LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
EXECUTION AGAINST LAND

LRC 40

1978

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE GARDE B. GARDOM, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
EXECUTION AGAINST LAND

The *Execution Act* sets out a scheme whereby a judgment creditor may proceed against an interest in land belonging to his judgment debtor to obtain satisfaction of his claim. Generally speaking, the statutory scheme works in a satisfactory manner and we have no major recommendations for change. Nonetheless, there are circumstances in which the Act can operate unfairly or in which rights arising under it could usefully be clarified. Appropriate recommendations are made with respect to these situations.

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INTRODUCTION

This is the second in a series of Reports arising out of the Commission's project on the Enforcement of Judgments. The focus of the Report is on the way in which an unsecured judgment creditor may enforce his rights against an interest in land belonging to his judgment debtor.

In 1976 a working paper on this topic was circulated among the legal profession and groups having an interest in its subject matter. The working paper set out a number of proposals for reform and requested comment and criticism. Little was received. Those who took the time to respond to our proposals generally indicated satisfaction with them.

A significant development since the circulation of our working paper has been the enactment of legislation to amend the *Execution Act* in relation to proceedings against land. The *Execution Amendment Act, 1978* is one of three pieces of legislation introduced during the 1978 Legislative session to modernize the law relating to land registration and conveyancing. This "package" is based on similar legislation that was introduced and given first reading in 1977 but which was allowed to lapse. The *Execution Amendment Act* received Royal assent on June 29, 1978 but it has not yet been proclaimed into force.

The approach we take in this Report is first to consider the law in its present state. We then outline the changes contemplated by the Act and finally make our recommendations for reform, making such references to that Act as may be necessary.

CHAPTER 1 THE EXISTING STATUTORY SCHEME

In this chapter we outline the statutory scheme which governs execution against land as set out in sections 33 to 63 of the *Execution Act*.

Before any right of enforcement arises the creditor must first have obtained a judgment. Section 34 of the Act sets out the following definition:

> "Judgment" means a judgment, decree, or order of the Federal Court of Canada, Court of Appeal, Supreme Court, or any County Court or Small Debts Court or of any Judge of any of those Courts, or claim established under the *Creditors' Relief Act*, by which judgment, decree, order, or claim a sum of money is payable to any person.

Once a judgment has been obtained it may then be registered in one or more Land Registry offices. This is done by obtaining a "certificate" of judgment from the court in which it was entered and tendering the certificate for registration in a Land Registry office. Upon registration, the name of the debtor is entered in an index known as the register of judgments. At this stage notation is made on any certificate of title to land in which the debtor has an interest. The registration of a judgment is effective for two years and registration may be renewed.

The effect of registration is set out in section 35 of the *Execution Act*:

> Immediately upon a judgment being entered ... [it] may be registered in any or all of the Land Registry Offices in the Province, and from the time of registering ... [it] forms a lien and charge on all the lands of the judgment debtor in the several land registration districts in which the judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of the judgment the judgment creditor may, if he wishes to do so, forthwith proceed upon the lien and charge thereby created.

The procedure to enforce a charge created by section 35 is set out in sections 38 to 46. Under section (1) a creditor may, by originating application, apply to the Supreme Court calling on the debtor and any other person having the legal estate in the land to:

> Show cause why any land in the land registration district in which the judgment is registered or the interest therein of the judgment debtor, or a competent part of the land, should not be sold to realize the amount payable under the judgment.

An application under section 38 (1) may be dealt with in a summary way or by the trial of an issue or by an inquiry before an officer of the court. The third option is usually the one adopted, with the inquiry conduction by the District Registrar of the Supreme Court. This is the most convenient course, as a reference to the Registrar is necessary in any event. Section 40 (1) provides:

> Where an order is made upon any application under section 38, there shall be included in the order a reference to a District Registrar of the Supreme Court
>
> (a) to find what lands are liable to be sold under the judgment; and
>
> (b) to find what are the nature and particulars of the interest of the judgment debtor in the lands and of his title thereto; and

(c) to find what judgments form a lien and charge against the lands and the priorities between the judgments; and

(d) to determine how the proceeds of the sale shall be distributed; and

(e) to report all such findings to the Court.

In the proceedings before the registrar the onus is on the creditor to produce the necessary evidence of the debtor's ownership. This is normally done through submitting a "certificate of encumbrances" obtained under section 252 of the *Land Registry Act*. The Registrar must also deal with any other judgments which may be registered against the debtor's land.

Once the Registrar has reported his findings the creditor must make a further application to the Court. This application will normally ask for:

(a) confirmation of the Registrar's report; and

(b) an order that the debtor's interest in the land be sold.

An order for sale is directed to the Sheriff and the procedure which must be followed is set out in sections 47 to 55.

At least one month must elapse between the time the order is delivered to the sheriff and the time the land is offered for sale. Before sale, a notice specifying:

(a) the particular property to be sold;

(b) the name or names (if more than one) of the plaintiffs and defendants in every action;

(c) the charges (if any) appearing on the register against the lands;
(d) the date of the registration of encumbrances or charges;

(e) the time and place of the intended sale; and

(f) the amount of the judgment

must be published in the Gazette and a local newspaper and posted in the sheriff's office.

The Act does not specify the method of sale but the language of a number of provisions suggest that a public auction is contemplated. Section 60 (3) refers to an "auctioneer's licence;" section 51(1) refers to "biddings" and "bidders;" and Form C in the schedule refers to the sale having been by "public auction." Moreover, the right given to the creditor to purchase the property is more consistent with a public auction than a private sale.

The Act empowers the sheriff to execute a conveyance, in prescribed form. Registration of that conveyance vests the debtor's interest in the purchaser free of the judgment proceeded on and of any subsequent charges. A purchaser is not bound to inquire whether the requirements of the Act have been met and his rights are not affected by any "breach ... impropriety or irregularity in the sale" to which he is not a party, even if he has notice thereof.

The Act directs the sheriff to pay the proceeds of the sale to the Court Registrar. Those proceeds are "deemed to be money levied under execution within the meaning of the *Creditors' Relief Act*" and are to be distributed in accordance with that Act. The application of the *Creditors' Relief Act* was considered by us in a previous working paper.

CHAPTER II THE IMPACT OF THE EXECUTION AMENDMENT ACT

When the provisions of the *Execution Amendment Act* are brought into force the existing execution scheme will be altered in a number of ways. The major innovation contemplated by the Act is to provide for the registration of a judgment directly against the title of property owned by the judgment debtor in the same manner as any other charge. The effect of this will be to eliminate the indices of judgments in the various land registry offices.

At a more practical level, the legislation will compel judgment creditors, and those acting on their behalf, to identify the specific property in which the judgment debtor has an interest before registration can take place. No longer will it be possible simply to register against the debtor's name on the basis of speculation that he owns some land. The Act goes on to provide a scheme whereby the owner of property against which a judgment has been registered will receive notice thereof and which permits him to apply to have the registration cancelled if he is not the judgment debtor.

The introduction of the *Execution Amendment Act* did not come as a surprise to us. At the time our working paper was in preparation, the measures contemplated by the Act were considered but, in the light of initiatives then being taken within the AttorneyGeneral's Department, we thought it preferable to reserve our position for the reasons that we expressed in the working paper in the following terms:

> One further matter which we have considered, but upon which we have made no proposals, concerns the mechanics of the registration of judgments. One issue in this area is whether the "index" of judgments should be replaced by a requirement that a judgment creditor register directly against the particular parcel or parcels of the debtor's land sought to be bound. Such a move would enhance the operation of the registration system, but it would mean that a registered judgment would no longer be capable of binding afteracquired land. We understand that this issue is receiving attention in the context of other reforms relating to the *Land Registry Act,* real property law and conveyancing being carried out internally by the AttorneyGeneral's Department. In the light of the uncertain status of this aspect of the existing legislative scheme, any proposals in this regard by us would seem to be premature and we would prefer to reserve our position until the situation is clarified.

When the substance of the government initiatives crystallized in the *Execution Amendment Act,_1977* (the "exposure" bill that was allowed to lapse), we were in a position to confront this issue directly.

We are anxious that the totality of reform in this area of law should strike an appropriate balance between a number of competing interests. A particularly difficult issue is the competition between creditors who wish to execute against land and those whose main concern is an assurance of title: property owners and conveyancers, and those who must administer our land registry system.

The system presently in force favours the creditor. With a single registration he can effectively tie up all a judgment debtor's land in a registration district, whether or not its existence is known to the creditor, and all the land that the debtor may acquire during the period in which the registration is effective. But a side effect of this registration is that a shadow is cast over the titles of all persons having a name similar to that of the debtor. Moreover, the index of judgments is a significant source of error and additional work in the administration of the Land Registry Office.

The substance of the new legislation represents, at the highest level of generality, a conclusion that the procreditor balance of the existing scheme must be modified. That conclusion is one with which, in the abstract, we cannot quarrel.

However, when the 1977 Bill emerged preliminary reading of it left us with some concern that the pendulum had swung too far in the other direction, leaving the interests of creditors unjustifiably unprotected. The elimination of the index of judgments would place a burden on the creditor to check the records of the Land Registry office, on a periodic basis, to try to determine whether the debtor has acquired an interest in land. That would not be an onerous burden if there was an accurate and uptodate name index that could be utilized in obtaining the required information. However, the present state of the name indices in a number of Land Registry Offices which maintain them is far from satisfactory and no judgment creditor can safely rely on them. It was our view, after considering the 1977 Bill, that the scheme set out would be acceptable only if administrative steps were taken to enhance the accuracy of the name indices throughout the land registry system.

