Book Review: Creditor-Debtor Law in Canada, by C. R. B. Dunlop

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BOOK REVIEW

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I. INTRODUCTION

For some unexplained reason, the law of debtor and creditor, and more specifically, the law relating to the enforcement of money judgments by unsecured creditors, has not of late spawned an overwhelming array of academic writing. A handful of articles and notes in learned journals and three casebooks have served to help educate lawyers, judges, law professors and students. Hardly a massive display of interest in an area of the law that has been aptly characterized as "often ambiguous, complex and archaic"1 — an area much in need of organizational, substantive and procedural reform.

This rather appalling dearth of recent material on so vital a subject may be contrasted with the texts on enforcement that seemed to abound in the nineteenth century.2 However, a renewed interest in debtor-creditor law has been apparent, at least to some degree, since the 1960's. For the most part, law reform agencies have been in the vanguard,3 clearly recognizing that the deficiencies, vagaries and confusion endemic in this branch of the law has continued far too long. In the nature of things, however, these valuable sources of information cannot be — and, indeed, do not purport to be — comprehensive texts bringing together in a coherent work the often incoherent mass of debtor-creditor law.

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Mercifully, this void has now been filled by Professor Dunlop's *Creditor-Debtor Law in Canada*, and for this alone we should all be most grateful. However, Dunlop's courageous excursion into what hitherto has often been uncharted seas deserves praise not merely because it provides the Canadian (and, it is to be hoped, the international) legal community with a new text on debtor-creditor law. It is, in fact, an admirable and prodigious effort at comprehension, assimilation, rationalization and exposition. The pains of many years have resulted in a work that deserves to be read by practitioners, jurists, academics and students. Indeed, it actually can be *read* — even for the sheer pleasure of absorbing interesting and reliable information.

Having regard to the nature and scope of this volume, Professor Dunlop has, in the process of introducing his book, short-changed himself. After noting the paucity of scholarly writing on the law of enforcement of money judgments, he states that "some good casebooks have been published." Unfortunately, one is now generally of interest to antiquarians only, another is basically an amalgam of statutes and cases, with little commentary, and the third is, like the others, out of print (although it is the only one to be reprinted in a new edition). Moreover, even the best casebook cannot supplant a good text, particularly one that so comprehensively and successfully discusses the law governing the enforcement of money judgments in all Canadian common law jurisdictions.

II. FORMAT

Before attempting to outline and review the substance of Professor Dunlop's book, a few words on format and organization are in order. Aside from a useful (and, by now, not uncommon) "Table of Cases" — where over 2,000 cases are listed, itself an indicia of the comprehensiveness of the coverage — the volume contains a detailed "Table of Statutes", "Rules and Regulations" and a "List of Works Cited". It goes without saying, of course, that both Tables facilitate the use to which the book may be put.

Regretably, the same cannot be said of the "Index": it clearly is not as detailed as it ought to be — a problem that seems to arise frequently in Canadian (and, indeed, other) publications. Lengthy searches through an index tend to bespeak excessive pruning, whether in the interest of cost-cutting or otherwise.

The organization of the book is generally orthodox. However, one might perhaps question why the chapter on "Execution" is so far removed from,
say, "Seizure and Sale", broken up as it is by the discussion of prejudgment remedies, attachment of debts and other creditors' remedies. After all, chapter 6, on "Execution", does focus attention on writs of *fieri facias* and, therefore, is intimately connected with "Seizure and Sale". But this is mere quibbling.

### III. MATTERS OF SUBSTANCE

#### A. General

There is a certain difficulty in reviewing a large law book devoted to matters of detail. While one might be tempted to criticize the book on this very basis, it should be pointed out that the law relating to the enforcement of judgment debts is itself complex and detailed; a mass of statutory and regulatory material, case law from Canada, England and elsewhere, and holdovers from the days of Robin Hood. One simply cannot escape the minutiae of enforcement law.

This is not to say that Professor Dunlop has ignored the socioeconomic milieu in which debt collection is undertaken. However, for better or for worse, he has concentrated his efforts mainly on "the law", without losing sight of its deficiencies and possible avenues for reform. The book is, therefore, largely a creditor-oriented book. But, then, the law respecting the enforcement of judgment debts is necessarily a creditor-oriented device.

#### B. Creditors' Rights vs. Debtors' Rights

Without attempting to be overly sensitive to language, it is perhaps not without some interest that the book is entitled *Creditor-Debtor Law in Canada*, thereby eschewing what seems to be the more common "debtor-creditor law" terminology. What's in a title? While the usage may be fortuitous and unintended, it may be noted that, in fact, very little time is expended on the rights of debtors. For example, having regard to the length of the treatment of topics respecting the collection of judgment debts, only relatively passing reference is made to instalment payment plans and stays of execution in favour of judgment debtors. While the opportunity for a debtor to benefit from such "rights" is more firmly entrenched in Saskatchewan, for example, provision has been made for them in Ontario (although there does appear to be some controversy concerning their scope).

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8 See, *e.g.*, Dunlop at 7 *et seq.*

9 See, *e.g.*, Dunlop at 45, 60-66 and 106-107.

10 See *The District Court Act*, R.S.S. 1978, c. D-32, ss. 64-74, and *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, ss. 75-85. Under both statutes, the courts are given very broad powers to order instalment payment plans and stays in respect of most judgments for the recovery of money. In disposing of a request for an order, the court is empowered to act upon its own view of the proper order to be made, having regard to all the facts. On making an instalment payment order, the court may decide which enforcement proceedings, if any, may be taken, and when any proceedings may commence. This would seem to give the court jurisdiction, for example, to permit execution against all or part of the debtor's personal property, while at the same time to prohibit garnishment of the debtor's wages. For a similar proposal for the Ontario small claims courts (but, significantly, not the higher courts), see OLRC Report, Part I at 68.
In the latter connection, reference may usefully be made to Dunlop’s view of the ambit of the stay of execution remedy in Ontario. Despite the absence of specific Ontario legislation empowering the higher courts to stay execution in all cases, Dunlop asserts that “the courts retain their inherent jurisdiction to direct a stay on a proper case.” Two of the cases he cites in support of this proposition are *Mitchell v. Fidelity and Casualty Company of New York* and *Cotton v. Corby.* In *Mitchell,* Meredith C.J.O. approved a statement in the second edition of *Halsbury’s Laws of England* to the effect that the English High Court “has an inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases.” Meredith C.J.O. stated that, in the courts of Ontario, this jurisdiction has been exercised, and as far as he was aware its existence never had been questioned.

However, it bears noting that the early Ontario cases espousing the notion that the Supreme Court has inherent jurisdiction to stay execution involved stays pending appeal. Moreover, the above-quoted statement in the second edition of *Halsbury’s Laws of England* has been rejected by the English Court of Appeal in *T.C. Trustees Ltd. v. J.S. Darwen (Successors) Ltd.*

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11 See, however, *Wages Act,* R.S.O. 1980, c. 526, s. 8(1), dealing with instalment payment plans and stays “[w]here a garnishment order has been made against the debtor”; and O.R.P. 505 *et seq.*, dealing with stays pending appeal. With respect to the scope of Rule 505, see OLRC Report, Part I at 56-58.

12 Dunlop at 61.


16 [1969] Q.B. 295, [1969] 2 W.L.R. 81 (C.A.). The statement in the second edition was modified in the fourth edition to differentiate the court’s general power to stay proceedings from the power to stay the execution of a final judgment or order:

- The court’s power to stay proceedings should not be confused with its power to stay the execution of a final judgment or order. The court has an inherent jurisdiction to control its own proceedings so as to prevent an abuse of process, and accordingly to stay proceedings which are frivolous, vexatious or harassing, or which are manifestly groundless or in which there is clearly no cause of action in law or equity, or where the justice of the case so requires. The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases... The court has no inherent jurisdiction or other power to stay or suspend the execution of a judgment...

(Halsbury, Laws (4th) para. 451. For another reference to this issue, see OLRC Report, Part I 57 n. 183.)

The general statutory silence respecting the power of the Ontario higher courts should be contrasted with the wide jurisdiction given the Ontario small claims courts, a jurisdiction not discussed in any detail by Dunlop. For example, s.131(8) of the *Small Claims Courts Act,* R.S.O. 1980, c. 476, provides for instalment payment plans in the context of “judgment summons” proceedings, and s. 102(1) provides more generally that “[t]he judge may order the times and the proportions in which a sum and costs recovered by judgment shall be paid, having regard to section 117.” While not a model of clarity, s. 117 is a critically important provision operating both in conjunction with s. 102(1) and independently, as a general relief provision. It provides as follows:

117. Except where a new trial is granted, the issue of execution shall not be postponed for more than fifty days from the service of the summons,
C. **The Setting**

Prior to considering "the principal subject of this book, namely, the remedies which the legal system offers the unsecured creditor which will enable him to collect the money owed to him by his debtor," Professor Dunlop discusses such preliminary topics as the nature of a "debt" (chapter 2), the meaning and effect of a "judgment" (chapter 3), and extra-judicial debt collection (chapter 4). The discussion provides the reader with background knowledge of the setting in which judgment debts are enforced by unsecured creditors. But Dunlop clearly acknowledges that, while legitimate debts must be collected, it is not creditors alone whose interests deserve consideration and protection: an enforcement system that routinely countenances the penury of debtors cannot be morally sound or even beneficial to creditors generally. In this connection, Dunlop states that "[o]ne of the defects of the present system of creditors' remedies is that it encourages creditors to execute or garnishee precipitously in order to be sure of payment."  

In the main, proposals for reform throughout the common law world do not envisage any dramatic shift insofar as the respective roles of the state and creditors are concerned. For example, the Ontairo Law Reform Commission recommended as follows with respect to the jurisdiction of its proposed new
"integrated and co-ordinated enforcement office responsible for the enforcement by virtually all means of judgments from all court levels":

While the state should take a role considerably more active than that assumed at present, a balance should be struck between creditor initiation and control and state involvement. The new enforcement office should exercise expanded, although nonetheless basically traditional, enforcement jurisdiction, similar to that now exercised by the sheriff. Necessary flexibility should be introduced by means of express provisions in the governing legislation rather than by means of broad judicial and administrative discretion to be exercised by a state official. 19

This more or less orthodox approach 20 to the role of the state in the enforcement of judgment debts varies substantially from the recommendations made by some other law reform agencies. Unlike the Ontario Law Reform Commission, these other bodies did not reject the second option considered by the Commission — that is, "a reorganized enforcement office . . . integrating enforcement activities from all court levels, but exercising broad discretionary judicial and administrative powers specifically designed to tailor enforcement measures to meet the requirements of each individual enforcement situation." 21

This second, more radical, alternative is most vividly illustrated in the New Brunswick Report, 22 at least in that part of the report containing proposals for a wholesale change in the organization of enforcement activities. The nature and scope of the New Brunswick approach are described by the Ontario Law Reform Commission in the following passage:

With respect to the organization and jurisdiction of the proposed unified enforcement regime, the New Brunswick Report contemplated the appointment of an 'official responsible for enforcement' who would be given extremely broad 'administrative' and 'judicial' powers. The official would be empowered to engage in the following activities: conduct a hearing prior to a decision regarding the method of enforcement to be followed; commence his own investigation concerning the financial circumstances of the debtor; decide on the best method of enforcement with respect to the particular debtor before him; review and vary prior enforcement decisions; designate which assets of the debtor are to be realized to satisfy the judgment and determine the sequence and method of realization; deal with the debtor's assets in the same manner that the debtor himself could have done prior to the commencement of enforcement proceedings against him; specify a percent-

20 The Ontario Commission stated that its approach was "more in keeping with the general philosophy of our judicial and enforcement system": OLRC Report, Part I at 110. In the words of the U.K. Payne Report at 103, para. 380:
[A] private debt does not cease to be private by being transformed into a judgment debt. The use of judicial institutions to convert a claim for a debt or damages into a judgment debt does not impose a duty of collecting that debt upon the State. The creditor retains the initiative as to how he should proceed to enforce judgment.
21 OLRC Report, Part I at 110. However, it should be noted that the Commission did countenance some measure of discretion on the part of the sheriff. For example, the creditor would be permitted "to authorize the enforcement office to use any and all enforcement measures essential to enforce the judgment, without necessarily specifying which particular measures ought to be employed." (id. at 138) The sheriff would then be empowered to choose which enforcement method or methods ought to be pursued.
22 Supra note 3.
age of non-exempt income that is to be attached; agree with the debtor to enter into an instalment payment scheme in lieu of or in addition to exercising any other enforcement powers; require judgment debtor examinations; and stay enforcement measures upon an appeal from the judgment or because the debtor is unable to pay without depriving himself or his dependants of the necessities of life.

