (1807) 8 East 467, 103 E.R. 423 and Gore v. Bowser (1855) 3 Sm. & Giff 1, 65 E.R. 537, Aff. 24 L.J. Ch. 440.

540 See Thornton v. Finch (1865) 4 Giff. 515, 66 E.R. 810 and Bullus v. Bullus (1910) 102 L.T. 399, as to an injunction being a form of equitable execution.

541 (Alta.) R.S.A. 1970, c. 198. See Brown v. Sage 11 Grant 239, Wason v. Carpenter 13 Grant 320 and Cochlin v. Massey Harris Co. Ltd. (1915) 8 Alta. L.R. 392 (Alta. A.D.) per Beck, J., (dissenting in part) as to an execution creditor being able to obtain an injunction "restraining the diminishing of the value of the land bound by the execution by the cutting and removal of timber." (Id. at 397).

542 Stoehr and McPherson v. Morgan (1929) 24 Sask. L.R. 18, [1929] 4 D.L.R. 301, [1929] 2 W.W.R. 577.

543 See supra pp. 153 - 155.

544 The writ of elegit may have been a method of execution which could be used in Ontario at one time. See Doe ex dem McIntosh v. McDonell (1835) 4 Old Series King's Bench Reports (Upper Canada) 195.

545 (1874) L.R. 9 Ch. 229, 43 L.J. Ch. 372.

546 See cases cited in Halsbury, supra, n. 3 at 111 - 112.

547 Id. at 112.

548 (Alta.) R.S.A. 1970, c. 198.

549 It seems that under this section an execution creditor can file a writ against land owned by the debtor and registered under an alias. See Re Gaar Scott Co. and Giguere (1909 - 10) 12 W.L.R. 245 (Sask. Full Court).

550 [1917] 1 W.W.R. 1497 (Alta. A.D.).

551 Id. at 1506.

552 [1971] 5 W.W.R. 446.

553 Id. at 449. Cf. Re Land Titles Act and Cockshutt Plow Co. Ltd. [1920] 3 W.W.R. 1069 per Harvey, C.J., at 1071.

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