With these considerations in mind, we approached the persons responsible for the new legislation and the operation of the land registry system. We were told that improvements to the name indices are, in fact, under way. The Deputy AttorneyGeneral, on May 2, 1978, wrote to us in the following terms:

> It is realized that for the new provisions to be fully effective there must be justifiable confidence in the standard of accuracy of the index of registered owners presently kept under section 249 of the *Land Registry Act*.
>
> I have accordingly instructed [the Director of Titles] to take such steps as may be necessary to upgrade the standard of accuracy of the owners' index to the standard of accuracy of the Title Registers, such upgrading to be completed by the time of proclamation of the proposed ... *Execution Amendment Act*.

In the light of these assurances, we are satisfied that the position of the creditor has not been overlooked or unjustly subordinated to competing interests.

It is our conclusion that the new legislation, in conjunction with an improved name index and the recommendations set out in this Report, will produce a legal regime for execution against land that will operate efficiently and fairly.

CHAPTER III A PRELIMINARY EVALUATION

While the *Execution Act* provides a relatively sophisticated scheme to proceed against, and ultimately sell, a debtor's interest in land, the full force of the Act is seldom brought to bear. Some statistics which we have gathered concerning the use of the Act are most revealing.

During the calendar year 1972, a total of 870 certificates of judgment were registered in the Vancouver Land Registry Office. A search of court records in the Vancouver Registry of the Supreme Court indicated that during the one year period from March 1, 1972 to February 28, 1973, a total of 74 applications were brought under section 38 of the *Execution Act* seeking, ultimately, an order for sale. While these figures cannot be compared directly without some distortion, a strong inference may be drawn that less than 10 per cent of creditors who register judgments proceed any further with them. During that same period of time only 6 orders for sale were delivered to the sheriff in Vancouver. Thus, of applications brought under section 38, something less than 10 per cent of them actually resulted in an order for sale. Although 6 orders for sale were delivered to the sheriff a sale of the debtor's land actually occurred in only 2 cases.

What might explain the dramatic reduction in the numbers of creditors' claims as execution proceedings became further advanced? It may be that in some cases judgments are registered on speculation and the debtors, in fact, have no exigible interests in land. It may be that the values of many debtors' interests are so slight that proceedings are not justified. While these possibilities may be factors in "sifting out" certain creditors' claims, it is our

belief that in large numbers of cases, creditors' proceedings are not taken, or are terminated, because the debtor has satisfied the judgment or has otherwise made satisfactory arrangements with his creditor.

The *Execution Act* provides a potent remedy against land and the mere existence of the threat of sale is frequently sufficient to induce the debtor to satisfy the creditor's claim. Moreover, the registration of a judgment has the practical effect of limiting the debtor's ability to deal with the land. No prudent buyer or mortgagee will be prepared to buy, or lend money on the security of , land which is encumbered by a judgment. If a disposition of the land is contemplated, the buyer or lender will almost invariably require the debtor to obtain a release of the judgment, or withhold money so he may do so himself.

In our experience this is how many registered judgments are, in fact, satisfied. One respondent to our working paper also pointed out that a registered judgment creditor is entitled to be joined as a defendant if a prior mortgagee commences foreclosure proceedings. He may, therefore, apply for a sale of the land in the context of those proceedings and share in any excess funds generated.

The possibility of a disposition by the debtor or a foreclosure is heightened where an unsatisfied judgment exists. This is often a reflection of a generally unsound financial position which makes the liquidation of a major asset a necessity. Thus a judgment creditor may simply register his judgment and sit and wait for events to take their course. Circumstances force a disposition of the land in large numbers of cases.

It is our view that the basic scheme presently provided in the *Execution Act* for proceedings against land is one which is sound and should be retained. Nothing in the Execution Amendment Bill alters this view. The Act is not, however, free of difficulty on points of detail or in its application to certain situations. The balance of this Report is devoted to an examination of a number of problems which may arise under the Act and the development of recommendations for their solution.

CHAPTER IV THE SCOPE OF THE ACT

A. The Definition of "Land"

What sorts of interests are exigible under sections 33 to 63 of the *Execution Act*? The answer to this question turns on the definition of "land" set out in section 34:

> "land" or "lands" includes every estate, right, title, and interest therein, and all real property, both legal and equitable, and of what nature and kind soever, and any contingent executory, or future interest therein, and a possibility coupled with an interest in such land or real property, whether the object of the gift or limitation of such interest be ascertained or not, and also the right of entry, whether immediate or future and whether vested or contingent, into and upon any land, but does not include preemption claims.

That definition was examined at length in our working paper. We proposed that the definition should be clarified with respect to certain interests. That proposal has been adopted in section 1(b) of the *Execution Amendment Act* and our concerns have now been met.

B. Pre-emption Claims

Section 3 of the *Execution Act* provides that this Act does not apply to ... pre-emption claims," and the definition of "land" in section 34 specifically excludes "pre-emption claims". To what do those provisions refer? It would seem to be a reference to certain rights which formerly arose under lands legislation enacted by the Provincial Government which was designed to encourage the settlement and development of unoccupied Crown lands. Such provincial legislation existed at least as early as 1870. The basic scheme of the legislation was that a settler could record a claim to unoccupied Crown land and, after satisfying certain statutory requirements relating to surveys or staking, improvements, and occupation, ultimately be issued a Crown grant. The interest of the settler before a Crown grant was issued was known as a "pre-emption record".

This legislation was carried forward until 1970 when it was repealed and a new *Land Act* enacted. The new *Land Act* contains no provisions relating to pre-emption of Crown lands, nor are there any "transition" provisions relating to any pre-emption records which may have been in existence in 1970.

The provisions of the *Execution Act* which exempt pre-emption claims are redundant in the sense that such claims cannot arise today. The real issue is whether any subsisting pre-emption claims should continue to be exempt, We were advised by the Department of the Environment in 1976 that there were only 36 pre-emption claims in existence at that time and these were expected to ripen into Crown grants within 2 or 3 years. There seems to be little point in preserving the pre-emption exemption in the *Execution Act* in the light of this information.

In our working paper we proposed that all references to pre-emption claims be omitted from the *Execution Act*. That proposal has been adopted in part in the *Execution Amendment Act*. The amendment to the definition of "land" would strike out the words "but does not include pre-emption claims".

That amendment would, however, leave section 3 of the *Execution Act* untouched. That section is considered further below.

C. The Homestead Act

Section 3 of the *Execution Act* provides:

> Nothing in this Act shall in any way be deemed to limit the operation and effect of the *Homestead Act*, and this Act does not apply to lands registered under the *Homestead Act*, or to pre-emption claims.

What is the effect of that provision in relation to "homesteads"?

The term "homestead" may have three different meanings under British Columbia law. The first meaning is that arising from ordinary usage: the interest claimed by a "settler" in formerly unoccupied land. The second meaning is the definition in the *Wife's Protection Act*: a matrimonial home against which an entry underthe Act has been made. The third definition is that in the *Homestead Act*:

> 2. In this Act, unless the context otherwise requires, "homestead" means the pieces or parcels of land, together with any erections or buildings thereon, whether leasehold, or both leasehold and freehold, with their rights, members, and appurtenances, that are duly registered as a homestead in manner hereinafter mentioned; and any erection or building or any such homestead as aforesaid, whether or not the same is affixed to the soil, shall be taken to be real estate and part of such homestead.

In other words a "homestead" is land which has been registered as such under the Act.

And what purpose is served by such registration? The *Homestead Act* is concerned with exemptions from execution. It provides, in section 5, that if land is registered under the Act the land is exempt from execution to the

extent of $2,500. Other provisions regulate the descent of a "homestead" on intestacy and require a spouse's consent to its disposition.

The Act appears to have lost its relevance with the passage of time. The exemption figure of $2,500 was set in 1867 and has never changed. originally it may have been intended that all or most of a debtor's real property should be exempted (having regard to the purchasing power of $2,500 in 1867) but the Act manifestly does not achieve that end today.

The Act is little used. In May, 1973 an inquiry was directed to all Registrars of Title. In the period from January 1, 1970 to May, 1973 only 3 homesteads were registered throughout the Province. In the Vancouver Land Registry Office the latest registration occurred in 1947.

The Act also creates certain technical problems. Section 3 of the *Execution Act* provides that it does not apply to lands registered under the *Homestead Act*. Assuming the homestead is worth more than $2,500 how does a creditor proceed against it? Presumably, in the light of section 3, he cannot register his judgment and apply to the court for a sale of the property under the *Execution Act*. Section 10 of the *Homestead Act* sets out procedures for resolving questions between "parties" (and provides for partition or sale) but it is far from clear that a judgment creditor is a "party". It may be that the creditor's only recourse is to equitable execution.

While we have deferred a full consideration of exemptions from execution to a later phase of our project on the enforcement of judgments, one principle seems clear at this stage. Exemptions should be available equally to all debtors who qualify for them. The use of the *Homestead Act* to provide real property exemptions is repugnant to this principle. At present, the benefit of the Act is available only to those who have the wit to register under it. It is our conclusion that these sections of the *Homestead Act* which provide an exemption from execution, of land registered under the Act, should be repealed. A question remains as to whether the balance of the Act should be preserved.

Most of the *Homestead Act* is procedural in character and only two sections of the Act (other than the exemption provision) affect substantive rights. Those are sections 7 and 8. Section 7 provides:

> 7. (1) If any person holding a homestead dies intestate, leaving him surviving a widow and minor children, the homestead of the value aforesaid shall wholly pass to the widow, to be held by her during the minority of the children, or while the widow remains unmarried; and the exempted property shall not be sold during such minority, or while the widow remains unmarried, for the payment of any debt that has been contracted by the deceased person subsequent to the due registration of the homestead.
>
> (2) If any person holding a homestead dies intestate
>
> (a) leaving a widow him surviving and no children, the widow is entitled to the homestead absolutely;
>
> (b) leaving children only him surviving and no widow, the property belongs to the children absolutely in equal shares divisible upon the youngest child attaining the age of twentyone years.