The mere listing of these broad discretionary powers makes abundantly clear the comprehensive and far-reaching nature of the proposals respecting the jurisdiction of the proposed new enforcement office. The fundamental concept is, at least in part, to integrate, coordinate and centralize all enforcement activities in one office, and to attempt to tailor enforcement measures to the particular judgment debtor. For these purposes, the state is to assume virtually total control over all enforcement decisions and activities made or taken in respect of the debtor. While an enforcement decision made by the official may be appealed, the scope of the jurisdiction of the official to grant or withhold rights with respect to the enforcement of judgment debts is substantial...

A very similar approach to the one advocated in the New Brunswick Report and in the New South Wales Report was adopted in the Judgments (Enforcement) Act (Northern Ireland), 1969, an outgrowth of the 1965 Northern Ireland Report. That report proposed the creation of a new Enforcement Office that would exercise virtually total control over the enforcement of money judgments. This approach was made manifest, for example, in sub-section 13(2) of the 1969 legislation, which provides as follows:

The method of enforcement of a money judgment shall be in the discretion of the [Enforcement of Judgments] Office and an applicant for enforcement may not require the use of any particular method.

It is, of course, not the purpose of this review to enter the fray in respect of the legitimate role of the state in enforcing a judgment debt. Suffice it to note that the Ontario Commission rejected the notion that the state should be able to deprive a creditor of what the Commission considered to be the legitimate fruits of his or her judgment; it therefore did not find compelling the New Brunswick Report’s arguments in favour of a regime that in every case would tailor enforcement to individual debtors, citing the likely unpredictability, delays, inconsistencies, and high costs of such a system. But it should at least be noted that the New Brunswick approach, involving substantial state intervention, could serve to minimize unjustifiable debtor harassment by what Professor Dunlop calls aggressive creditors bent on collecting their judgment debts at almost all costs.

24 Supra note 3. The jurisdiction of the proposed Registrar of Judgments was described as follows (at 13, para. 4.3: footnote reference omitted):
   On application by the judgment creditor for enforcement (or by the judgment debtor for an order to pay by instalments) the Registrar would —
   (a) ascertain the debtor’s means;
   (b) decide upon and institute an appropriate mode of enforcement.
26 Supra note 3.
D. Imprisonment of the Debtor

The meat of Professor Dunlop's book begins in chapter 5, dealing with imprisonment of the debtor and examinations in aid of execution. It is from this point on that the author assumes that "the debtor has no defence to the creditor's claim or has chosen not to assert it." 28

As usual, Dunlop discusses the historical antecedents of the law and, more particularly, the law in England and its transmittal to North America. In this connection, brief mention might be made of Dunlop's discussion of the applicability of the English Debtors Act, 1869 29 in Alberta. 30 Dunlop notes that the English statute abolished imprisonment as a general remedy after judgment, subject to certain exceptions. In Alberta, An Act respecting the Imperial Debtor's Act of 1869, 31 passed in 1908, provided in section 1 that the Debtors Act, 1869 "shall not be in force or effect in the Province of Alberta from and after the date of the coming into force of this Act." The author then asks this question: "Did the Alberta Act, by declaring the 1869 statute not to be in force in the province, have the unexpected consequences of reviving imprisonment as it existed prior to that date?" 32 While Dunlop asserts that, despite the general assumption that there has been no such revival, "the point is by no means free from uncertainty on a strict reading of the law," 33 he makes no mention of clarifying legislation in Alberta in 1909. In that year, the Legislature passed An Act to Amend the Statute Law, 34 section 20 of which provided as follows:

The Act respecting the Imperial Debtors' Act of 1869, being chapter 6 of the statutes of 1908, is amended by adding at the end of section 2 thereof the following:
And nothing herein contained shall be deemed to have brought into force within the province the law of England as to arrest or imprisonment for making default in payment of a sum of money as the same existed either immediately prior to the passing of the said Imperial Debtor's Act of 1869, or in the year 1670; and it is hereby declared that the said law of England as to arrest or imprisonment for making default in payment of a sum of money as the same existed at either of the dates mentioned is not in force in the province.

E. Judgment Summons Proceedings and Examinations in Aid of Execution

In the second portion of chapter 5, Dunlop juxtaposes the "judgment summons process" and "examinations in aid." In part, the former has very much the same purpose as the latter — to examine the debtor in order to dis-

28 Dunlop at 91. This assumption is a trifle misleading, since, at 102 et seq., Dunlop discusses the Ontario Fraudulent Debtors Arrest Act, R.S.O. 1980, c. 177, pursuant to which a debtor can be arrested before judgment.

29 32 & 33 Vict., c. 62.

30 Dunlop at 100.

31 S.A. 1980, c. 6. In Saskatchewan, see An Act respecting the Imperial Debtors' Act of 1869, S.S. 1918-19, c. 83.

32 Dunlop at 100.

33 Id. at 100-101. Footnote reference omitted.

34 S.A. 1909, c. 4. No such remedial legislation was needed in Saskatchewan, since the 1918-19 Act, supra note 31, made it clear that the pre-Debtors Act, 1869 law did not apply in that province.
cover, *inter alia*, his income and assets. In both cases, the mere existence of an unsatisfied judgment is sufficient to warrant the commencement of proceedings.\(^3\)

However, the "judgment summons process" involves more than an attempt to uncover what is garnishable or exigible. Having regard to the results of the examination, the judge is empowered to order payment either immediately or at some future date, or to make an order for the payment of the judgment by instalments. If the debtor defaults, a second summons — generally called a "show cause" summons — may be issued. If he does not attend and if such nonattendance is "wilful", or if he fails to respond satisfactorily to the questions asked of him, the debtor may be imprisoned for contempt. Non-wilful default ordinarily results in a further opportunity for the debtor to obey the court order. Provision is also made for the variation or rescission of an instalment payment order.

The examination in aid process is restricted to fact-finding on the part of the judgment creditor. In this connection, it is not entirely clear why Dunlop cites Rules 587-96 of the Supreme Court of Ontario Rules of Practice as illustrative of "composite remedies with elements of both processes"\(^3\) — that is, judgment summons and examination in aid. His description of the examination process seems to belie this contention. Rules 587-96 do not, in fact, permit the judge — who does not conduct the examination and who need not be involved at all in authorizing the examination if commenced pursuant to Rule 587(1) — to make orders for the payment of the judgment debt, whether immediately or at some future date, or by a lump sum or an instalment payment plan.

One interesting development with respect to examinations is the use, or proposed use, of questionnaires administered on the debtor in lieu of, or in addition to, an oral examination. The Payne Report gave the following advantages of a questionnaire:

(a) . . . it would avoid the need for the parties to attend the Enforcement Office and would save considerable time and expense;
(b) . . . it would be cheap;
(c) . . . it would be quicker; and
(d) . . . it would provide information in a standardised and permanent form.\(^3\)

Indeed, "the questionnaire will obviate the need for the oral examination of many debtors."\(^3\)

The reaction to suggestions that a questionnaire be employed has been mixed. With respect to New South Wales, where questionnaires are employed, the New South Wales Report did not propose their discontinuance, but clearly

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\(^3\) In some jurisdictions, a creditor must file an affidavit, in the case of a second or subsequent judgment summons, stating his belief that the debtor is able to pay all or part of the judgment. See, *e.g.*, *Small Claims Courts Act*, R.S.O. 1980, c. 476, s. 131(4)(b).

\(^3\) Dunlop at 112 and 112n. 31.

\(^3\) Payne Report, *supra* note 3, at 121, para. 450.

\(^3\) Id. at 124, para, 463.
was not entirely sanguine as to their efficacy.\textsuperscript{39} While the Northern Ireland Report\textsuperscript{40} recommended that creditors be given an option either to seek an oral examination or to have an enforcement officer attend upon the debtor to complete a questionnaire, the \textit{Judgments (Enforcement) Act (Northern Ireland) 1969}\textsuperscript{41} made no provision for questionnaires.

The New Brunswick Report was even more vociferous in its criticism and rejection of the use of questionnaires:

> It is doubtful that an examination by mail would be adequate since no form could be devised that would adequately cover all contingencies. To the extent that the form was designed to cover a number of possible situations, it would become so complex that many debtors would experience difficulty in completing it. Only a personal interview by an official experienced in this sort of inquiry is likely to produce adequate information promptly. Moreover, just as defaulting debtors ignore other written documents directed towards collection, including the writ of summons, many debtors are likely to simply ignore a mailed form for examination of debtors.\textsuperscript{42}

However, the Ontario Law Reform Commission has endorsed the recommendations made in the Northern Ireland and Payne Reports. The Commission's proposals are rather long and complicated. For our purposes, the following recommendations should be noted:

157. Before a creditor is entitled to demand an oral examination of the debtor, he should be required to make use of a judgment debtor questionnaire.

158. Where a creditor initiates active enforcement measures against a debtor, the enforcement office should be required, upon the instructions of the creditor:

\begin{itemize}
\item[(1)] to mail to the debtor a judgment debtor questionnaire. The questionnaire, in prescribed form, should seek information concerning the debtor's employment and assets, and any other information usually obtained on a judgment debtor examination; or, alternatively,
\item[(2)] to serve the questionnaire personally on the debtor, with an enforcement officer administering it (that is, requiring the debtor to complete it) upon service.\textsuperscript{43}
\end{itemize}

Provision is also made for oral examinations where the questionnaire is “incomplete, inaccurate or insufficiently or fraudulently answered.”\textsuperscript{44} The Commission was of the view that its proposals would reduce debtor harassment and inconvenience without prejudicing creditors.

F. Execution Against Real and Personal Property

As might be expected from Professor Dunlop's previous writing on the subject,\textsuperscript{45} his newest effort canvasses exceedingly well the historical develop-
ment of the law respecting execution and writs of *fieri facias*. This introduction is essential to any real understanding of execution law because of the immense influence of the English common law on existing Canadian jurisprudence. Professor Dunlop describes this rather confusing legacy and attempts to isolate those areas in which it has been altered to meet the needs of different communities.

One holdover from medieval England relates, of course, to the very means by which a judgment creditor may seek to satisfy his judgment. More specifically, Dunlop notes that, except for Nova Scotia and Prince Edward Island, all or most of the old writs — for example, *fieri facias*, sequestration and attachment — survive intact.46 Professor Dunlop rightly decries the need for separate and distinct processes to satisfy a judgment from a debtor's goods, lands, wages or salary, and so on; he would "replace them with one all-purpose remedy."47

In some instances, more than one remedy — with different procedures and safeguards — may be employed to obtain the same property of the debtor. For example, sub-section 19(2) of the Ontario Execution Act provides as follows:

The sheriff may seize any book debts and other choses in action of the execution debtor and may sue in his own name for the recovery of the moneys payable in respect thereof.