The general scheme of distribution of an intestacy is set out in sections 101 to 103 of the *Administration Act*.

> 101. (1) If an intestate dies leaving a widow and issue, his estate, where the net value thereof does not exceed twenty thousand dollars, shall go to his widow.
>
> (2) Where the net value exceeds twenty thousand dollars, the widow is entitled to twenty thousand dollars and has a charge upon the estate for that sum.

(3) Of the residue of the estate, after payment of the said sum of twenty thousand dollars,

(a) where the intestate dies leaving a widow and one child, onehalf shall go to the widow;

(b) where the intestate dies leaving a widow and children, onethird shall go to the widow.

(4) If a child has died leaving issue and such issue is alive at the date of the intestate's death, the widow shall take the same share of the estate as if the child has been living at the date.

(5) In this section "net value" means the value of an estate wherever situate, both within and without the Province, after payment of the charges thereon and the debts, funeral expenses, expenses of administration and probate fees.

102. If an intestate dies leaving issue, his estate shall be distributed, subject to the rights of the widow (if any), per stirpes among the issue.

103. If an intestate dies leaving a widow but no issue, his estate shall go to his widow.

Section 7 of the *Homestead Act* appears to depart from the general law governing distribution of an intestacy in two respects.

The *Administration Act* is concerned with the distribution <u>of</u> the entire estate of the intestate. Section 7 is concerned only with the disposition of the homestead property.

2. Where the intestate is survived by a widow and one or more children, under the *Administration Act* the estate, to the extent that it exceeds $20,000, is divided among them. Under section 7 the homestead passes wholly to the widow subject only to her retaining it *in specie* until she remarries or during the minority of the children.

How significant is this divergence between the *Administration Act* and section 7 of the *Homestead Act?* The answer to this depends on the meaning of the words "homestead of the value aforesaid" in line 2 of section 7(1). To what does that refer?

The only "value" specified before that section is the $2,500 exemption. If, in fact, the effect of section 7 is limited to the first $2,500 of the property, in the same way as the exemption is, then the section is of little practical importance and the deviation from rights under the *Administration Act* is insignificant. Having regard to the fact that section 10 of the Act also confines the effect of the Act to the first $2,500 of a homestead, we believe this is the most reasonable construction to place on section 7.

Section 8 of the *Homestead Act* provides:

8. Nothing herein contained shall be held to prevent the person for whose benefit a homestead is registered at any time from abandoning, aliening, mortgaging, or otherwise parting with, limiting, or encumbering his interest therein, as to him may seem fit, regard being had to the nature, quality, and incidents thereof, and of his power to dispose of the same; except that in case the owner of any homestead is a married man, he shall not during coverture so abandon, alien, mortgage, part with, limit, or encumber the same, except with the consent of his wife, if she is a resident of the Province, such consent to be given by instrument executed by her and duly attested in the manner provided in the *Land Registry Act* for the attestation of instruments; but in case the wife is not a resident no such consent is requisite.

The main significance of this provision is that it prevents a husband from selling or mortgaging the property without the written consent of his wife.

There is no doubt that section 8 gives a measure of security to the wife but similar protection can be obtained through an entry under the *Wife's Protection Act*

To us, the arguments in favour of the total repeal of the *Homestead Act* seem overwhelming. The Act is almost never used. Its special provisions for distribution on an intestacy seem to be limited to a relatively low dollar value and their deviation from the *Administration Act* is difficult to justify on policy grounds since the *Homestead Act* has ceased to provide a meaningful real property exemption from execution.

The Commission recommends that:

1. *Section 3 of the Execution Act be repealed.*

2. *The Homestead Act be repealed.*

D. Unregistered Interests in Land

An interest in land of a judgment debtor may not be reflected in the records of a land registry office. This may be because the instrument under which his interest arises has not been registered (e.g. an unregistered conveyance or agreement for sale or a trust instrument which has not been registered under section 149 of the *Land Registry Act*). It may also be the case that the interest is in land which has not been brought within the *Land Registry Act* (e.g. an unregistered Crown grant of unsurveyed land). Is the registration of a judgment under the *Execution Act* effective to reach such interests?

Professor Dunlop expressed some doubt:

> Neither the *Execution Act* nor the *Land Registry Act* provides much help in finding an answer to [this] question. The *Execution Act* speaks throughout of interests in land without saying whether they must be registered or not ... [T]he procedural sections ... are by and large neutral on the question. Indeed, section 54 may offer some slight assistance by providing that a purchaser of land from the sheriff may ignore breaches of the Act, improprieties or irregularities in the sale or otherwise, and informalities in the conveyance of the property. The section ends by providing that the conveyance by the sheriff to the purchaser "shall be deemed to be valid to and for all ends, intents, and purposes." On the other hand, section 52 and Form C (the form of conveyance) appear to contemplate a sale of registered land, rather than the situation in which the title stands in the name of a person other than the judgment debtor.
>
> The *Land Registry Act* is similarly unhelpful. Section 174 provides that the land registrar must keep an alphabetical list of names against whom judgments have been registered. Judgments are filed in the register of judgments rather than against the title of the judgment debtor, a fact which is at least compatible with execution against an unregistered interest. Sections 166 to 168, taken together with section 195, suggest the opposite result. The matter is further complicated by sections 209 to 220, which create a procedure whereby a person claiming to be interested under any registered instrument "or otherwise" in any registered land may by leave of the registrar or a judge lodge a caveat against that land. The judgment creditor seeking to execute against an unregistered interest in land is thus faced with two problems. He must first establish that such a property interest is exigible and he must then find a procedure whereby he can obtain registered title. The legislation provides no clear guide as to either problem.

Our working paper went on to point out that despite these doubts the definition of "land" seems wide enough to encompass interests arising under an unregistered instrument, and section 35, speaking as it does of "a lien on *all lands* of the judgment debtor *in* the ... *land registration district*[s]" does not seem to be confined to land with respect to which a certificate of indefeasible title has been issued. We proposed that the application of the *Execution Act* to unregistered interests in land should be put beyond doubt.

Our concerns have been met in part by the *Execution Amendment Act*. That Act would add to the *Execution Act*, as section 37B(91), the following provision:

> (9) Where a judgment creditor has knowledge that the judgment debtor is the beneficial owner of an estate or interest in land, the title to which he has not registered, the judgment creditor may, on proof satisfactory to the registrar, apply, in the same manner as an application is made to register any other judgment, to register the judgment against the beneficial estate or interest in the land affected.

That provision makes it clear that a beneficial interest which is not reflected in the register of the Land Registry Office is exigible and sets out the procedure to register a judgment against such an interest.

E. Narrowing the Scope of "Land"

Execution against land which is not within the land registry system continues to be a difficult issue. The *Execution Amendment Act* would add the following provision to the *Execution Act* as section 37B (8);

> (8) A judgment shall not be registered against unsurveyed Crown land or Crown land the title to which is not registered under the *Land Titles Act*.

The implications of that provision are not entirely clear.

On one hand section 37B(8) may simply be a reflection of a more general proposition relating to execution against the Crown. Section 13(6) of the *Crown Proceedings Act* provides:

> No execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of money or costs.

If the effect of section 37B(8) is restricted to the enforcement of judgments against the Crown it is noncontentious as other machinery exists to realize on such judgments.

The difficulty we have is that while it does not seem to make sense to talk of registration against a nonexistent title, section 37B (8) does just that. Does the fact that unregistered Crown land has been specifically excluded from registration carry with it the implication that registration is permissible against unregistered land which is not vested in the Crown? If so, what are the mechanics of registration?

We continue in ourbelief that private interests in unregistered land should be subject to execution but have reconsidered our view that they should be assimilated to conventional registered interests and subject to sections 33 to 63 of the *Execution Act*. In the light of the *Execution Amendment Act*, they simply do not fit comfortably into the legislative scheme and we now favour their exclusion from the definition of "land".

This exclusion raises the issue of whether the definition is too wide and encompasses other rights, which are arguably interests in land within that definition, but which ought not to be treated like "conventional" interests in land for the purposes of execution.

The definition of "land" may include certain resource tenures which arise under the *Forest Act*, *Mineral Act*, *Placer Mining Act*, and *Petroleum and Natural Gas Act*. Should such interests be treated like conventional interests in land, or similar interests, such as profits a prendre, which arise by private grant? It is our view that they should not. The procedure to execute against land set out in the *Execution Act* is essentially geared to the existence of a torrens system of land registration which records the state of, and changes in, the ownership of interests in land.

A tenure may fall within the definition of "land" in the *Execution Act* or have associated with it a registered grant of surface rights but the "land" character of such an asset is secondary only. Its primary characteristic will be defined by the statute under which the tenure is created and that statute will normally provide a mechanism to record ownership of, and interests in, the tenure and transfers thereof.

It follows that an execution procedure aimed at such interests should be sufficiently flexible to address itself to the peculiarities of primary character of the asset. The scheme set out in the *Execution Act*, while efficient within its domain, does not have sufficient flexibility to meet all the difficulties which may arise out of execution proceedings against a resource tenure.

The Commission recommends that:

3. *The definition of "land" should not include*

   (a) *an interest in land with respect to which no "certificate of title" or "absolute certificate of title", as defined in the* Land Titles Act*, has been issued, or*

   (b) *resource tenures acquired under the*

      (i) Forest Act
      (ii) Mineral Act
      (iii) Placer Mining Act, *or*
      (iv) Petroleum and Natural Gas Act

      nor any grant of surface rights acquired in connection with such tenures.