Professor Dunlop notes that this piece of legislation, enacted in 1929,49 "literally appears to make exigible all choses in action whatever, including book debts, despite the existence in 1929 and at present of an attachment of debts [or garnishment] process which would appear to accomplish the same objective, at least as far as book debts are concerned."50

The legitimacy of using sub-section 19(2) — and, therefore, a writ of *fieri facias* to seize money owing to a judgment debtor — was cast in doubt in *Sheriff of the County of Waterloo v. Mutual Life Assurance Co. of Canada.*51 In that case, the debtor's debtor was served with a notice of seizure (issued, as a matter of practice, pursuant to a writ of *fieri facias*) purporting to seize "all monies due or accruing due" to the debtor. The debtor's debtor ignored the notice of seizure and paid the debtor. Costello Co. Ct. J. held that the notice of seizure procedure could not be used to collect the money owing to the debtor52; rather, garnishment was the proper, and presumably only, method.

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46 It should be noted that, in many jurisdictions, the term "writ of execution" is defined expansively to include all writs by which a money judgment may be enforced. See, e.g., O.R.P. 2(t), and s.l(a) of the Execution Act, R.S.O. 1980, c. 146.
47 Dunlop at 141. The notion that the present welter of different remedies and processes ought to give way to single, more comprehensive method of enforcement was put forth in, for example, the OLRC Report, Part I at 124.
48 Execution Act, R.S.O. 1980, c.146.
49 The Execution Act, 1929, S.O. 1929, c. 35, s. 5.
50 Dunlop at 159.
52 This view seems to have been adopted in the New Brunswick Report, supra note 3, at 14n. 5. See also *id.* at 19n. 11.
Costello Co. Ct. J.'s view of the ambit of sub-section 19(2) was expressly rejected by the Ontario Court of Appeal in *Re Attorney-General for Ontario and Royal Bank of Canada*. While Brooke J.A. agreed that garnishment was the usual method of collection, he stated that the clear language of sub-section 19(2) permitted a creditor to employ the alternative method of seizure under a writ.

In discussing the *Royal Bank* case, Professor Dunlop notes its "dramatic consequences" for Ontario, whereby "all choses in action, including book debts, are exigible pursuant to a writ of execution whether or not they can be said to be capable of physical possession and regardless of the state of the common law or of statute law before 1929." By way of apparent contrast, he cites the OLRC Report, which, he says, "takes a much narrower view of the impact of the *Royal Bank* cases." It is a curious observation. Most of the passages that he cites from the OLRC Report have nothing to do with the *Royal Bank* case or sub-section 19(2), but are either general comments dealing with the present "non-exigibility of certain types of personal property," notwithstanding the broad language of section 18 of the Ontario *Execution Act*, or with sub-section 19(1) of that Act, or with "cheques, bills of exchange and promissory notes."

However, while the Ontario Law Reform Commission expressly noted that "a notice of seizure [and, therefore, a writ of *fieri facias*] may still be used to collect amounts payable in respect of 'book debts and other choses in action'," the Commission recommended that, as a matter of policy, and except in respect of negotiable instruments, "all such collection ought to be subsumed under and effected through the proposed garnishment procedure." Accordingly, the report said, "the right of a sheriff under section [19(2)] to institute legal proceedings to collect the amounts due, and the practice involving a notice of seizure as an alternative means of collection, should be abolished."

The Commission justified the retention of but one method of collection on three grounds, all of which — and particularly the inappropriateness of having two remedies designed for the same purpose — seem reasonable in light of the enforcement regime proposed by the Commission. First, the proposed new garnishment remedy would be an expanded, continuing one, so that all debts, including sub-section 19(2) debt obligations, would be reached by this method. Secondly, sheriffs rarely commence legal proceedings as envisaged by sub-section 19(2), presumably because garnishment is a much more

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54 Dunlop at 160-61.
55 Id. at 161 n. 43.
57 Id. at 45. See the contrary recommendations, at least in part, in Law Reform Commission of British Columbia, *Report on Attachment of Debts Act* (1978), *supra* note 3, at 56 et seq.
58 OLRC Report, Part II at 45. However, the Commission recommended that, "in addition to the physical seizure of any document representing the debt obligation, the use of a notice of seizure should be available as a means of seizing the property described above for the purposes of sale". (id., at 46)
available remedy. Thirdly, the new dispute resolution procedures proposed by
the Ontario Commission were said to "offer the garnishee and others adequate
safeguards in all cases." 59

A final word respecting execution against personalty concerns the rather
sorry state of the law dealing with the exigibility of shares in a so-called
"private company".

The problem may be illustrated by the Ontario legislation. Section 14 of
the Execution Act permits the seizure and sale of, inter alia, "shares . . . in . . .
a corporation having transferable shares. . . ." The remaining provisions in
section 14 expound on this basic principle. Then section 15 provides:

If a sheriff seizes the shares of an execution debtor in a private company, he shall
first offer them for sale to the other shareholders or any one of them in such
private company, and if none of them will purchase the shares for a reasonable
price, the sheriff may then offer the debtor's interest therein for sale to the public
generally and sell and convey to the highest bidder.

Nowhere in the Execution Act is the term "private company" defined. It is not
used in the Business Corporations Act, 60 but is used in the Corporations Act 61
and the Securities Act, 62 where it is defined basically to mean a company in
whose instrument of incorporation (a) the right to transfer its shares is
restricted; (b) the number of its shareholders cannot exceed fifty; and (c) any
invitation to the public to subscribe for its securities is prohibited.

Prior to the enactment of section 15 in 1929, 63 Dunlop states, "there was
considerable doubt whether company shares with restricted transferability
were exigible at all." 64 Dunlop cites the Ontario case of Re Phillips and La
Paloma Sweets Ltd., 65 which held that the reference to a corporation having
"transferable shares" meant freely transferable shares — that is, shares in a
"public", but not a "private", company. Dunlop then concludes that
"[s]hares in private companies or any other companies with restrictions on
transferability were therefore not exigible" prior to the enactment of section
15 in 1929. 66

The lesson to be learned from Re Phillips may not be so easily stated, for
it is a rather troubling (and, to some, troublesome) case. The real issue was
whether the purchaser at a sheriff's sale was entitled to "a mandatory order
directing the proper officers of La Paloma Sweets Limited, an incorporated
company, to record a transfer of shares of the company's stock and to issue a
proper share-certificate to the applicant." 67 The Court refused to make such
an order. The debtor could not sell his shares except subject to the restrictions

59 Id. at 196.
60 R.S.O. 1980, c. 54.
61 R.S.O. 1980, c. 95, s. 1(h).
62 R.S.O. 1980, c. 466, s. 1(1)31.
63 The Execution Act, 1929, S.O. 1929, c. 35, s. 4.
64 Dunlop at 165.
65 (1921), 51 O.L.R. 125, 66 D.L.R. 577 (H.C.).
66 Dunlop at 165-66.
67 Supra note 66, at 126 (O.L.R.), 177-78 (D.L.R.).
on transferability, and a creditor (and, therefore, a sheriff) could obtain no higher right than the debtor.

At this juncture, then, no one appeared to question the exigibility, as a matter of law, of private company shares. The Court did not state that, since shares were not exigible at common law, only clear statutory language, which did not then exist, could make them exigible, although this may have been behind the Court’s assertion that what is now section 14 did not apply to private company shares. But a nagging question remains. Why did the Court examine the issue of the directors’ refusal to record the transfer of shares to Phillips if, in fact, private company shares were simply not exigible by means of a writ of fieri facias, as Professor Dunlop has suggested? The 1929 enactment of section 15 served only to complicate matters. If Re Phillips is still good law in Ontario, the procedures in section 14 for the seizure and sale of shares are not applicable to private company shares. But, then, what procedures are to be used? Section 15 is singularly unhelpful, since its opening flush (“If a sheriff seizes . . .”) simply presupposes a seizure.

One reaction to Re Phillips, at least insofar as the issue of the directors’ refusal to record a transfer of shares is concerned, appears in the British Columbia case of Associates Finance Co. Ltd. v. Webber. In this case, Anderson J., expressly refusing to follow Re Phillips, overturned the orthodox common law rule that the transferee cannot obtain any greater interest than that of the debtor. He stated that the discretion in the directors to refuse to register an intended transferee of private company shares was not effective against the sheriff and the transferee from him. It was this view that Professor Dunlop legitimately finds “at first blush . . . surprising, even heretical . . . .” However, while Dunlop states that “the common law principle relied on by Anderson J. rests on very shaky foundations” (presumably less dangerous than being “heretical”), he suggests that the case “may be supportable on the basis of s. 22 of the British Columbia Execution Act . . . .”

Section 22 dealt with the rights and obligations of transferees in a manner akin to the final part of sub-section 14(5) of the Ontario Execution Act. However, the closing portion of section 22 also provided that “the proper officer of the company shall enter such sales as a transfer in the manner by law provided.”

It is by no means obvious that the quoted portion of section 22 supports the contention of Anderson J. The operative phrase — “in the manner by law provided” — may well beg the critical question concerning precisely what law governs. Is it simply a reference to the relevant corporation law, and therefore procedural, or does it include applicable enforcement law?

Moreover, the conflict in policy between Re Phillips and Webber is not easily resolvable. While one may well sympathize with remaining

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69 Dunlop at 167.
70 Id. at 168.
71 Id. at 169. See, now, Court Order Enforcement Act, R.S.B.C. 1979, c. 75, s. 62, which is almost identical in wording to s. 22.
shareholders — unable to take up their right of first refusal under Ontario section 1572 — having to work with a "stranger" introduced into what may be a small, closely-held family company, one must also leave some room to sympathize with creditors whose debtors seek to shield themselves behind their private company shares.

The rather novel solution, or compromise, of the Ontario Law Reform Commission ought to be noted here. The OLRC Report contains the following proposals:

50. With respect to the seizure and sale of private company shares under a writ of enforcement, the following further rules are recommended:

(1) upon notice by the enforcement office to a private company, the directors or other officers of that company ought to be absolutely prohibited from consenting to any transfer of shares by the debtor to another party, and the company and its transfer agent or other authorized officer should be prohibited from registering any such transfer on the books of the company;

(2) where the debtor beneficially owns 100% of the allotted shares, the sheriff should be entitled to sell the seized shares and, without qualification, the purchaser should be entitled to be registered on the books of the company as the new owner of the shares;

(3) where the transfer of the shares or the registration of a transferee on the books of the company is subject to the consent or approval of the directors before taking effect, such consent or approval should not be arbitrarily or unreasonably withheld; and

(4) acting on behalf of the creditors, the sheriff should be entitled to apply by way of summary application to the county or district court to overturn the directors' refusal. The onus of proving that the directors' refusal was unreasonable or arbitrary ought to be on the sheriff. In determining the issue, the court should have regard to all the circumstances of the case, including the extent of the remaining shareholding, the intended transferee (if known at the time), the enterprise in which the company is engaged, and the locus of effective "control" of the company.73

The above proposals immediately bring to mind the provisions of section 91 of the Landlord and Tenant Act.74 In the context of residential tenancies, sub-section 91(3) provides that "[a] tenancy agreement may provide that the right of a tenant to assign, sublet or otherwise part with possession of the rented premises is subject to the consent of the landlord and, where it is so provided, such consent shall not be arbitrarily or unreasonably withheld." In other words, the Legislature has seen fit to interfere with the normal right of landlords to rent premises to whomever they choose.

The analogy is not, of course, a perfect one. Most residential tenancy relations involve basically impersonal dealings between landlords and tenants, so that, arguably, there is less justification for refusing to consent to a parting of possession by a tenant. In the private company context, however, the execution sale of a debtor's shares to a "stranger" could be far more disruptive. On

72 Execution Act, R.S.O. 1980, c. 146.
73 OLRC Report, Part II at 295.
the other hand, it does bear repeating that the present law in Ontario permits a debtor to shield behind his private company shares to the obvious prejudice of his creditors.

After canvassing in some detail execution against personalty, Professor Dunlop sets forth in chapter 6 (entitled "Execution") the first portion of his discussion concerning execution against land. (The second portion appears in chapter 11, entitled "Seizure and Sale".) The consideration of land is somewhat less satisfactory, or at least less comprehensive, than his admirable excursion through the maze respecting execution against personal property.75

One area mentioned only in passing is that dealing with the vexing relationship between the execution process and the conveyancing of land.76 It is of such importance that some consideration of the main problems, and possible solutions, might usefully be canvassed here in the context of Ontario law and practice.

75 One quite rare slip for Professor Dunlop, or perhaps one development subsequent to delivery of his manuscript to the publisher, ought to be noted here. At page 170, it is stated that s. 153(1) of the Ontario Land Titles Act, R.S.O. 1970, c. 234 "makes it clear that as far as land registered under that statute is concerned the writ will not bind until a certified copy has been received by the proper master of titles." Subsection 153(1) was repealed by s. 14(1) of The Land Titles Amendment Act, 1980, S.O. 1980, c. 49. The new provision, now s. 137(1) of the 1980 Revised Statutes, c. 230 provides, _inter alia_, that "no registered land is bound by any writ of execution until a copy delivered by the sheriff has been received _and recorded_ by the land registrar." (emphasis added) With respect to the continued relevance of what is now s. 137(3), see OLRC Report, Part III at 75n. 13.

76 See Dunlop at 173. Another interesting, and troublesome area of the law concerns execution against the interest of a joint tenant of land, discussed by Professor Dunlop at 180 et seq. It bears noting that the inherent conflict between the surviving joint tenant and the creditors of the deceased debtor-joint tenant is exceedingly difficult to resolve. See, for example, Law Reform Commission of British Columbia, _Report on Execution Against Land_ (Vancouver, B.C.: The Commission, 1978); Manitoba Law Reform Commission, _Report on The Enforcement of Judgments: Part II: Exemptions Under "The Judgements Act"_ (1980), _supra_ note 3, at 18 et seq.; and OLRC Report, Part III at 23 et seq. The Ontario Commission's compromise solution is as follows (_id._ at 134):

9. Where a debtor is a joint tenant of land, the following rules should apply:
   (1) the filing of a writ of enforcement against the debtor should not sever the joint tenancy. Severance should occur only once the sheriff enters into a binding agreement of purchase and sale with a prospective purchaser at an execution sale;
   (2) where the debtor dies before severance, but after sale proceedings have been commenced, there should be a right of survivorship; however, subject to paragraph (3), the value of the debtor's interest in the hands of the surviving joint tenant should be subject to a charge to the extent of the debts of judgment creditors who have delivered writs of enforcement to the sheriff; and
   (3) with respect to the charge proposed above,
      (a) in the distribution of the debtor's estate, the former joint tenancy interest should be resorted to for payment of debts only if the other property of the debtor has been exhausted and the creditors' debts remain outstanding, and
      (b) in order to determine the debtor's interest that should be available to creditors, there should be a statutory _prima facie_ presumption that, where the deceased debtor and the surviving joint tenant were joint tenants in law, they were also joint tenants in equity.

In other words, a surviving joint tenant would no longer have an unlimited right in all cases to obtain the full interest of a deceased joint tenant-debtor.
As is readily apparent to any solicitor with a real estate practice, the very nature of a writ of *fieri facias*, operating as a general lien not registered directly against the title to the land it binds, serves to complicate substantially the conveyancing of land registered under the *Registry Act*; at the same time, it permits execution creditors to use the conveyancing process as an inexpensive method of collecting their judgment debts. In effect, innocent strangers to the debtor-creditor relationship — vendors, purchasers, mortgagors and mortgagees — rather than the execution creditors, now bear the bulk of the financial burden of uncovering land owned by execution debtors.

A writ of *fieri facias* delivered to the sheriff binds all the land of the execution debtor that is situated within the sheriff's bailiwick and that is governed by the *Registry Act*. The writ also binds land that is acquired by a debtor subsequent to the delivery of the writ to the sheriff.

The system under which writs of *fieri facias* bind land protects execution creditors by ensuring that a writ delivered to the sheriff automatically acts as a lien against all of the debtor's land within the applicable geographic limits so that, unlike the situation in respect of personalty, the claims of the creditors cannot be defeated by the interposition of any other party obtaining a subsequent interest through the execution debtor. This system inevitably imposes substantial costs on at least four groups of persons, all of whom have no connection with the debtor-creditor relationship: (a) prospective vendors and mortgagors (where, of course, they are not the debtors in question); (b) prospective purchasers and mortgagees; (c) execution creditors; and (d) sheriffs.

For example, purchasers of land must assure themselves that their vendors can create in them the ownership bargained for, subject only to those prior rights or interests to which the purchasers have agreed. In order to obtain such assurance, a purchaser must conduct a search for writs of *fieri facias* in the sheriff's office. The initial search for writs is against all persons who have owned the land in question over at least twenty years prior to the closing date of the transaction. If a writ has been lodged against such a predecessor in title when he owned the land, the writ, if properly renewed, would continue to bind the land.

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77 R.S.O. 1980, c. 445. The following discussion will not deal with the effect of a writ on land affected by the *Land Titles Act*, R.S.O. 1980, c. 230. While the effect is similar to that under the *Registry Act*, R.S.O. 1980, c. 445, title is guaranteed by the province and all writs binding land must appear on the register (see *Land Titles Act*, R.S.O. 1980, c. 230, s. 47(6)).

78 *Execution Act*, R.S.O. 1980, c. 146, s. 10(1).

79 *Execution Act*, R.S.O. 1980, c. 146, s. 10(1).

80 There is some debate respecting the length of time during which a writ, properly renewed, can continue to bind the land. There appears to be no universal custom about the period of time through which an historical search for writs is conducted. Some lawyers rely on a restrictive interpretation of s. 45(1)(c) of the *Limitations Act*, R.S.O. 1980, c. 240, and search executions against all owners only within the preceding twenty years. Others rely on s. 23(2) of the *Limitations Act* and Rule 566 of the Supreme Court of Ontario Rules of Practice; accordingly, since they believe that a writ, once lodged and continuously renewed, can bind land indefinitely, they may search executions against owners even back to the Crown grant. Yet others rely on the forty year search period established by the *Registry Act* (see *Registry Amendment Act, 1981*, S.O. 1981, c. 17, s. 4), although their argument concerning the relationship between these provisions and the binding effect of a writ seems rather weak. See Dunlop at 364 et seq.
Because land changes ownership quite frequently, there are usually many past owners against whom an execution search must be conducted. Moreover, since sheriffs' certificates respecting executions can be relied upon only by the person requesting the certificate, each purchaser must conduct his own execution search, notwithstanding that many of the predecessors in title will already have been cleared by prior purchasers making the same type of search.

While in theory the process of searching for executions against predecessors in title seems simple enough, it gives rise in practice to serious problems for purchasers. The major problem is often called the "similar name" problem. Let us assume that at one time the land in question was owned by someone named David Paul Webb, against whom an execution search is conducted. The sheriff will not issue a clear certificate where he has on file writs against persons with the identical or similar names — for example, David Webb, Paul Webb, D. Paul Webb, or perhaps even Paul D. Webb. Yet, what if the vendor is not the same person as any of the debtors against whom writs have been lodged with the sheriff?\(^8\) The practical problems in resolving the matter may be quite considerable, particularly where the execution search is against a deceased predecessor in title (and assuming, of course, that the relevant writs were delivered to the sheriff's office during the period in which Webb owned the property).

In some cases, it may be possible to obtain an affidavit from the debtor's creditor swearing that Webb the owner is not Webb the execution debtor. Where this is not feasible, other, less satisfactory methods of resolving the issue must be tried. For example, the creditor's solicitor may agree to swear an affidavit respecting the identity of the debtor or, in some cases, the purchaser may accept the admittedly self-serving affidavit of the vendor himself.

The "similar name" problem is inherent in the present enforcement and conveyancing systems, where a writ operates as a general, "off-the-record" lien and where historical searches are required each time land is sold. The problem is magnified where the relevant owner has a common name, such as Smith or Jones.

As if the "similar name" problem is not great enough when the initial execution search against all relevant owners is made, a purchaser may well be forced to resolve the problem within a very short time-frame after the last-minute subsearch for executions has been undertaken against the vendor. In some cases, the vendor and purchaser will be forced to agree to some sort of escrow arrangement, whereby sufficient funds will be held in trust until adequate proof of non-identity can be procured; in other cases, last-minute problems will abort a sale entirely.

Whether it is the vendor or the purchaser who ultimately bears the brunt of the inconvenience depends, in part, on the circumstances of each case. While the vendor must satisfy the purchaser if the sale is to proceed, he may

\(^8\) See Silva v. Atkins (1978), 20 O.R. (2d) 570, 88 D.L.R. (3d) 558, 4 B.L.R. 209 (H.C.) and Bayham Investments Ltd. v. Gulf Oil Canada Ltd., unreported, Feb. 6, 1979 (Ont. H.C.). The latter case is reproduced in Laskin et al., supra note 7, at 323.
simply refuse to do so and throw the problem into the lap of the purchaser. The purchaser, meanwhile, suffers the uncertainty of not knowing the final outcome.

In 1960-61, the *Execution Act* was amended to deal with the "similar name" problem. Section 11(1) now reads as follows:

Where the name of an execution debtor set out in a writ of execution is not that of a corporation or the firm name of a partnership, the writ does not bind the lands of the execution debtor unless,

(a) the name of the execution debtor set out in the writ includes at least one given name in full; or

(b) a statutory declaration of the execution creditor or his solicitor is filed with the sheriff identifying the execution debtor by at least one given name in full.

Whatever the impact of this provision was intended to be, it is quite clear that the "similar name" problem continues to plague parties to real estate transactions.

In the course of its deliberations on enforcement law, the Ontario Law Reform Commission became convinced that the benefits conferred on execution creditors by the present conveyancing and registration arrangements were clearly outweighed by the costs to virtually all other interested parties.

The Commission considered two alternative long term proposals for reform; (a) province-wide binding of a writ against land, and (b) abolition of the writ as a general lien and the mandatory registration of a writ directly against the title in order to bind the land.

The Commission justifiably rejected the first alternative, notwithstanding that it would resolve most of the concerns of creditors, essentially because "the writ of execution would continue to be an off-the-record claim" — that is, a general lien binding all Registry Act land in Ontario without any requirement that it be registered directly against the parcel sought to be bound. As a result, this alternative would perpetuate the present, unsatisfactory system in which some interest affecting land are not registered directly against the title. Moreover, the first alternative is not compatible with current Ontario plans to centralize as much information as possible in one, central register.

There was also a practical reason for rejecting province-wide binding: it would significantly aggravate the "similar name" problem described earlier, by making it province-wide, instead of county-wide, in scope. The potential costs and frustration could be astonishing.

Accordingly, the Commission chose the second alternative. Following developments and proposals in British Columbia, Manitoba, and Ontario...
tario, the Commission recommended the abolition of the writ as a general lien and its replacement by a requirement that all writs must be registered directly against the title of land that is to be bound.

The Commission's break with traditional enforcement principles respecting execution against land was not espoused, however, without recognition that a careful balancing of competing interests was required, rather than a clear-cut, self-evident choice between good and evil. The Commission did "acknowledge that some creditors might be prejudiced by a system of parcel registration." In recognition of the need to assist creditors who might not know what land their debtors owned, the Commission recommended as follows:

[We] recommended the creation of an automated or computerized province-wide index of landholdings for all land in Ontario. In this manner, creditors required to register their writs of enforcement directly against the parcel will be able to obtain information concerning land owned by their judgment debtors. The index clearly should comprehend landholdings for both Registry Act and Land Titles Act land.