The exclusion of these interests fram the definition of "land" in the *Execution Act* raises the need for a remedy against them unless they are to remain totally beyond the reach of judgment creditors. The creation of such a remedy is a matter which we would prefer to have deferred to a later stage of our project on enforcement of judgments, but if our recommendations are implemented swiftly we would be loath to see judgment creditors left without any remedy against such assets while awaiting further recommendations in this regard.

The approach which presently commends itself to us for execution against such assets and against other more "difficult" types of personal property is to expand the range of circumstances in which equitable execution, and in particular receivership, is available. As an interim measure we favour the adoption of equitable receivership as the appropriate way to proceed against such interests. While this is not totally satisfactory in the absence of a complete study we have no doubt that it would significantly improve the position of judgment creditors with respect to such assets. Under the present law their exigibility is uncertain and even if they are exigible, the law offers no guidance as to how one might proceed against them.

The Commission recommends that:

4. *Where a judgment debtor has an interest property that is excluded from the definition of "land" by recommendation3 the judgment creditor may apply to the Supreme Court for the appointment of a receiver and an order vesting in the receiver, control over all the judgment debtor's rights and the interest in or to the property,*

5. *A receiver appointed under recommendation4 should have the same powers and be subject to the same duties as a receiver appointed by the Court in the exercise of its jurisdiction relating to equitable execution*.

CHAPTER V DEBTORS' RIGHTS OF "REDEMPTION"

A. Introduction

When viewed in functional terms, the statutory scheme for execution against land has a certain similarity to proceedings on a mortgage which is in default. Registration of a judgment is comparable to the creation and registration of a security interest in land and proceedings under section 38 are similar to the initiation of foreclosure proceedings. While the analogy between execution and foreclosure proceedings cannot be carried too far (*e.g.* in foreclosure proceedings the basic relief sought is the vesting of the defendant's interest in the plaintiff which is not the case in execution proceedings) it may be a useful one.

In December 1975 this Commission issued a Report entitled *Security Interests in Real Property: Remedies on Default* (hereafter referred to as LRC 24). In that Report we considered the two forms of consensual security agreement most widely used in British Columbia: the mortgage and the "agreement for sale". We concluded that although these two devices were functionally identical, the rights and remedies of the parties, on default, diverged in a number of ways. It was thought that this was undesirable and that a person should not be significantly better or worse off under one device than under the other. We therefore made a number of recommendations aimed at achieving a uniformity of rights and remedies.

While we do not maintain that the interest of a creditor who has registered a judgment is "functionally" equivalent to that of a mortgagee, there is a sufficient similarity to justify a consideration of uniform rights in relation to certain aspects of "redemption".

B. The Time for "Redemption"

A judgment debtor has the right to bring execution proceedings to a halt by satisfying the judgment. This can be done at any time before his land is sold. This corresponds to the right of a mortgagee to "redeem" his property in foreclosure proceedings. But how much time does the judgment debtor, in fact, have to do so?

Section 47 of the *Execution Act* provides:

> The Sheriff shall not offer the lands for sale within a less period than one month from the day on which the order for the sale thereof is delivered to him.

Thus the debtor has, in effect, one month to "redeem" his land. This is to be contrasted with the basic redemption period of 6 months which we have recommended be given to mortgagors and purchasers. We can see no sound reason why the execution debtor's "redemption" period should be shorter thhn that applicable to consensual security agreements. It is our conclusion that a 6 month period would be more appropriate.

We also recommended in LRC 24 that the court should have the discretion to order a shorter or longer redemption period if circumstances warrant it. Such a discretion would also be useful in connection with a redemption period given by the *Execution Act*.

The Commission recommends that:

6. *Section 47 of the* Execution Act *be modified so as to provide that the land should not be offered for sale for 6 months unless the court in its discretion determines there should be a shorter or longer period of time*.

Lest this recommendation is thought to be a startling innovation, it should be noted that the imposition of some sort of waiting period is a common feature of Canadian statutes which provide for execution against land. It often takes the form of a requirement that at least one year elapse between the registration of the judgment or execution in the appropriate land transfer recording office and a sale of the land by the sheriff.

We also stress that the imposition of a six-month redemption period should not visit significant hardship upon the judgment creditor. His rights would not be "at peril" for six months as his priority position, as against subsequent transferees and mortgagees of the debtor's interest and as against other creditors, is governed by the original registration and no subsequent delay will impair whatever priority he had initially acquired.

C. Varying the Time for "Redemption"

In LRC 24 we recommended that the court, upon sufficient cause being shown, should have the power to extend or abridge the redemption period. We see no reason why a similar power should not exist with respect to execution proceedings.

The Commission recommends that:

7. *At any time before the land is sold the debtor, creditor or any person whose interest in the land will be adversely affected by a sale, may apply to the court to have the period of time provided by section 47, or specified by the court, extended or abridged*.

D. "Reopening" a Sale

In LRC 24 we pointed out that notwithstanding a final order for foreclosure the court retains a discretion to reopen a foreclosure and give the mortgagor a further right to redeem. This discretion will be exercised only in exceptional circumstances and where it will not prejudice the rights of a third party who may have acquired an interest in the property.

In the context of execution there is little room for such relief to arise as a sale is normally made to a third party. But the *Execution Act* does permit the execution creditor to purchase the property, and if he does so there may be circumstances in which it would be fair to allow the execution debtor to "reopen" the sale.

The Commission recommends that:

8. *Where the land is sold by the sheriff to the execution creditor, and the debtor is prepared to repay the amount of the purchase price to the creditor, and satisfy a deficiency which may exist on the judgment and costs, the court should have a discretion to reopen the sale and set it aside, and that discretion should be exercised in the way the comparable discretion would have been exercised if the proceedings had been for the foreclosure of a mortgage*.

We have framed the previous recommendation so as to make the test of when a sale by the sheriff to the judgment creditor may be reopened comparable to the test applied to the reopening of a final order of foreclosure of a mortgage. Essentially, for the discretion to be exercised, the application must be made speedily and the debtor

would be required to demonstrate that the rights of the creditor and of any interested third party would not be impaired and that allowing the sale to stand would create a great hardship for the judgment debtor.

CHAPTER VI THE RIGHTS OF THIRD PARTIES

A. Joint Tenancies

1. *Survivorship*

A basic feature of our land law is a form of ownership known as joint tenancy. This arises when property is conveyed or transmitted to two or more persons as "joint tenants" giving them identical and undivided interests in that property. The most important incident of joint tenancy is the right of survivorship the rule that when one joint tenant dies his interest in the property is transmitted to the surviving joint tenant(s). Thus, if land is owned by A and B as joint tenants, upon A's death B becomes the sole owner of the land and A's share does not become part of his estate for distribution to his heirs.

But a joint tenancy can be "severed" or terminated. This may happen when a party sells or encumbers his share or does some other act which is inconsistent with a joint tenancy. When that occurs the tenancy becomes one known as a "tenancy in common." A tenancy in common also involves ownership of an undivided interest by two or more persons but the right of survivorship does not exist in relation to it. Thus, in our previous example, if A and B owned the land as tenants in common, upon A's death his interest in the land would become part of his estate and as such liable for his debts and available for distribution to his heirs.

What is the legal position when a creditor obtains a judgment against a joint tenant and registers that judgment under the *Execution Act?* This question was considered by the British Columbia Court of Appeal in *Re Young*. In that case land was jointly owned by a husband and wife. A creditor of the husband obtained a judgment against him which was duly registered. Four months later the husband died. No further proceedings were taken (apart from periodic renewals of the judgment) by the judgment creditor and three years later the wife died. The Public Trustee then applied for registration, as administrator of the wife's estate, with respect to the property. The Registrar of Titles then lodged a caveat forbidding registration. The issue before the court was whether the Registrar's caveat should be discharged and that issue turned on the legal effect of the registered judgment.

The judgment creditor argued that the registration of the judgment had the effect of severing the joint tenancy or, alternatively, putting the right of survivor ship into suspension. A majority of the Court of Appeal held that it did neither. A view was adopted that:

> The trend of the authorities is that a mere lien or charge on the land, either by a cotenant or by operation of law, is not sufficient to sever the joint tenancy; there must be something that amounts to an alienation of title.

This led the majority to conclude that the registration of the judgment did not sever the joint tenancy.

The second argument advanced by the judgment creditorthat the right of survivorship was "suspended" - was raised in the earlier British Columbia Supreme Court decision of *Re Penn*. It is difficult to see its basis. On what legal theory may rights of survivorship become "suspended" and "unsuspended" as circumstances change? Maclean J.A. examined the relevant legislation and concluded:

In my view the *Land Registry Act* and the *Execution Act* do not provide a basis for a finding that the rights of the surviving joint tenant under the *jus accrescendi* [right of survivorship] are so modified or abrogated that he must take subject to a judgment registered under s. 35 of the *Execution Act* and on which no further proceedings have been taken.

> I think that if I were to hold that the mere registration of a judgment under s. 35 of the *Execution Act* constituted an encroachment of the *jus accrescendi*, I would be straying into the legislative field.

Thus it was held that the mere registration of a judgment neither severs a joint tenancy nor suspends the right of survivorship and the interest of a surviving tenant will defeat that of a judgment creditor.

When, if ever, will the rights of the creditor crystallize into an interest which will survive the death of his debtor who is a joint owner of land, if registration is not enough? At the time proceedings are commenced under section 38? At the time of *lis pendens* issued under section 44 is registered? At the time an order for sale is made? At the time the land is sold? *Re Young* is singularly unhelpful on this point. The only reference to the issue is in the judgment of Maclean, J.A.:

> Appellant admits that if the execution procedure under ss. 33 to 59 of the *Execution Act* had been carried to a point where an order for sale was made, the *jus accrescendi* would have been extinguished. It is not necessary to make a finding on this point here.

Are the policies embodied in *Re Young* ones which should be continued? Professor Dunlop suggests not:

> This decision may be sound law, but it seems unjust when considered on the level of policy. In any case other than joint tenancy, the *Execution Act* permits a creditor to file a judgment in the land registry office and to take no further proceedings until the debtor either transfers his land or dies. In either case, assuming that the judgment has been properly filed and renewed, it attaches to the land in the hands of the purchaser or the executor or administrator. If the land in *Re Young* had been held in tenancy in common, and the deceased debtor had left his interest in the land to the other tenant, the judgment would have travelled with the land ... As a matter of policy, it seems difficult to explain why the judgment creditor should be completely defeated in the situation where the debtor joint tenant predeceases his cotenant. The creditor has taken the necessary steps to create a charge against the land of his judgment debtor but, in the case of land held in joint tenancy, the effectiveness of his charge turns on the complexities of the law governing severance of joint tenancy and on the accident of which joint tenant dies first.

Davey, C.J.B.C., the dissenting member of the Court of Appeal in *Re Young*, also questioned the policy of the majority view:

> I must say I find ... [the severance of a joint tenancy by registration of a judgment] satisfactory, because it makes answerable for a judgment the judgment debtor's interest in a joint tenancy over which he had in himself complete power of disposal in his lifetime, and avoids one of the highly technical consequences of a joint tenancy, as contrasted with a tenancy in common, that has little to commend it in the light of modern needs.

The legal position created by *Re Young* is such that a creditor who wishes to fully protect himself and preserve his position with respect to jointly owned land cannot rely on registration only. He must take further steps. How far he must go is uncertain, but at the very least he must commence proceedings under section 38 whether he

wishes to do so or not. In Chapter III it was noted that the *Execution Act*, as it applies to land, encourages voluntary payments by the debtor and we approve of that effect. To the extent that *Re Young* encourages the unnecessary commencement of enforcement proceedings it is counterproductive.

But what is the proper approach? Should the registration of a judgment sever a joint tenancy? The dangers of this approach are illustrated by *Re Penn* (now overruled by *Re Young*). In that case a husband and wife were joint owners of land, and at the time of the wife's death a judgment had been registered against her. After her death the surviving husband discharged the judgment and filed the discharge in the Land Registry Office. He then applied to have the land registered in his name. The refusal of that application was upheld by the Supreme Court of British Columbia on the ground that there was no joint tenancy in existence at the time of the wife's death and her interest became part of her estate. The Court left open the possibility that the joint tenancy might have revived had the judgment been discharged during the wife's lifetime.

It is difficult to see why the act of registration by a creditor should create rights in favour of third parties (*e.g.* the debtor's heirs) as against the surviving joint tenant; but that would be the effect of a rule that registration of a judgment severs or suspends a joint tenancy. The preferable rule would seem to be that registration of a judgment should not sever a joint tenancy, but if a joint owner, against whom a judgment has been registered, dies, the judgment should continue to charge the debtor's interest in the hands of the surviving owner.

But this raises a number of other problems. The suggested rule may leave the surviving owner in the unhappy position of being unable to ascertain the value of what it is he has received. It may be important that he be able to do so for a number of reasons. If it is clear that the survivor is the only person who may be called upon to satisfy the judgment, its value might be discounted from the value of the joint interest transmitted. But if the deceased has other assets, the judgment creditor may make a claim against the estate to satisfy his judgment in whole or in part. This contingency makes the value of the interest transmitted to the survivor uncertain.

The possibility of a claim against the estate may raise other problems. Consider the following situation.

> A and B (husband and wife) are joint owners of land worth $40,000. C obtains a judgment for $10,000 against A which is registered. A dies leaving an estate (of assets other than his interest in the land) worth $10,000. A's personal representative is B. A had one other creditor, E, whose debt is for $10,000. E's debt is unsecured and he has not taken judgment on it.

The following results are possible:

> C makes no claim in the estate but looks to the land to satisfy his judgment. E gets the full estate of $10,000 to satisfy his claim. C gets paid $10,000, either directly by B or from the proceeds of a sale of A's interest in the land.

or

2. C claims in the estate and is paid $5,000. E also receives $5,000. C then looks to the land for the remaining $5,000 and it is sold (or the remaining $5,000 is paid directly to C by B) to discharge the judgment (and E gets no further payment).

If the second result occurs E will be understandably aggrieved. E will have lost $5,000 and B will have obtained a corresponding benefit.

We see a possible solution to these difficulties in the equitable doctrine of marshalling. This is described in Hanbury as follows:

> The doctrine of marshalling is a principle of equity by virtue of which a secured creditor, B, can require a prior creditor, A, to take satisfaction out of assets upon which creditor B has no lien; thus leaving B's security available for him. "If a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien."
>
> For example: if A mortgages Blackacre and Whiteacre to B; then mortgages Blackacre to C; C can require B to satisfy himself in the first instance out of Whiteacre.

The doctrine of marshalling has been a feature of the law concerning the administration of estates for many years.

In the context under discussion, the application of the doctrine of marshalling would require that a claim of a registered judgment creditor against a debtor's estate should be subordinated to the claims of ordinary unsecured creditors except to the extent that a deficiency exists (or is likely to arise) such that the proceeds of a sale of the land are (or will be) insufficient to satisfy the judgment.

If, on the other hand, there is sufficient money to satisfy both the judgment debt (in whole or in part) and all ordinary creditors, it is our view that the judgment creditor should look first to the estate and proceed against the land (or call upon the surviving joint owner for payment) only if the estate is unable to satisfy his claim in full. A clear rule along the lines described above would be fair to ordinary creditors and would assist in quantifying the value of the joint interest transmitted to the surviving owner.

The Commission recommends that:

9. *If a judgment is registered against a debtor who has an interest, as a joint tenant, in land, the joint tenancy is not severed but if the debtor dies and the judgment remains unsatisfied then the judgment continues to charge the interest of the debtor in the hands of the surviving owner(s); and*

    (a) if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is greater than the claims of all creditors, then

        (i) a registered judgment creditor should look first to the estate of the debtor for satisfaction of his judgment, but his claim is subordinated to the claims of ordinary creditors who have not registered a judgment against the debtor's interest in land, and

        (ii) if the debtor's estate, after satisfying the claims of ordinary creditors, is insufficient to satisfy a registered judgment the judgment creditor should then be entitled to look to the debtor's interest in land in the hands of the surviving joint owner; and

    (b) if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is less than the claims of all creditors, then

        (i) a registered judgment creditor may share rateably in the estate, but his claim therein is reduced by the value of the debtor's land which is available to satisfy his claim, and

(ii) *a registered judgment creditor is entitled to look to the debtor's interest in land in the hands of a surviving joint tenant to satisfy the deficiency.*

(c) *notwithstanding (a) and (b) if, at the time of the debtor's death, the judgment creditor had commenced proceedings under section 38 of the* Execution Act *to enforce the change created by registration of his judgment he may continue those proceedings.*

10. A joint tenancy be severed by a sale of a joint owner's interest in land pursuant to the Execution Act.

This recommendation reflects a proposal that was set out in our working paper. The proposal has since been tentatively adopted by the Manitoba Law Reform Commission in their working paper on Exemptions under The Judgments Act.

2. ___Partition and Sale

A thread which rung throughout the law of execution is the general rule that the sheriff cannot seize or sell a better title to, or greater interest in, an asset than the judgment debtor owns. If that asset is an interest in land which is coowned by the debtor, either as a joint tenant or as a tenant in common, that undivided interest is all that the sheriff can sell under the *Execution Act*. But there is not a ready market for such interests in land. A buyer will usually want the whole. Thus the price obtained on a forced sale of a coowner's interest in land is unlikely to reflect its true value.

Legislation exists in British Columbia whereby a coowner can apply to a court to have property divided among the owners, or enforce a sale of the whole and have the proceeds divided. Section 3 of the *Partition Act* provides:

> All joint tenants, tenants in common, coparceners, mortgagees, or other creditors having liens on, and all parties whosoever interested in, to, or out of, any lands may be compelled to make or suffer partition or sale of the said lands, or any part or parts thereof, as hereinafter mentioned and provided, and the partition may be had whether the estate is legal or equitable or equitable only; except that in respect of special timber licences no partition or sale shall be made of a single licence, and any odd licences not possible to assign by partition to any of the parties interested shall be ordered to be sold.

The reference in section 3 of the Act to "creditors having liens on ... lands" makes it clear that a registered judgment creditor is bound by proceedings for partition or sale of land in which his debtor has an interest. Does this burden carry a corresponding benefit: status to apply for partition or sale?

In what appears to be the only reported British Columbia case on this point, *Morrow* v. Eakin, a registered judgment creditor applied under the *Partition Act* for the partition of land owned jointly by the debtor and his wife, and for a sale of the debtor's portion. Whittaker, J. regarded section 5 as defining standing to apply for partition. The opening words of section 5 provide:

> Any person who, if this Act had not been passed, might have maintained an action for partition may maintain such an action ...

He considered standing at common law and under earlier legislation and concluded that the judgment creditor was not entitled to seek partition.