Clearly, a type of "similar name" problem could arise under this system. A creditor searching in the proposed new index of landholdings for land owned by John Smith could obtain information on land owned by a great many persons in Ontario by that name. Accordingly, in order to permit easier matching of landowners and debtors in the index, the Commission recommended that individual identifying information should be required on all writs (with respect to debtors) and all documents of title (with respect to purchasers of land). A dispute resolution mechanism, similar in principle to sections 81 and 82 of the British Columbia Court Order Enforcement Act, would be enacted, whereby owners of land against which a writ has been registered would be notified and permitted to dispute the registration. In addition, provision for an award of damages or costs, payable to an owner in respect of an erroneous filing, was contemplated.

The Commission conceded that, in view of the time span before its long term proposals could be adopted, and in view of the serious nature of the problems described earlier, it was necessary to propose short term measures. For example, in order to help alleviate any "similar name" problem that might arise during the final subsearch for executions, the Commission recommended "that a writ should not bind a debtor's land until the expiry of ten calendar

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88 OLRC Report, Part III at 109-10 (footnote references omitted). See similar proposals made in British Columbia (supra note 84), Manitoba (supra note 3) and Ontario (supra note 86).

89 R.S.B.C. 1979, c. 75.
days from the delivery of the writ to the sheriff. . . ." As a result, there would be ten days within which to resolve a "similar name" problem and no further "similar name" problems could arise unexpectedly on or before closing.

In order to protect themselves during the ten days within which the writ, continuing to operate as a general lien, would not bind land, a creditor would be entitled under the Commission's recommendations to register a copy of his writ directly against the title to the land owned by the debtor, with binding to occur immediately upon such registration. While this would not protect a creditor who was ignorant of land owned by his debtor, the Commission was of the view that the costs of existing enforcement arrangements bore far too heavily on innocent persons who had nothing to gain from such arrangements. In a sense, then, a compromise solution was proposed — delayed binding where the writ continued to operate as a general lien and immediate binding where the writ was registered directly on title.

The Commission also sought to bring some order to the law respecting what writs bind land and, therefore, what information sheriffs were obliged to report to persons seeking execution certificates. Finally, the Commission considered the "enormous amount of wasteful duplication" and the exacerbation of the "similar name" problem caused by the requirement of each new purchaser of Registry Act land to conduct an historical search for executions against relevant owners. The Commission was justifiably of the view that the present need to conduct such searches was anomalous and completely unwarranted. Accordingly, proposals for reform were offered to eliminate the need to conduct historical searches.

In making its long term and short term proposals for reform, the Commission was obviously animated by the belief that traditional enforcement principles could not be viewed in isolation — detached from the realities of the conveyancing process. Viewed in such isolation, it is, of course, not impossible to justify the existence of a writ of fieri facias as a general lien binding all of a debtor's property merely upon filing with the sheriff.

However, the Commission was firmly, and rightly, convinced that a similar regime could not continue to exist in respect of land without seriously undermining the conveyancing process. Moreover, as a matter of policy, it was thought to be unjust to expect innocent vendors, purchasers, mortgagees and mortgagors to bear the financial and emotional burden of serving, in effect, as unwilling and inappropriate agents to collect the debts of others. The recommendation endorsing a direct parcel registration regime, even with an index of landholdings, and the short term proposals for reform, were offered in full

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80 OLRC Report, Part III at 117-18.
81 Id. at 139-40, Recommendation 21(7)-(11).
82 Id. at 130.
83 Id. at 140-41, Recommendation 21(12)-(15).
84 Indeed, the Commission endorsed and expanded this principle in relation to the binding of personal property: it recommended that a writ "filed in any enforcement office in Ontario should bind a debtor's goods throughout the Province, in the same fashion as a writ of execution now binds a debtor's goods within the county in which it is filed. . . ." Id., Part II at 17.
recognition that no perfect solution was available and that some creditors might indeed be prejudiced. But the proposals were seen as effecting a reasonable and equitable shift in cost burden from innocent strangers to those who at least have something to gain from the enforcement system.

With respect to short term measures designed to alleviate problems for sheriffs in determining which writs ought to be reported by them where a search is made in their offices, reference should be made to a recent directive from the Ontario Ministry of the Attorney General. The rules governing searches are as follows:

1. Searches for corporate or partnership names

Only executions filed against corporations or partnerships with identical names to those against which searches are requisitioned will be reported. A clear certificate issued with respect to a corporation or partnership will indicate that there are no executions filed against a corporation or partnership with that exact name. The sole exception to this rule will be that such searches will include searches against the name plus corporate identifiers used (Limited, Incorporated, Corporation) and as well against the name plus the abbreviation of the particular corporate identifier used.

2. Names of individuals

When a search is requested against the name of an individual, only writs of execution filed against judgment debtors with an identical surname and at least one identical given name to the name against which the search was requested will be reported. [emphasis added]

Two brief comments may be made in respect of the directive. First, while the new guidelines may well be required to reduce problems for sheriffs and inconsistencies in reporting, they put the procedural cart before the substantive horse. Before determining precisely what names ought to be reported by sheriffs, it is clearly necessary to know what writs bind land. Since the virtually non-existent case law is of little assistance, and since the legislation is silent, reform in respect of the latter issue is urgently needed; the rules concerning what executions must be reported will then follow inexorably.

Secondly, it appears that the new guidelines have, in the main, sharply increased the number of writs reported to solicitors and others — so much so that the reaction to the directive apparently has been rather critical. Solicitors who had, or who perceived, difficulties before in clearing names are now often faced with what they consider to be a deluge of writs that might bind the land in question. This problem is not, of course, unrelated to the first matter noted above: the real issue is not the number of names to be cleared, but rather whether the writs noted by the sheriff bind the land.

G. Prejudgment Remedies

In chapter 7, Professor Dunlop canvasses prejudgment remedies and absconding debtors legislation. Inevitably, given the exceedingly fast pace of developments in respect of the *Mareva* injunction — whereby the disposition

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95 Effective as of May 1, 1982.
96 See supra note 81.
of a debtor's assets may be prohibited until judgment is obtained — the book could not have pretended to be entirely *au courant*.

For example, Professor Dunlop notes that "[t]he remedy was first granted in commercial cases involving liquidated claims but it has recently been extended to tort actions in which the claim was for unliquidated damages and in which liability was doubtful." Dunlop cites the English case of *Allen v. Jambo Holdings Ltd.*

"The remedy was first granted in commercial cases involving liquidated claims but it has recently been extended to tort actions in which the claim was for unliquidated damages and in which liability was doubtful." Dunlop cites the English case of *Allen v. Jambo Holdings Ltd.*

In the latter case, which is under appeal, Montgomery J. held that a *Mareva* injunction should issue in respect of a wrongful dismissal action. However, in *Van Brugge v. Arthur Frommer International Ltd.*, Callaghan J. stated that a *Mareva* injunction may well be inappropriate in a wrongful dismissal case.

*Mareva* injunctions have received favourable consideration in several Canadian jurisdictions, but their status remains very much in limbo. In view of the fact that the law, at least in Ontario, "exhibits some confusion," Mr. Justice Anderson held, in *Chitel v. Rothbart*, that the matter should be referred to the Court of Appeal. While space does not permit any more than a cursory look at the Court of Appeal decision, it bears emphasizing that the Court was unanimously of the view — albeit by way of *obiter dicta* — that the "*Mareva* injunction is here and here to stay and properly so". However, "it is not the rule — it is the exception to the rule" set forth in *Lister & Co. v. Stubbs*. In order to prevent an abuse of what was called the "new" *Mareva* injunction, certain guidelines were adopted, essentially from the decision of Lord Denning, M.R., in *Third Chandris Shipping Corporation and others v. Unimarine S.A.*

Three of the guidelines — briefly, full and frank disclo-

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97 Dunlop at 190.
100 See 13 A.C.W.S. (2d) 155.
105 *Id.* at 44.
106 *Id.*
107 (1890), 45 Ch. D. 1; 59 L.J.Ch. 570; 38 W.R. 548.
108 *Supra*, note 104, at 44.
sure, full particulars of the plaintiff’s claim, and an undertaking as to damages — were regarded by the Ontario Court of Appeal as standard Ontario conditions respecting interlocutory injunctions. The last two — grounds for believing that the defendants have assets in the jurisdiction and that there is a risk that the assets will be removed or dissipated before satisfaction of any judgment — were characterized as being unique to Mareva injunctions.

The Court in Chitel expanded slightly on these English guidelines. Most significantly, perhaps, was its insistence that the applicant for a Mareva injunction have a “strong prima facie case on the merits” — presumably, then, not just a prima facie case or a “good” prima facie case, and certainly not a case that was simply not frivolous or vexatious. The Court’s too briefly stated rationale for adopting the “strong prima facie case” test appeared to be “that the availability of the cross-examination transcript makes more legitimate a preliminary consideration by the motions judge of the merits of the case”. 110 In short, an applicant for a Mareva injunction will be required to meet a more rigorous test than that applicable to interlocutory injunctions generally, having regard, for example, to American Cyanamid Co. v. Ethicon. 111

The Court of Appeal made it clear that, given the absence of full disclosure, it would not continue the injunction in the instant case, so that its views respecting the Mareva injunction were obiter,112 although obviously of critical practical importance. However, the Court’s attempt to consider the Mareva injunction in some detail leaves several matters in some doubt. For example, is the “new” Mareva injunction remedy a comprehensive one, including within its ambit all similar types of prejudgment remedies? Early in Chitel, the Court noted two exceptions to Lister & Co. v. Stubbs: where the asset to be “frozen” by the interlocutory injunction is the very subject matter of the litigation, and where a strong prima facie case of fraud or theft is made out. 113 Will these continue to be recognized exceptions, along with the Mareva injunction, or are we now dealing with but one prejudgment remedy respecting injunctions?

In addition, is the Absconding Debtors Act114 to fall within the four corners of the new remedy? Presumably not, as it offers a different type of statutory prejudgment relief. But it is unfortunate — although predictable — that the Act was, for the most part, ignored in view of the Court’s general discourse on prejudgment relief. This is, of course, characteristic of the present general attitude toward the various kinds of prejudgment relief; they are seen as separate and distinct remedies, and this attitude is unlikely to change if

110 Supra note 104, at 19. “The Ontario court is in a better position than it would be without such cross-examination to assess the respective merits of the parties ... with regard to whether a strong prima facie case has been established on the claim ....” (id. at 42).
112 Supra note 104, at 14.
113 Id. at 14-15.
114 R.S.O. 1980, c. 2.
the Court’s position in Chitel simply rationalizes the Mareva injunction alone, leaving all other types of prejudgment relief — even if only injunctive relief — to await future intervention and rationalization by another court or by the legislature.