If *Morrow* v. *Eakin* represents the current legal position in British Columbia, is it sound policy? Whittaker, J. sought comfort in the fact that a purchaser from the sheriff of the debtor's interest would have standing to apply for partition or sale. But it will be a rare purchaser that is willing to buy a lawsuit under the *Partition Act*. The effect of

Morrow v. *Eakin* is artificially to depress the price which might be obtained at a sheriff's sale of the debtor's land. This may harm both the debtor and the creditor and, in the long run, does not assist the coowner because a purchaser may be found, albeit at a low price, who will buy the debtor's interest and proceed under the *Partition Act*.

It is our conclusion that a creditor who has obtained and registered a judgment against a coowner of an interest in land should have standing to apply for an order for partition or sale of the land. It is also our belief that an execution creditor should be able to apply for such an order in the context of the execution proceedings and a separate application under the *Partition Act* should not be necessary.

The Commission recommends that:

11. *A provision be added to the* Execution Act *which allows a creditor, who has obtained and registered a judgment against a debtor who is a coowner of an interest in land, to apply for an order for partition or sale of the land or both*.

12. *The* Partition Act *should apply mutatus mutandis to such an application as if an order had been sought under that Act by the debtor.*

13. *An application for partition or sale may be made in an application for enforcement under section 38*.

B. Execution Against Security Interests: Sections 52 (2), (3)

Section 52(2) of the *Execution Act* provides:

> (2) Notwithstanding the provisions of subsection (1), where the execution debtor's interest in the land sold under this Act is that of a mortgagee or a vendor under an agreement to sell the land, the conveyance executed by the Sheriff under subsection (1) vests in the purchaser no right to payment of any moneys paid by or on behalf of the mortgagor or the purchaser under the agreement to sell the land, as the case may be, prior to receipt of notice of the judgment by the mortgagor or the purchaser, or his personal representative.

Section 52(3) sets out what the notice of judgment must contain.

> Section 52(2) is a response to section 52(1) which vests in a purchaser from the sheriff all the debtor's estate or interest *as it existed at the time the judgment was registered*. Those who drafted the Act appeared to feel that section 52(1) might vest in the execution purchaser a right to all payments made by a mortgagor or buyer to the judgment debtor after registration of the judgment. Section 52(2) would avoid putting those persons in the position of having to pay twice.

To that extent section 52(2) seems sound, but why was the notice procedure provided and what are its legal implications? What is the position of, say, a mortgagor who receives a notice of the judgment under that section? Should he cease making payments? Is he liable to legal proceedings by the executiondebtormortgagee if he does so?

Should a creditor, by the mere acts of registering his judgment and serving notice on the mortgagor, be able to interfere with the normal flow of payments from the mortgagor to the debtormortgagee? We can understand why a creditor might wish to do so. A mortgage, by its nature, is a diminishing asset and a registered judgment creditor may feel that his "security" is substantially impaired by allowing payments to continue. Moreover, he may fear that, the executiondebtormortgagee, seeing that a sheriff's sale of his mortgage is a possibility, might induce the mortgagor to make a large "prepayment" on his obligation (perhaps by discounting the obligation secured).

But the notice procedure provided by section 52(2) is not the only way in which the creditor might protect his interests. It is open to him to garnishee the mortgage payments under the *Attachment of Debts Act*. Under existing law this is a cumbersome process and would call for a separate garnishing order with respect to each payment, thus garnishment may not be a realistic alternative. We have, however. in our Report on the *Attachment of Debts Act* recommended that a creditor should be permitted to issue a "writ of continuing garnishment". Such a writ would attach any debt which came due during some term specified in the writ. This innovation if adopted would enable the judgment creditor to preserve his position with respect to a mortgage in a relatively simple fashion without resorting to the ambiguous, and possibly dangerous, notice procedure provided by section 52(2). It is our conclusion that the notice procedure in its present form should be dropped from the *Execution Act* and that the only relevant notice to a mortgagor or purchaser under agreement should be a notice of a sale under the Act. The danger contemplated by section 52(2) may also exist with respect to proceedings against a reversion (lessor's interest in property) and the section might be extended to cover payments under a lease.

The Commission recommends that:

14. Section 52(2) be amended

(a) by adding "reversion or landlords interest under a tenancy agreement" as an interest to which the section is applicable, and

(b) by deleting the words 'prior to receipt of notice of the judgment by the mortgagor or the purchaser, or his personal representative" and substituting "prior to the receipt by the mortgagor, purchaser or tenant of notice that the execution debtor's interest in the land has been sold under this Act".

15. Section 52(3) be repealed.

C. Proceedings on Prior Charges

Where a debtor's land is sold by the Sheriff, the purchaser ordinarily takes subject to any charge such as a mortgage which was registered prior to the judgment under which the land was sold. While the debtor has lost his land, his liabilities with respect to that charge have not necessarily ended. He will, for example, normally remain personally liable on the covenant for payment contained in a mortgage on the land. If a default in payment occurs it is open to the mortgagee to proceed against the debtor on the personal covenant rather than proceed against the land now in the hands of the purchaser from the sheriff. If the mortgagee chooses to do so it is a windfall to the purchaser, as the extent to which his land is charged is reduced. The debtor suffers a corresponding loss. This state of affairs seems manifestly unfair.

Two approaches to its correction are possible. First, the law might require that the mortgagee proceed against the land and permit proceedings against the debtor on his personal covenant only if, and to the extent that, there is a deficiency. This is an "equitable marshalling" approach. Second, the law might make the purchaser accountable to the debtor for any payment made by the debtor pursuant to his personal covenant. This might be termed a "restitution" approach.

The *Execution Act* expresses a preference for the latter approach. Subsections (3) and (4) of section 50 provide:

> (3) If the lands purchased ... are subject to a mortgage or other pecuniary charge ... which has priority over the execution under which the lands have been sold ... if the person entitled to the encumbrance enforces payment of the amount thereof, or any part of it, or any interest or costs, then the purchaser shall repay to the mortgagor or

> other person who has been enforced to make any such payment the amount so paid, or a proportionate part thereof, ascertained or to be ascertained ...
>
> (4) In default of repayment by the purchaser under subsection (3) within one month after demand, the person who has made the payment, his executors or administrators, may recover from the purchaser the amount so paid, with interest, in a proceeding for money had and received; and until such money has been repaid with interest he or they shall have a charge for the same on the lands so purchased.

It is difficult to quarrel with the preference for the "restitution" approach. While the "equitable marshalling" approach is somewhat clearer and simpler, it does limit the freedom of action of the mortgagee who is, after all, an innocent party *vis a vis* the execution proceedings. It is our conclusion that the principles of sections 50(3) and 50(4) should be retained.

It is our view, however, that the drafting of section 50(3) could be improved. Subsection (2) seems to contemplate a situation in which the judgment creditor is a mortgagee who has taken a judgment on the personal covenant of the debtor and seeks to proceed against the debtor's land under the Execution Act rather than under the terms of his mortgage. This possibility has, unnecessarily in our view, found its way into the drafting of subsection (3). When quoting subsection (3) above we deleted all references to that possibility and its meaning became much clearer.

Second, section 50(3) refers to the land sold being subject to a prior "mortgage or other pecuniary charge". It is arguable that this language is not broad enough to encompass the situation in which the debtor's interest which had been sold was the interest of a purchaser under an agreement for sale. If that is the case the debtor would have no remedy against the purchaser from the sheriff if the vendor enforced the personal covenant. The applicability of section 50(3) to agreements for sale should be clarified. Similar considerations apply if the debtor's interest was that of a lessor under a lease.

Finally, it is not clear what is meant by "enforces payment". The word "enforces" suggests that something more than a mere demand by the secured party is necessary. Must the secured party have commenced proceedings on the personal covenant, obtained judgment, or proceeded to execution before payment can be said to have been "enforced"? If "enforcement" contemplates something more than a mere demand, a debtor who pays in response to such a demand would appear to have no right to claim against the purchaser under section 50(3). It is our view that a payment by a debtor pursuant to a demand by the secured party should be sufficient to create rights against the purchaser under section 50(3).

To return again to section 50(2), the provision reads:

> In the event of a mortgagee becoming the purchaser of lands sold in respect of his mortgage debt, or any part of it, he shall give the mortgagor a release of such debt, or of a proportionate part thereof, such proportion to be ascertained and certified, in Form B, by the Sheriff.

We doubt if this provision is necessary. First the situation contemplated is very remote. The only reason we can envisage why the mortgagee would prefer to proceed against the land under the *Execution Act* rather than his mortgage would be to obtain a "quick sale" and avoid the 6 month redemption period associated with mortgages. That advantage would, of course, disappear if our recommendation No. 6 is adopted.

Secondly, it is not clear why section 50(2) should provide for a formal release. Surely the receipt of the sale proceeds by the mortgageejudgmentcreditorpurchaser would *pro tanto* release the debt as a matter of law. We believe that section 50(2) could safely be repealed.

The Commission recommends that:

16. *Section 50(2) and Form B be repealed.*

17. *Section 50 (3) be amended by:*

    (a) *omitting all references to a purchase by a mortgagee*

    (b) *specifying that "pecuniary charge" includes a vendor's interest under an agreement for sale and a lessor's interest under a lease, and*

    (c) *specifying that "enforces payment" includes any demand by a secured party or lessor based on the debtor's personal liability on the security agreement or lease.*

D. Other Creditors

It is not proposed to deal at length with the rights of other creditors. This matter has been canvassed in our working paper on the Creditors' Relief Act which included a consideration of sections 57 and 58 of the *Execution Act*. The main issue confronted in that working paper is whether the *Creditors' Relief Act* should be repealed, or retained with certain modifications. Our final conclusions on that issue may raise the need for further modification of the *Execution Act* to accommodate them.

CHAPTER VII PREJUDGMENT PROCESS

Sections 33 to 63 of the *Execution Act* and our recommendations thus far are all based on the assumption that the creditor has no status to invoke the Act until he has taken a judgment against his debtor. Only when the creditor becomes a judgment creditor does the Act provide a remedy. Should this necessarily be the case?

Executionlike procedures that are available before judgment are not unknown to British Columbia law. A secured creditor may be able to apply for the appointment of a receiver to preserve property until judgment. An unsecured creditor may, in some circumstances, issue a garnishing order before judgment which orders that money owing to the defendant be paid into court to await the outcome of the action. These procedures are not execution in the sense that they provide funds which, before judgment, may be paid to the creditor to satisfy his claim. Rather, they enable the creditor to take steps to preserve the status quo and prevent the debtor's dissipating his assets, thus defeating the creditor.

The Land Registry system provides a suitable vehicle for the implementation of a "prejudgment preservation" policy. The devices of the *lis pendens* and the caveat already exist to prevent or limit the disposition of property which is the subject matter of litigation or a pending claim. It would not be difficult to allow a plaintiff who has commenced an action to file a "notice" of that action in the same fashion as a judgment and allow any judgment arising out of that action to bind the debtor's interest in land from the time the notice was filed.

It is our conclusion that this would be a useful innovation provided that it is surrounded by a number of safeguards.

The Commission recommends that:

18. A plaintiff who commences an action seeking a money judgment should, with leave of the court obtained on notice to the defendant, be permitted to issue and register a "notice of action" against land owned by the defendant.

19. The priority of any judgment recovered by the plaintiff in the action to which the notice relates should date from the registration of the notice of action and any subsequent interests should be subject thereto.

What safeguards are desirable and appropriate or, to put it another way, what factors should be relevant in a decision to grant or deny leave to issue a notice. This is an issue which we confronted in the context of another prejudgment remedy. In our Report on the *Attachment of Debts Act* we identified a number of ways in which the remedy of prejudgment garnishment should be qualified.

First, it was our view that the remedy should be available only if the court is satisfied that the plaintiff is "insecure" in the sense that there are reasonable grounds for believing that a judgment obtained in the action may not be substantially satisfied unless prejudgment garnishment is permitted.

A second qualification is that a court must be satisfied that prejudgment garnishment is "just" in the sense that the benefit to the creditor outweighs the potential or actual inconvenience or hardship to the debtor.

A third qualification is that a court must be satisfied concerning the merits of the plaintiff's claim in the sense that he is prepared to verify, under oath, the facts on which it is based and there appears to be no defence, other than one based on facts that are in dispute, that has a reasonable prospect of succeeding.

A fourth qualification is that the procedure should be flexible enough to permit other security to be substituted for money that would otherwise be garnishable and held by the court.

A final qualification is that where the defendant succeeds in the main action he should have a right to compensation for the loss of use of his money.

We believe these qualifications are equally apt in the context under discussion and, with necessary modification, should form the basis of safeguards surrounding prejudgment process against land.

The Commission recommends that:

20. Where a notice of action has been issued and registered under recommendation 18 and the defendant succeeds in the action he should be entitled to compensation for any loss resulting from the registration of the notice of action.

21. (a) On an application for leave to issue a notice of action, leave should not be granted unless the court is satisfied that

(i) there are reasonable grounds for believing that a judgment obtained by the plaintiff may not be substantially satisfied unless the registration of a notice of action is permitted,

(ii) having regard to the potential or actual hardship or inconvenience to the defendant and the benefit to the plaintiff, it is just in the circumstances to permit the registration of the notice of action, and

(iii) the plaintiff has sufficiently demonstrated the merits of his claim.

(b) The court in granting or denying leave to issue a notice of action should have a discretion to impose terms and conditions on the parties to achieve a just result.

(c) The terms and conditions that may be imposed under (b) should include, but not be limited to, one or more of the following

(i) the provision of security by the defendant, of a kind and in an amount that is satisfactory to the court, in place of the land against which the notice of action is sought to be registered,

(ii) the provision of security by the plaintiff, of a kind and in an amount that is satisfactory to the court to secure any compensation the defendant may be entitled to under recommendation 20,

(iii) an order concerning the disposition of the proceeds of any sale of the land against which the notice of action is registered or is sought to be registered, and

(iv) an order that the action be brought to trial in some specified period of time.

22. For the purposes of Recommendation 21(a),

(a) the matters set out in Recommendations 21(a)(i) and 21(a)(ii) may be presumed to be true but this presumption may be rebutted by evidence adduced on behalf of the defendant, and

(b) the merits of a claim should be sufficiently demonstrated if:

(i) one or more affidavits filed on behalf of the plaintiff

1. set out and verify the facts on which the plaintiff's claim is based, and

where a defence is alleged

2. set out and verify any additional facts which rebut that defence, and

3. deny the facts on which the defence is based; and

(ii) there appears to be no defence that has a reasonable prospect of defeating the claim other than a defence which, to succeed, depends on a finding, favourable to the defendant, on a fact that is in dispute.

We believe that these recommendations adequately balance the interests at stake but there is one situation in which the plaintiff may still be at peril. If the defendant is a true rogue, the knowledge that the plaintiff is seeking leave to register a notice may induce him to sell or mortgage his land to a bona fide buyer or lender before that leave can be obtained.

We therefore believe that it should be open to the plaintiff to apply *ex parte* for leave to register a notice of limited duration which would protect his position while he seeks leave to register the "usual" notice. In such an application, however, he should not have the benefit of the evidentiary presumption set out in Recommendation 22(a).

The Commission recommends that:

23. (a) A plaintiff should be permitted to apply ex parte for leave to register a notice of action.

(b) In an application under (a) the plaintiff should not have the benefit of the presumption set out in recommendation 22(a).

(c) A notice of action registered pursuant to leave granted in an application made under (a) should expire 10 days, or such longer or shorter period as the court may order, after its registration.

(d) A plaintiff who has registered a notice of action pursuant to leave granted in an application under (a) may apply, on notice to the defendant, for an order that the registration of the notice of action does not expire.

(e) Recommendations 21 and 22 should apply to an application under (d).

CHAPTER VIII A PROCEDURAL MATTER

As we pointed out in an earlier chapter, section 40 of the *Execution Act* requires that in every case in which a creditor takes proceedings under section 38, there must be a reference to the registrar to inquire into and report on certain matters. The registrar's reference can be a useful device when there is some question as to the nature or extent of the debtor's interest but we question the utility of a reference in all cases. At the time an application is made under section 38 the creditor may be able to present to the court all the information necessary to form the basis of an order for sale. In such a case the reference would be no more than a formality which leads to cost and delay and achieves nothing.

We believe the reference to the registrar should be retained, but its use should not be mandatory. Section 40 should, therefore be phrased in permissive language.

The Commission recommends that:

24. A reference to the District Registrar under section 40 of the Act should be permissive rather than mandatory, at the discretion of the court.

CHAPTER IX CONCLUSION

A. Summary of Recommendations

Rather than simply repeat the recommendations as they are set out in the body of this Report, we have chosen to summarize them in a somewhat modified format and language. Our recommendations are, therefore, expressed in the language of legislation and presented in the form of amendments to the *Execution Act* in a style similar to that of the *Execution Amendment Act*. This may help to illustrate the lines along which legislation could proceed.

For clarity, where we have added words to an existing provision of the *Execution Act* those words appear in italics. Lines have been drawn through words to be deleted.

The Commission recommends that legislation be enacted in the following terms:

1. Section 3 of the *Execution Act* is repealed.

2. Section 34 is amended

(a) in the definition of "land", by striking out "but does not include the rights of a lien claimant under the *Mechanics' Lien Act*; and", and substituting the following:

"but does not include

(v) the rights of a lien claimant under the *Mechanics' Lien Act*, *or*

(vi) *an interest* in a *special tenure;*",

and

(b) by adding the following definition at the end:

"*special tenure*" means

(i) an interest in land with respect to which no certificate of title or absolute certificate of title, as defined in the Land Titles Act, has been issued, and

(ii) a resource tenure acquired under the Forest Act, Mineral Act, Placer Mining Act or Petroleum and Natural Gas Act and any grant of surface rights acquired in connection with such a tenure.

3. The following sections are added after section 37F:

37G (1) In any proceeding in which the plaintiff claims a judgment for money the plaintiff may register a notice of action in Form E with respect to any land of the defendant in any or all of the Land Registry Offices in the Province.

(2) Where a plaintiff who has registered a notice of action under subsection (1) subsequently registers under section 35, a judgment entered in the same proceeding the priority of the judgment dates from the registration of the notice of action.

(3) Where a plaintiff has registered a notice of action under subsection (1) and the defendant succeeds in the proceeding, the plaintiff is liable to compensate the defendant for any loss resulting from the registration of the notice of action.

(4) No notice of action shall be registered under subsection (1) without the leave of the court in which the proceeding was commenced.

(5) The court shall not grant leave to register a notice of action unless it is satisfied that

(a) there are reasonable grounds for believing that a judgment obtained by the plaintiff may not be substantially satisfied unless the registration of a notice of action is permitted,

(b) having regard to the potential or actual hardship or inconvenience to the defendant and the benefit to the plaintiff, it is just in the circumstances to permit the registration of the notice of action, and

(c) the plaintiff has sufficiently demonstrated the merits of his claim.

(6) For the purposes of subsection (5)

(a) the matters set out in paragraphs (a) and (b) of subsection (5) may be presumed in favour of the plaintiff but this presumption may be rebutted by evidence adduced on behalf of the defendant, and

(b) the merits of a claim are sufficiently demonstrated if:

(i) one or more affidavits filed on behalf of the plaintiff

1. set out and verify the facts on which the plaintiff's claim is based, and

where a defence is alleged

2. set out and verify any additional facts which rebut that defence, and

3. deny the facts on which the defence is based; and

(ii) there appears to be no defence that has a reasonable prospect of defeating the claim other than a defence which, to succeed, depends on a finding, favourable to the defendant, on a fact that is in dispute.