H. Garnishment of Debts

In chapter 8, Professor Dunlop turns to “[a]ttachment (or garnishment) of debts . . . undoubtedly the most powerful weapon in the arsenal of the creditor.”115 Without canvassing the law of garnishment here, it should be noted that, because in Ontario only present debts are garnishable, judgment creditors must seek a new garnishment order as each debt arises. In other words, continuing garnishment is generally unavailable.116

However, notwithstanding the orthodoxy of this principle, reference should be made to the recent case of Kraw v. Kraw.117 In that case, Fisher Prov. Ct. J., without any discussion, made a continuing garnishment order in respect of moneys payable to one of the parties from O.H.I.P. The issue in the case was whether such moneys were in fact garnishable, but the order itself is interesting because of what appears to be its continuing effect. Such a radical departure from received learning has not yet occurred elsewhere, despite its obvious appeal.118

I. Exemptions

In chapter 10, Professor Dunlop canvasses exemption legislation in Canada. While he stated earlier the inevitability of leaving out certain facets of enforcement law, it is rather curious that no mention is made of the relevant statutes affording protection to debtors in respect of their pensions. A brief word on such legislation therefore seems in order here.119

Some provisions, like those in the Ontario Public Service Superannuation Act,120 deal expressly with the exemption of the “interest” of the pensioner in the relevant fund or in moneys payable, while others, like those in the Ontario Pension Benefits Act,121 deal only with the exemption of “moneys payable” under a pension plan. There is clearly a difference. In the absence of express legislation, theoretically one could seize and sell a pensioner’s “interest” as a chose in action under sub-section 19(2) of the Execution Act,122 but would have to garnish “moneys payable”. In all likelihood, this absence of uniformity

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115 Dunlop at 211.
116 See, however, s. 30(1) of the Family Law Reform Act, R.S.O. 1980, c. 152, and s. 34(6) of the Retail Sales Tax Act, R.S.O. 1980, c. 454.
117 Unreported, May 24, 1982 (Ont. Fam. Ct.).
118 See proposals in OLRC Report, Part II, ch. 3.
120 R.S.O. 1980, c. 419, s. 34(1).
121 R.S.O. 1980, c. 373, s. 27(1).
122 R.S.O. 1980, c. 146.
of language — an absence reflected in pension legislation across Canada — does not signify a different intention on the part of various draftsmen; the differences probably represent the ad hoc process of development and amendment of the many Acts over a number of years.

Since Professor Dunlop does not mention pension exemptions, he does not examine the rather unique status of support creditors under, for example, two Ontario statutes. These two Acts — the Ontario Municipal Employees Retirement System Act and the Pension Benefits Act — both contain provisions that exclude Family Law Reform Act support debtors from the pension exemptions in those statutes; that is, a support creditor may, in fact, garnish, attach, or seize moneys payable out of the applicable fund.

The obvious question why only two Acts contain such an important exception to the exemption provisions has been considered in Re Lamb and Lamb. In that case, Scott Co. Ct. J. considered whether the exception for support debtors in the Pension Benefits Act was applicable to a pension created under the Ontario Municipal Employees Retirement System Act, which, at that time, did not contain a similar exception (now contained in subsection 12(2)).

Scott Co. Ct. J. held that there was a clear conflict between the two Acts; accordingly, reference had to be made to subsection 1(3) of the Pension Benefits Act, which provides that the Pension Benefits Act prevails in the event of conflict with any other Act. He therefore resolved the conflict in favour of an interpretation of the exception provision of the Pension Benefits Act that would make that provision applicable to the Ontario Municipal Employees Retirement System Act.

The rationale in Re Lamb and Lamb is certainly not self-evident. At first blush at least, it would seem that pension statutes other than the Pension Benefits Act establish a reasonably comprehensive scheme to deal with the pensions to which they are made to apply, and that the Pension Benefits Act was designed to govern the growing number of “private” pension plans for which no specific legislation existed.

Of course, this would not explain why only one statute, excluding the Pension Benefits Act, was amended to deal with support debtors and creditors. Perhaps the 1979 enactment of subsection 12(2) of the Ontario Municipal Employees Retirement System Act simply reflected an abundance of caution, since the litigation in Re Lamb and Lamb was ongoing at the time and it might well have been thought that it could be decided the other way. In any event, the case has been cited with approval in Seymour v. Seymour (a

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123 R.S.O. 1980, c. 348, s. 12(2).
124 R.S.O. 1980, c. 373, s. 27(2).
125 R.S.O. 1980, c. 152.
126 Reference should be made here to the broader provisions in s. 19(2) of Saskatchewan's The Pension Benefits Act, R.S.S. 1978, c. P-6, as am. by S.S. 1979-80, c. 65, s. 9. Sub-section 19(2) permits enforcement proceedings (against moneys payable under a pension plan) in respect of “an order or an interspousal contract made under The Matrimonial Property Act” (emphasis added).
127 (1979), 25 O.R. (2d) 23 (Co. Ct.).
case that is itself worthy of note, for it decided that a pension or a pension benefit to which the Pension Benefits Act applied could not be attached or garnished, under the exception in sub-section 27(2), to enforce a maintenance order under the Divorce Act.129

The absence of any discussion relating to pension exemptions may be contrasted with Dunlop's extended discussion of life insurance exemptions. In the latter connection, it bears mentioning that the author does not really consider the basis of the exigibility of an insured's interest in his unmatured policy, a matter, it is suggested, that has been rather myopically perceived in the jurisprudence (such as there is of it). Much of the debate has centred on whether such property is exigible under sub-section 19(1) of the Execution Act, dealing, inter alia, with the exigibility of "cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for money" of the debtor. The question debated is whether the insured's interest falls within the rubric "other securities for money." While the law is certainly not clear,130 most courts have opted for an ejusdem generis reading of this phrase. For example, in Weekes v. Frawley,131 Boyd C., following Alleyne v. Darcy132 and In re Sargent's Trusts,133 held that a life insurance policy on which premiums had yet to be paid was not exigible as "security for money". On the other hand, it was held in The Canadian Mutual Loan and Investment Co. v. Nisbet134 that a fully paid up policy was in fact exigible as "security for money".135

The debate seems sterile, even leaving aside the existence of statutory exemption provisions that are virtually uniform across Canada. In Ontario, for example, one would have thought that a debtor's interest in his life insurance policy would be exigible (obviously apart from statutory prohibition) under either section 18 or sub-section 19(2) of the Execution Act. Section 18 provides very broadly for the seizure and sale of "any equitable or other right, property, interest or equity of redemption in or in respect of any goods, chattels or personal property", and sub-section 19(2) provides for the seizure of any choses in action, which would include a debtor's interest in his policy.136 Since, in the absence of a statutory prohibition (which exists in respect of certain types of policies), a policy is assignable, with the assignee stepping into the shoes of the

129 R.S.C. 1970, c. D-8. Remedial legislation has, however, been introduced in Ontario to overturn the Seymour decision: see cl. 5 of the proposed Pension Benefits Amendment Act, 1982, Bill 178, 1982 (32d, Leg. Ont., 2d Sess.). New s. 27(2) of the Pension Benefits Act would provide as follows:

27.-(2) Notwithstanding subsection (1), where a person is receiving payment under a pension plan to satisfy the payment of pension benefits to which the person is entitled, the payment is subject to execution, seizure or attachment in satisfaction of an order for support or maintenance enforceable in Ontario.

This provision would apply to orders made either before or after s. 27(2) comes into force.

130 See New Brunswick Report, supra note 3, at 14n. 5.
131 (1893), 23 O.R. 235 (Ch. D.).
132 (1855), 5 Ir. Ch. R. 55.
133 (1879), 7 L.R. Ir. 66.
134 (1900), 31 O.R. 562 (Div. Ct.).
135 See also Edwards, supra note 2, at 133.
136 Sub-section 19(2) has been given a very wide interpretation in Re Attorney General for Ontario and Royal Bank, supra note 53.
there seems to be no reason why a sheriff cannot seize and sell an assignable life insurance policy under either section 18 or sub-section 19(2).

Why attention has been so firmly riveted on sub-section 19(1) is, again, not at all clear.

Professor Dunlop's discussion of the main body of exemption law is highly informative. However, his one half page reference to the exceptions from exemptions deserves better treatment. For example, sub-section 7(1) of the Ontario Execution Act provides that, subject to some exceptions, "[t]he exemptions prescribed in this Act do not apply to exempt any chattel from seizure to satisfy a debt contracted for the purchase of such chattel. . . ." There appears to be almost universal agreement respecting the legitimacy of this provision. But its rationale is not as self-evident as it might first appear. The vendor-creditor has made a decision not to exact security from the purchaser-debtor — a means of protection that he could employ if he felt in need. Yet, after default, the creditor is accorded a type of statutory preference or priority. Where there are several creditors, it seems inequitable to differentiate between them in the manner made manifest in sub-section 7(1); indeed, in the absence of a security agreement covering the chattel in question, it is not unreasonable to suppose that most creditors would perceive the sub-section 7(1) exception as an unexpected windfall. It was this reasoning that led the Ontario Law Reform Commission to defy custom and recommend the repeal of sub-section 7(1).138

One exception briefly discussed by Professor Dunlop is that afforded to maintenance creditors. Sub-section 7(2) of the Ontario Execution Act provides that, with some exceptions, "[t]he exemptions prescribed in this Act do not apply to exempt any article from seizure to satisfy a debt for maintenance of a spouse or former spouse or of a child. . . ." In discussing the sometimes uneasy and unclear relationship between exemptions legislation and creditors' relief legislation, Professor Dunlop raises the following issue:

"Suppose that a spouse with a judgment for maintenance seizes property which would be normally exempt. The execution is proper because the spouse falls within one of the exceptions set out in the Exemptions Act. The property is sold. Must the sheriff distribute the proceeds of sale among all creditors entitled to share under the creditors' relief legislation? If he does what priorities must he take into account?"

Dunlop then contrasts the opposing views. "The obvious solution", he concludes, "is comprehensive and integrated legislation, failing which the courts may have to make a difficult choice between the competing philosophies of these different statutes."140

In the OLRC Report, the Commission appeared to have no difficulty opting for the protection of the maintenance creditor. Its position was as follows:

"Where the sheriff has knowledge of the fact that one of the execution creditors is a maintenance creditor comprehended by section 7(2), ordinarily he will distribute

137 See Insurance Act, R.S.O. 1980, c. 218, s. 174.
138 OLRC Report, Part II at 89-90.
139 Dunlop at 445. Footnote reference omitted.
140 Id. at 446.
the proceeds of a seizure, up to the dollar amount of the exemptions provided in section 2, exclusively to the maintenance creditor. For example, if the sheriff knows of the existence of a maintenance creditor, he now can seize all of the debtor’s household furniture without regard to the $2,000 exemption in section 2.2. The maintenance creditor is given priority in respect of the first $2,000 collected as the proceeds of a subsequent execution sale, and any surplus is distributed pro rata.

The Commission’s perception of the paramountcy of the protection for the maintenance creditor under sub-section 7(2) over the general pro rata distribution scheme under the Creditors’ Relief Act seems unassailable, both as a matter of pure statutory interpretation and as a matter of policy.

Before leaving exemptions legislation, mention should be made of what Dunlop calls its “antiquated, unclear and inappropriate” nature in light of “modern economic and social conditions.” He concludes, quite justifiably, that “[r]eform of exemptions law in Canada is long overdue.” Noting that “[t]he philosophy of the exemptions laws is to encourage the debtor to survive and to carry on his life as an economic and social element in society,” the author expressly favours “a more expansive reading” of exemptions legislation.

Several law reform bodies have attempted to deal with the very unsatisfactory state of this legislation. The OLRC Report, for example, adopted a very conservative, traditional approach, basically keeping the old categories of exempt chattels, while raising the dollar values and adding some new categories.

Not surprisingly, this orthodox approach has come under severe attack from several sources. The most sweeping criticism and set of reform proposals may be found in the New Brunswick Report, in which the following statement appears:

It would appear more satisfactory to provide a mechanism for individual discretionary determination of which assets should be made available in a particular debtor’s case. Guidelines should take the form of general policy, rather than detailed regulation.

Therefore, while the report also proposed the enactment of “[c]ertain minimal guarantees of the debtor’s interest similar to the existing statutory exemptions,” the main thrust of the recommendations was to attempt to tailor the exemption provisions to the needs of each debtor.

The Ontario Law Reform Commission expressly rejected the proposals in the New Brunswick Report as leading to unwarranted uncertainty and an un-

141 OLRC Report, Part II at 94-95. Footnote reference omitted.
142 Dunlop at 315.
143 Id.
144 Id. at 320.
145 Id. at 321.
146 OLRC Report, Part II at 79-86.
147 The Commission stated that its approach “is more in keeping with the general philosophy of our judicial and enforcement system.” (id. at 110)
148 Supra note 3, at 262.
149 Id.
due increase in time and money spent on determining the precise requirements of each debtor, although the OLRC Report did acknowledge that “in theory the complete individualization of exemptions may be a praiseworthy objective.”150 Substantially more emphasis was placed by the Commission on the critically important income exemption,151 although even here the Commission did not endorse a discretionary exemption; rather, it opted in favour of a percentage exemption subject to variation on the application of either the debtor or creditor.