(7) The court, in granting or denying leave register a notice of action, may impose terms and conditions on the parties.

(8) Where a notice of action has been registered the defendant may apply for an order that the registration be cancelled and the court may

(a) order that the registration be cancelled, either absolutely or subject to terms and conditions, or

(b) confirm the registration, either absolutely or subject to terms and conditions.

(9) The terms and conditions that may be imposed under subsections (7) and (8) include, but are not limited to, one or more of the following:

(a) an order that the defendant provide security, of a kind and in an amount that is satisfactory to the court, in place of the land against which the notice of action is, or is sought to be, registered,

(b) an order that the plaintiff provide security, of a kind and in an amount that is satisfactory to the court, to secure any compensation the defendant may be entitled to under subsection (3),

(c) an order concerning the disposition of the proceeds of any sale or assurance of the land against which the notice of action is, or is sought to be, registered and

(d) an order that the proceeding be brought to trial in some specified period of time.

(10) where a plaintiff applies ex parte for leave to register a notice of action

(a) subsection 6(a) does not apply, and

(b) the registration of a notice of action pursuant to leave granted in such an application is effective for 10 days only, or for such longer or shorter period as the court may order.

(11) The court may, on the application of a plaintiff who has registered a notice of action to which subsection 10(b) applies, order that the effective period of registration be extended.

37H (1) The registration of a judgment against the interest in land of a judgment debtor who is a joint tenant

(a) does not sever the joint tenancy, and

(b) if the joint tenancy is subsisting at the date of the death of the judgment debtor, the lien and charge, unless expired or satisfied, continue against the title of the surviving joint tenant to the extent of the deceased joint tenant's former interest in the land.

(2) A joint tenancy is severed by an actual sale under this Act of the interest of a joint tenant in the land affected.

37I (1) In this section "continuing charge" means a lien and charge which continues against an interest transmitted to a surviving joint tenant under section 37H(l)(b), and 'Unsecured creditor" includes

(a) a judgment creditor who has the benefit of a continuing charge, and

(b) a secured creditor to the extent that the obligation secured exceeds the value of his security.

(2) Where a judgment creditor has a continuing charge

(a) if the total value of

(i) the judgment debtor's estate which is available for distribution among his unsecured creditors, and

(ii) the interest subject to the continuing charge is greater than the total value of the claims of all unsecured creditors.

(iii) the judgment creditor should proceed first against the judgment debtor's estate for the satisfaction of his judgment but his claim therein is subordinate to the claims of unsecured creditors who do not have a continuing charge, and

(iv) if the judgment debtor's estate, after satisfying the claims of unsecured creditors who do not have a continuing charge, is insufficient to satisfy the claim of a judgment creditor who has a continuing charge that creditor may then proceed on the continuing charge.

(b) if the total value of

(i) the judgment debtor's estate which is available for distribution among his unsecured creditors, and

(ii) the interest subject to the continuing charge is less than the total value of the claims of all unsecured creditors,

(iii) a judgment creditor who has a continuing charge may share rateably in the estate but his claim therein is reduced by the value of the interest subject to the continuing charge, and

(iv) the judgment creditor may proceed on his continuing charge to satisfy the deficiency.

(3) Notwithstanding subsection (2) if, at the time of the judgment debtor's death, the judgment creditor had commenced proceedings under section 38 to enforce the change created by registration of his judgment, he may continue those proceedings.

37J (1) Where a judgment debtor has an interest in a special tenure the judgment creditor may apply to the Supreme Court for an order appointing a receiver of the judgment debtor's interest in, and rights relating to, the special tenure.

(2) A receiver appointed under subsection (1) has the same powers and is subject to the same duties as a receiver appointed by the court in the exercise of its jurisdiction relating to equitable execution.

4. Section 38 is amended by adding the following after subsection (3):

(4) Where the judgment debtor's interest in land is an undivided interest as a joint tenant or tenant in common, the judgment creditor may maintain a proceeding for partition to which the Partition Act applies and a motion under subsection (1) may include a claim for relief under that Act.

5. Section 40(1) is amended by striking out "shall" where it appears in the second line and substituting "may".

6. Section 42(2) is repealed.

(2) If in any case substituted service has been ordered by the Court of a Judge upon the judgment debtor, of the writ of summons or other process in the proceeding in which the judgment is obtained, then the land ordered to be sold as aforesaid shall not be sold by the Sheriff until the same has been advertised as hereinafter mentioned for a period of six months after the order for sale; but, upon application by the judgment creditor to a Judge of the Supreme Court, the Judge may shorten the said period of six months, or to make such other order in that behalf as he thinks fit.

The changes to section 47 would make it redundant.

7. Section 47 is repealed and the following substituted:

47. (1) The Sheriff shall not offer the lands for sale within a less period than six months from the day on which the order for the sale thereof is delivered to him unless the order specifies such shorter or longer period of time as the court thinks just.

(2) At any time before the lands are sold the judgment debtor, the judgment creditor, or any person whose interest in the lands will be adversely affected by a sale, may apply to the court to have the period of time provided in subsection (1) or specified in the order extended or abridged.

8. Section 50 is repealed.

9. Section 52 is repealed and the following is substituted:

52. (1) In this section

"obligee under a security agreement" means

(a) a mortgagee of land,

(b) a vendor under a registered right to purchase land, or

(c) a lessor of, or landlord under a tenancy agreement respecting, land.

“obligor under a security agreement" means

(a) a mortgagor of land,

(b) a purchaser under a registered right to purchase land, or

(c) a lessee of, or tenant under a tenancy agreement respecting, land.

"security agreement" means

(a) a mortgagee of land,

(b) a registered right to purchase land, or

(c) a lease of, or tenancy agreement respecting, land.

(2) A plaintiff, or any *obligor or obligee under a security agreement covering* the lands offered for sale, is at liberty to purchase at any sale by the Sheriff, and acquires the same estate, interest, and rights as any other purchaser. *(former s. 50(1) am.)*

(3) Upon the sale of lands made under this Act, the Sheriff shall execute to the purchaser a conveyance, under his hand and seal, of the lands sold, in Form C, or to the like effect, and shall in such conveyance fully, distinctly, and sufficiently describe the lands and interest therein which have been sold; and the conveyance, when delivered to the purchaser, and registered in the Land Registry Office for the registration district in which the lands are situate, vests in him, according to the nature of the property sold, all the legal and equitable estate and interest of the execution debtor therein at the time of the registration against the said lands of the first judgment, as well as at the time of the sale, or at any intermediate time, discharged from the first judgment and from all judgments and other charges against the execution debtor and his lands, subsequent to the first judgment. *(former s. 52(1).)*

(4) Notwithstanding subsection *(3)*, where the execution debtor's interest in the land sold under this Act is that of *an obligee under a security agreement,* the conveyance executed by the Sheriff under subsection (1) vests in the purchaser no right to payment of any moneys paid by or on behalf of the *obligor under the security agreement* prior to receipt of notice *by the obligor that the obligee's interest has been sold under this Act. (former s. 52(2) am.)*

(5) Where the execution debtor's interest in land sold under this Act

(a) is that of an obligor under a security agreement, or

(b) is subject to a security agreement which has priority over the execution

if the obligee under the security agreement, at any time after the sale, enforces *or demands* payment *under the agreement*, then the purchaser *of the execution debtor's interest* shall repay to the *execution debtor,* or other person who has made any payment *as a result of the enforcement or demand* the amount so paid, *(former s. 50(3) am.)*

(6) In default of repayment by the purchaser under subsection (5) within one month after demand, the person who has made the payment, his executors or administrators, may recover from the purchaser the amount so paid, with interest, in an action for money had and received; and until such money has been repaid with interest he or they shall have a charge for the same on the lands so purchased.

(7) Where the execution debtor's interest sold under this Act is purchased by the execution creditor, the court has a discretion to reopen the sale and set it aside if the execution debtor is prepared to

(a) repay the amount of the purchase price to the execution creditor, and

(b) satisfy any deficiency which exists on the judgment and with respect to costs.

(8) The discretion conferred by subsection (7) shall be exercised in the same way as a comparable discretion is exercised on an application to reopen the foreclosure of a mortgage after a final order has been made.

10. Form B in the Schedule is repealed.

11. The Schedule is amended by adding the following after Form D:

FORM E
(Section 37G)
EXECUTION ACT
NOTICE OF ACTION

IN THE *[Court]*

Action No.

Between

Plaintiff

and

Defendant

TAKE NOTICE that the *priority of any judgment for money entered in this proceeding by the plaintiff and registered with respect to*

[legal description of land]
shall date from the registration of this notice.

BY THE COURT

Registrar

12. The *Homestead Act* is repealed.

B. Acknowledgments

The Commission wishes to record its gratitude to a number of persons who have contributed to this Report. Our thanks go to Professor C.R.B. Dunlop, now of the Faculty of Law of the University of Alberta, whose research paper was of great assistance to us with respect to the chapter on the scope of the Act, and to Victor DiCastri, Q.C., and Henry Kennedy for the information and aid which they provided on various aspects of this study. We also wish to thank the small but helpful group of persons who responded to the working paper which preceded this Report. Finally, we want to acknowledge the contribution of Arthur L. Close, Counsel to the Commission, who drafted this Report and the working paper which preceded it.

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Commission member Kenneth C. Mackenzie did not participate in the making of this Report.

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