The Ontario Commission’s rejection of a discretionary regime is consistent with its rejection of total, or even much greater, state control of the enforcement process, a matter discussed earlier.152 Of course, other types of regimes are possible. A recent working paper from the Alberta Institute of Law Research and Reform153 has set forth the following models of exemption legislation: (1) selective and specific exemptions;154 (2) lump sum exemptions, which permit a debtor to choose whatever assets he wishes to retain up to a stipulated dollar limit,155 and; (3) some combination of (1) and (2).

J. Seizure and Sale

In chapter 11, Professor Dunlop returns to the writ of execution, mainly to examine the seizure and sale of personalty and realty, although there is also a useful discussion of limitation periods156 and the duration and renewal of writs of execution.

Dunlop then turns to the concepts of seizure and abandonment of seizure — an area of debtor-creditor law that mixes both the physical (for example, the physical taking of goods) and what at times appears to be the metaphysical (the sheriff’s intention to seize the goods). Considerable discussion ensues respecting the sheriff’s duties concerning seizure and his liability for an excessive seizure and for seizing goods of a third party.

It is clear from a reading of the author’s account of a sheriff’s duties that the latter walks a very thin rope indeed. So much can go wrong so easily. No wonder it is a common practice — although of dubious validity — for Ontario sheriffs to demand an indemnification agreement from creditors’ solicitors, attempting to save sheriffs harmless in respect of any action they take in seizing and selling property.157

150 OLRC Report, Part II at 82.
151 Id. at 81. See also id. at 153-77.
152 See part III, C.
154 See, e.g., Execution Act, R.S.O. 1980, c. 146, s. 2.
155 See, e.g., Court Order Enforcement Act, R.S.B.C. 1979, c. 75, s. 65.
156 See supra note 80.
157 Where a solicitor does not accede to this demand — which occurs only infrequently — it appears that sheriffs will attempt to execute the writ, so long as they have sufficient information concerning the nature and location of the exigible property.
The difficulty faced by sheriffs in knowing what property belongs to the debtor has prompted many sheriffs to be excessively cautious, sometimes notwithstanding the giving of indemnification agreements. It is this difficulty that prompted the Ontario Law Reform Commission to recommend a rather dramatic change in the rules governing seizure. The Commission's discussion and proposals are as follows:

We believe that there is yet a further means by which the problem of identification may be minimized without jeopardizing the interests of other parties involved. We recommend that, upon a creditor's instructions, the sheriff should be required to seize property in the sole or joint possession of the debtor. This duty should arise, and the sheriff should be protected from liability, unless the sheriff, acting in good faith, has some reasonable basis for believing that the property is not property in respect of which the debtor has some exigible right, title or interest. Accordingly, where the debtor is in sole or joint possession of exigible personal property, the sheriff should not be entitled to demand of the creditor, as a precondition to seizure, evidence of the debtor's precise right, title, or interest in that property.\[158\]

In connection with the last-mentioned proposal, the Commission also recommended that "the sheriff should not have to investigate the ownership of each asset found in the debtor's possession or the validity of conflicting claims made at the time of the attempted seizure."\[159\]

The rationale for substantially liberalizing the law of seizure was given as follows:

We believe that sole or joint possession in the debtor is a reasonable basis for seizing property, particularly given the safeguards in the present law and the safeguards to be proposed by the Commission respecting the protection of the interests of claimants to property. Persons who permit their property to be in the possession of another necessarily must take some risk. In an extreme case, one such risk is that the property honestly may be mistaken for the debtor's property without the debtor disabusing the sheriff of this erroneous belief. However, it may be said that in most cases debtors do not fraudulently release to the sheriff the property of others.\[160\] In fact, the reverse is more common: debtors frequently seek to withhold property from the sheriff and their creditors.\[161\]

Where property is in the sole possession of a third party, however, the Commission in effect endorsed the caution displayed by sheriffs. In lieu of physical seizure at the outset, where a creditor has instructed a sheriff to seize property in the sole possession of a third party, the sheriff would serve on that party a notice of seizure. Leaving aside the rather complicated proposals respecting the immediate disposition by the third party of his possessory or proprietary interest (if any) in the property, the third party would be afforded an opportunity to make a claim to the property. Where no claim is made, or where the right to seize is not disputed, the sheriff may physically take the property into his custody.

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158 OLRC Report, Part II at 32. Footnote references omitted.
159 Id. at 33. Concerning the discussion of such claims, see discussion infra.
160 Author's footnote. With respect to the seizure of property in the debtor’s possession, see art. 569 of the Quebec Code of Civil Procedure, R.S.Q. 1977, c. C-25, which provides, in part, that "[a] creditor may seize and sell the moveable property of his debtor which is in the possession of the latter, that in his own possession and that in the possession of third parties who consent thereto."
161 OLRC Report, Part II at 32.
The above proposals respecting the procedure to seize property were designed to clarify the duty of the sheriff in various situations. The Commission sought to create a regime in which the exercise of discretion on the part of sheriffs would be minimized. Other proposals were made in an attempt to deal with claims to seized property. These latter proposals are radical in nature and would serve to alter substantially the rights of persons who have a claim to seized property.

As Professor Dunlop notes, the orthodox law is that, "[w]hen the seized goods are sold by the sheriff, he conveys to the purchaser whatever title the debtor had in the goods." Dunlop describes the position of the purchaser as follows:

The bidder at a sheriff's sale is in a difficult position. The sheriff will generally offer no promises either as to his authority to sell or as to the title which the debtor has in the goods. The purchaser is left very much on his own, and any bid he makes involves a substantial gamble as to the validity and effectiveness of the transaction.

As a result, it has been said that "at a forced sale prices are low as a rule, it is an opportunity that buyers take in the hope of 'getting a bargain'."

In an attempt to ensure that the highest possible price is obtained for seized goods, the Ontario Law Reform Commission recommended an entirely new — and, as indicated, very radical — regime designed to give possible claimants an opportunity to make their claim, but to extinguish their interests after the expiry of the proposed limitation period within which claims may be made. The main recommendations, which, if implemented, would overturn the present law, are along the following lines. The Commission first proposed that "[s]ubsequent to a seizure, the sheriff should be required to serve a 'notice of seized property' and a prescribed proof of claim form on all persons who, to the knowledge or reasonable belief of the sheriff, may have some right, title or interest in the seized property." Leaving aside certain exceptions (for example, dealing with late claims), the person served with the notice would be entitled as of right to file a duly completed proof of claim form with the enforcement office within thirty days of the mailing of the notice to him by the sheriff. A procedure is to be established for the adjudication of claims made to the seized property. Then the critical recommendation is as follows:

199. At a sale of seized property, the purchaser should acquire clear title subject only to the right, title or interest of a person who has filed and successfully maintained a claim to such a right, title or interest prior to the time of sale; the claim of any other person should be extinguished upon the sale of the property.

162 Dunlop at 402. But see Associates Finance Co. Ltd. v. Webber, supra note 68 and accompanying text.

163 Author’s Footnote. Concerning the title of a purchaser at an execution sale of land, notwithstanding, for example, irregularities in seizure or sale, see Memorials and Executions Act, R.S.N.B. 1973, c. M-9, s. 9; Court Order Enforcement Act, R.S.B.C. 1979, c. 75, ss. 100-101; Judgment and Execution Act, R.S.P.E.I. 1974, c. J-2, ss. 36-38, 43-44 and 46; and Sale of Land under Execution Act, R.S.N.S. 1967, c. 275, s. 13. See, also, s. 36 of the Seizures Act, R.S.A. 1980, c. S-11, which provides, inter alia, that a sale of goods "shall be without warranty of title."

164 Dunlop at 402-403.

165 Maple Leaf Lumber Co. v. Caldbick (1917), 40 O.L.R. 512 at 516 (App. Div.).

However, a claimant whose right to the seized property has been extinguished may file a claim to a “first charge” on proceeds of sale, so long as his claim is filed “while the proceeds remain undistributed in the hands of the sheriff.” In short, a purchaser at an execution sale would always know precisely what interest he was acquiring—and, in some cases, where a claimant failed to assert his claim within the limitation period, he would in fact acquire a better title than that of the debtor. This foreknowledge would, it was assumed, result in a higher price for seized chattels. Whether it would also affect the practices of, for example, institutional lenders can only be a matter of conjecture, but it is not unreasonable to speculate that they would view the proposals with some antipathy.

K. Distribution of Proceeds

Chapter 12 is concerned with the distribution of proceeds among unsecured creditors (and chapter 13 deals with the related topic of priorities of secured and preferred creditors). Professor Dunlop here discusses creditors’ relief legislation in Canada, which, he states, is a “statutory system of compulsory sharing of the proceeds of execution among unsecured creditors.” However, not all unsecured creditors share under a pro rata distribution scheme. For example, section 3 of the Ontario Creditors’ Relief Act is narrowly circumscribed. Section 3 provides that, “[s]ubject to this Act, there is no priority among creditors by execution from the Supreme Court or from a county court.” No mention is made of execution creditors from a provincial court (family division) or from a small claims court.

It has never been the subject of dispute that, subject to certain exceptions, execution creditors from the small claims courts are paid on a first come, first served basis. However, there is some dispute concerning the distribution of proceeds realized from an execution issued by a provincial court (family division). The Ontario Family Law Reform Act is silent, and the Rules of the Provincial Court (Family Division) are cryptic in respect of this matter. Rule 80 provides that the sheriff executing the writ “shall make a return of [the] writ of execution and pay to the clerk of the court on behalf of the creditor any money available for distribution to the creditor.”

The question is, what type of scheme governs the determination of “money available for distribution to the creditor”? In practice, it appears that the sheriff makes this determination as though the provincial court (family division) creditor is to share pro rata under the Creditors’ Relief Act. However, the applicability of that Act is very much in question, having regard to the language of section 3. Certainly Rule 80 offers no guidance on this matter; it really begs the critical question.

One area of significance not mentioned in chapter 12 deals with the distribution of the estate of an insolvent debtor and the applicability of creditors’ relief legislation to an insolvent estate. Sections 50, 57, 58 and 59 of

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167 Dunlop at 415.
168 R.S.O. 1980, c. 103.
169 Creditors’ Relief Act, R.S.O. 1980, c. 103, ss. 16 and 25.
170 R.S.O. 1980, c. 152.
the Trustee Act\textsuperscript{172} provide a code for the administration of insolvent estates. For our purposes, only sub-section 50(1) need be reproduced:

On the administration of the estate of a deceased person, in the case of a deficiency of assets, debts due to the Crown and to the personal representative of the deceased person, and debts to others, including therein debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as are payable in like order of administration as simple contract debts shall be paid \textit{pari passu} and without any preference or priority of debts of one rank or nature over those of another; but nothing herein prejudices any lien existing during the lifetime of the debtor on any of his property.

In \textit{Re Williamson, Pennell v. McCutcheon},\textsuperscript{173} execution creditors of the deceased caused the sheriff to seize and sell the deceased's goods under their writs of execution. The execution creditors sought to have the proceeds distributed to them under \textit{The Creditors’ Relief Act}.\textsuperscript{174} It was noted that "\[t\]he sheriff, desiring relief for the other creditors, maintains that all assets must be distributed \textit{pari passu} among all the creditors"\textsuperscript{175} pursuant to sub-section 63(1) of \textit{The Trustee Act},\textsuperscript{176} the lineal ancestor of present sub-section 50(1). Middleton J. held that sub-section 63(1) "abolished all priority among creditors in administration of the estates of deceased persons' and that a writ "gave to the [execution] creditor no priority over the other creditors."\textsuperscript{177} He concluded that \textit{The Creditors’ Relief Act}, dealing only with the rights of execution creditors \textit{inter se}, did not alter "the superior right of the creditors as a whole to have the assets dealt with as the statute [\textit{The Trustee Act}] directs."\textsuperscript{178}

However, notwithstanding Middleton J.'s decision respecting the applicability of what is now sub-section 50(1) of the \textit{Trustee Act}, a crucial question remains unanswered. Is sub-section 50(1) \textit{intra vires} the province, having regard to exclusive federal jurisdiction in matters of "bankruptcy and insolvency"? While the provision predates Confederation, and has yet to be challenged, one may seriously question its validity, particularly in view of the opinions expressed by various Supreme Court of Canada justices in \textit{Robinson v. Countrywide Factors Ltd}.

While that case dealt with section 4 of the Saskatchewan \textit{Fraudulent Preferences Act},\textsuperscript{180} various opinions make it reasonably clear that a comprehensive provincial scheme for the distribution of the estate of an insolvent person would not likely receive a favourable reception in the Supreme Court of Canada.\textsuperscript{181}

The invalidation of section 50 of the \textit{Trustee Act} would, of course, severely

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\item \textsuperscript{172} R.S.O. 1980, c. 512.
\item \textsuperscript{173} (1917), 39 O.L.R. 413, 36 D.L.R. 783 (S.C.).
\item \textsuperscript{174} R.S.O. 1914, c. 81.
\item \textsuperscript{175} Supra note 173, at 414 (O.L.R.), 784 (D.L.R.).
\item \textsuperscript{176} R.S.O. 1914, c. 121.
\item \textsuperscript{177} Id. at 415 (O.L.R.), 784 (D.L.R.).
\item \textsuperscript{178} Id. at 414 (O.L.R.), 784 (D.L.R.).
\item \textsuperscript{180} R.S.S. 1965, c. 397.
\item \textsuperscript{181} See, e.g., supra note 179, at 794 (S.C.R.), 145 (W.W.R.), 528 (D.L.R.)(\textit{per} Spence J.), at 808-809 (S.C.R.), 158 (W.W.R.), 539 (D.L.R.) (\textit{per} Beetz, J.), and the dissenting opinion of Laskin, C.J.C.
\end{itemize}
prejudice the statutory scheme of pari passu distribution among all creditors of an estate. Moreover, given the apparent inapplicability of the Creditors’ Relief Act, it is not inconceivable for a court to revert to the common law first come, first served basis of distribution in lieu of any statutory provision governing the matter.

L. Voidable Transactions

The concluding chapter in Professor Dunlop’s work deals with voidable transactions, an area of the law superficially easy to grasp, but filled with an overabundance of conceptual and practical pitfalls and difficulties. The author takes his readers through the minefields, hedgerows and labyrinths with some ease, however, beginning with an essential historical overview of English and Canadian legislation.

In discussing early English fraudulent conveyance legislation, Dunlop notes a “permissive attitude towards preferential treatment [that] might well be proper in a legal system in which individual creditors ranked in order of delivery of their writs to the sheriff...”182 While Professor Dunlop is correct in concluding that the absence of fraudulent preference legislation is less justifiable where a pari passu distribution regime exists — for example, under the present creditors’ relief legislation — it is not clear why this absence may be “proper” in a regime in which creditors rank in order of delivery of their writs to the sheriff. A fraudulent preference given by a debtor may, of course, upset any distribution regime — where, for example, the preferred creditor ranks below another creditor who would be the lawful recipient of proceeds realized from a sale of the debtor’s exigible assets.

A “sleeper” in respect of fraudulent conveyance — as opposed to fraudulent preference — legislation is sub-section 4(1) of the Assignments and Preferences Act.183 This provision is usually passed over unnoticed or with little comment, perhaps because it appears in a statute dealing essentially with fraudulent preferences (transactions between a debtor and one of his creditors). Dunlop accords it only two sentences, the first one descriptive and the second one concluding that “[t]he provision is nothing more than a limited version of the Statute of Elizabeth [1571, 13 Eliz. 1, c. 5] the precursor of modern fraudulent conveyance statutes and would appear to add little to the English legislation.”184

It is unfortunate that the author chooses to mention sub-section 4(1) in the context of fraudulent preference legislation, and then only en passant and far too cryptically. Sub-section 4(1) expressly requires an impeaching creditor to prove, inter alia, that the impugned transaction was “made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full, or knows that he is on the eve of insolvency.”185 Under, for example, the Ontario Fraudulent Conveyances Act,186 however, there is no express requirement

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182 Dunlop at 510.
183 R.S.O. 1980, c. 33.
184 Dunlop at 534.
to prove insolvency or knowledge of impending insolvency (although, as a practical matter, such a state of affairs goes some considerable distance in proving the debtor's fraudulent intent or in establishing suspicious circumstances smacking of such an intent).

In addition, it is important to bear in mind that the saving provisions in sub-section 4(1) are different from those in the *Fraudulent Conveyances Act.* 187 Put briefly, the voiding provisions of the latter statute do not apply where the conveyance is for good consideration and *bona fide* to a person who has no notice or knowledge of the debtor's intent. 188 The saving provisions in respect of sub-section 4(1) are, however, more complicated. Sub-section 4(1) must be read "[subject to section 5," which provides a list of excluded transactions (some of which are clearly not referable to fraudulent conveyances as such, but relate to fraudulent preferences under sub-section 4(2) ). For example, sub-section 5(1) provides, *inter alia,* that:

> [N]othing in section 4 applies . . . to any *bona fide* sale . . . made in the ordinary course of trade or calling to an innocent purchaser or person, . . . nor to any *bona fide* conveyance, assignment, transfer or delivery over any goods or property of any kind, that is made in consideration of a present actual *bona fide* payment in money, or by way of security for a present actual *bona fide* advance of money, or that is made in consideration of a present actual *bona fide* sale or delivery of goods or other property where . . . the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

Accordingly, under section 3 of the *Fraudulent Conveyances Act,* the consideration necessary to save a transaction need only be "good". Full, or even adequate, consideration is not essential, 189 although nominal or grossly inadequate consideration will not do. 190 It may even include "natural love and affection", although this is not at all clear. 191 By way of contrast, the consideration necessary to save a transaction under sub-section 5(1) of the *Assignments and Preferences Act* must be "fair and reasonable". It is therefore easier to impeach a transaction under the latter Act than it is under the *Fraudulent Conveyances Act,* at least insofar as the consideration requirement is concerned. This state of affairs is illustrated by the case of *Leighton v. Muir,* 192 where the creditor could not succeed under the Statute of Elizabeth (applicable in Nova Scotia), but could successfully impeach the transaction for want of "fair and reasonable" consideration under the *Assignments and Preferences Act.* 193

188 R.S.O. 1980, c. 176, s. 3. See also s. 4.
192 Supra note 189.
193 R.S.N.S. 1954, c. 17.
A final point respecting fraudulent preferences concerns the distinction in Canadian legislation between preferences that occur within sixty days before they are impeached and preferences that occur outside the sixty day period. Sub-section 4(3) of the Ontario Assignment and Preferences Act\textsuperscript{194} provides as follows:

Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed \textit{prima facie} to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning this Act whether it be made voluntarily or under pressure.

While Professor Dunlop adequately discusses the apparent nature and scope of the legislation, some recent case law has tended to blur the line between actions within and actions outside the sixty day period. In \textit{Avco Financial Services Canada Ltd. v. West},\textsuperscript{195} Cooper J.A. stated with respect to an action commenced outside the sixty day period:

I address myself first to the burden of proof which rested upon Avco as the plaintiff in the action. I respectfully adopt what was said by Chief Justice Cowan of the Trial Division of this Court in \textit{Royal Bank of Canada v. Kirkpatrick et al.} (1977), 20 N.S.R. (2d) 458 at p. 468:

With regard to the burden of proof that the transfer of the property in question was made with intent to defeat, hinder, delay or prejudice the plaintiff creditor, it is clear that, if the effect of the transfer might be expected to be, and has, in fact, been to defeat, hinder, delay, or prejudice the creditor, the Court will attribute the fraudulent intention to the settlor...\textsuperscript{196}

A similar view was expressed in \textit{Wilson Equipment Ltd. v. Union Construction Ltd.},\textsuperscript{197} a view that seems to adopt the analogous views of Lord Hatherley L.C. in the famous fraudulent conveyance case of \textit{Freeman v. Pope},\textsuperscript{198} rather than the contrary views of Lord Esher M.R. in \textit{Re Wise; Ex parte Mercer}\textsuperscript{199} (a longstanding conflict discussed by Dunlop at some length\textsuperscript{200}).

As indicated earlier, under the \textit{Assignments and Preferences Act}, the debtor ordinarily must be insolvent. Therefore, every payment to one of his creditors will necessarily have the effect of prejudicing the other creditors. Having regard to this fact, and if the cases noted above accurately represent the law — in respect of which no categorial opinion ought reasonably to be ventured — there would seem to be little practical difference between the burden of proof where sub-section 4(3) applies and where it does not apply.

\textsuperscript{194} R.S.O. 1980, c. 33.
\textsuperscript{195} (1979), 101 D.L.R. (3d) 82 (N.S.C.A.).
\textsuperscript{196} Id. at 84-85.
\textsuperscript{197} (1979), 31 C.B.R. (N.S.) 208 (N.S.S.C.).
\textsuperscript{198} (1870), 5 Ch. App. 538.
\textsuperscript{199} (1886), 17 Q.B.D. 290 (C.A.).
\textsuperscript{200} Dunlop at 514-20.
IV. CONCLUSION

_Creditor-Debtor Law in Canada_ is indeed an admirable and timely book. It deserves to be read and reread, and will assuredly attain the status of a seminally important work in Canadian jurisprudence. Its major drawback — notwithstanding the legitimate view that the whole field cannot possibly be covered — is its virtual neglect of any consideration of the relationship between enforcement law and family law.

The enactment of new family law statutes in Canada heralded the introduction of entirely novel property law regimes for spouses. Given the generally comprehensive nature of family law reform, it is surprising that most statutes ignore the rights of creditors.201 For example, sub-section 4(1) of the Ontario _Family Law Reform Act_202 gives each spouse a right to have “family assets divided in equal shares” if any one of three statutory conditions is satisfied. Is the “right” to an equal division of family assets, including the matrimonial home, subject to seizure and sale under a writ of execution? In the case of a matrimonial home, can a creditor of the non-titled spouse file a writ of execution that would bind the property and prevent its disposition by the titled spouse? Can an order for the division of family assets defeat the rights of the titled spouse’s creditors? Can the rights of the titled spouse’s creditors be interfered with by an order for exclusive possession under section 45 in favour of the non-titled spouse? While the Act is silent, the courts have gradually come to deal with some of these questions.203 For example, in _Re Maroukis and Maroukis_,204 the Ontario Court of Appeal made it clear that, until the court makes an order dividing family assets, no rights are conferred by section 4 of the _Family Law Reform Act_,205 and the rights of the creditors of the titled spouse are, therefore, unimpaired.

These and other matters relating to family law — even the basic statutory and regulatory provisions governing enforcement in the family courts — are of critical importance and ought to have been comprehended by Professor Dunlop’s book, notwithstanding its present size. However, let it not be thought that this omission detracts from the vast amount of material that is in fact included. In respect of the latter, readers will surely share the view that the Canadian legal community owes a very sizeable debt of gratitude to Professor Dunlop.

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201 See, however, _The Matrimonial Property Act_, S.S. 1979, c. M-6.1, ss. 43-45, and _Court Order Enforcement Act_, R.S.B.C. 1979, c. 75, s. 88.


203 See also, OLRC Report, Part I at 83-96, and Part III at 53-60.


205 R.S.O. 1980, c. 152.

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