

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

Report
(LRC 27-1988)

REPORT ON
DEBT COLLECTION:
(1) THE LAW RELATING TO SHERIFFS

IRELAND
The Law Reform Commission
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CHAPTER 1: INTRODUCTION

1. On 6th March 1987, the then Attorney General requested the Law Reform Commission to formulate proposals for the reform of the law in a number of areas. These included the law relating to Sheriffs, Collection of Taxes and Debt Collection.

2. As a first step, the Commission established a Working Group to assist it in identifying the problems presented by the present law and the manner in which they might most effectively be overcome. The group consisted initially of the President, Mr. Liam de Feu, representing the Irish Trade Protection Association, Mr. John Fitzpatrick, Dublin County Sheriff, Mr. Tom Maher, representing the Collector-General's Office of the Revenue Commissioners, Mr. Desmond Moran, Solicitor and former Dublin County Sheriff, Mr. Frank Nowlan, Solicitor, Mr. John O'Malley, of Messrs. Dun & Bradstreet Limited, Mr. Thomas P. Owens, County Registrar for Cavan and Mr. Charles Lysaght, Research Counsellor to the Commission. Another member of the Commission, Mr. John Buckley, subsequently joined the Working Group and, on his transfer to other responsibilities, Mr. Maher was succeeded by Mr. J. V. Rogers and Mr. Patrick Burke.

The Commission would like to express its deep gratitude to the members of the Working Group from outside the Commission who devoted so much time to their work and contributed so helpfully to the preparation of this Report.

3. The subject referred to us by the Attorney General is extremely wide in its scope. The difficulties experienced by both business and individuals in collecting debts are well known. In recent times, the problems encountered by the Revenue in collecting taxes have also been the subject of much discussion. Some of the difficulties derive from the legal requirements as to the institution and processing of the necessary proceedings in the appropriate court and the administrative

difficulties encountered in the course of such proceedings. Some of them are associated with the present method of enforcing money judgments which is primarily, although not exclusively, execution by a sheriff or county registrar. And still more of them relate to the entire law of insolvency, embracing both bankruptcy (in the case of individuals) and liquidations (in the case of companies).

4 It is generally acknowledged that the law relating to sheriffs, which has not been the subject of any significant change for over 60 years, contributes in at least some measure to the present difficulties. Thus, the Commission on Taxation in their Fifth Report referred to it as one of the problems inhibiting the efficient collection of taxes¹ and our enquiries have satisfied us that it also presents problems for the private sector. We have, accordingly, decided to address in the first instance the specific problems associated with sheriff law.

5 It should be borne in mind that the execution of money judgments by a sheriff is only one of a number of methods of enforcing such judgments. All the other methods, however, require an application to court and do not come within the scope of sheriff law. These other methods include

- (a) the judgment mortgage procedure under which a creditor may obtain an order for the sale of his debtor's land,
- (b) a "garnishee" order requiring a person who owes money to the debtor, including a bank, to pay the money involved to the creditor,
- (c) a "charging" order which can make available to the creditor stocks and shares belonging to the debtor²
- (d) the appointment of a receiver "by way of equitable execution" making other assets of the debtor available to the creditor,
- (e) an order requiring the debtor to pay his debt by instalments under pain of imprisonment where the failure to pay is due to wilful refusal or culpable neglect.

These various methods of execution will be dealt with in subsequent Reports by the Commission, but do not directly affect the problems of sheriff law considered in this Report.

Fifth Report of the Commission on Taxation *Tax Administration* (October 1985) para. 15.33.

The sheriff, however, has a role in this mode of execution as the court may order the stocks or shares or their produce to be transferred to him with a view to satisfying the judgment (Common Law Procedure Amendment Act (Ireland) 1853).

CHAPTER 2: THE PRESENT LAW

6. When a judgment for the payment of money is obtained from a court, the person in whose favour the judgment is given is called a judgment creditor and the person who has to make the payment a judgment debtor. The primary method of enforcement of such a judgment is for the judgment creditor to obtain from the court office an order directed to the sheriff (or outside Dublin and Cork the County Registrar) commanding him to seize whatever goods are within his bailiwick belonging to the judgment debtor and to produce the sum due (including interest at 11% on the cost of execution) out of their sale.¹

7. Until 1926 the enforcement of court orders in civil proceedings, including money judgments, was the responsibility of officers known as sheriffs who were either appointed by the executive, or, in certain cases, elected by local authorities, and who could delegate their functions to under-sheriffs. In that year, legislation² provided for the transfer of these functions to the County Registrars. However, in four areas the office of sheriff has been retained: the County Borough and County of Dublin and County Borough and County of Cork.

The legislation also provided for the appointment of a new official known as a "court messenger" who was to have all the powers which would be vested by law in a bailiff employed by a sheriff.

In the result, except in Dublin and Cork, the enforcement of money judgments is the responsibility of the County Registrars who are civil servants. This is in addition to a wide range of other responsibilities of these officials, principally the organisation and administration of the Circuit Court within their county, and also extending to other functions such as the holding of parliamentary and presidential elections and referenda. The sheriffs in Dublin and Cork, by contrast, are not salaried civil servants and are remunerated on a commission basis known as "poundage". In addition, they are usually paid a small retainer by the State, the object of which is to enable them to provide an office and office staff and any other services which may be necessary

effectively to carry out the office. They are also entitled to some additional small fees, including a few which must be paid by the judgment creditor to the sheriff when he is lodging the court order for execution. The level of these fees has not been adjusted to allow for the huge inflation of the last three decades.

The Dublin and Cork sheriffs also perform all the duties of returning officers in connection with elections (other than local elections) and some functions concerning pounds. They are entitled to certain additional fees for this work.

It should be noted that sheriffs may appoint their own court messengers subject to the approval of the Minister for Justice.³ These appointees are not civil servants. In the result, a sheriff can increase or vary his staff at his discretion, thus enabling him to meet any sudden pressure of work that may arise.

More recently, a number of additional sheriffs have been employed by the Revenue Commissioners on the same basis in a number of counties outside Dublin and Cork to assist in the collection of a huge volume of tax arrears.

For the sake of convenience, the expression "sheriff" is used throughout the rest of this report as meaning both sheriffs and county registrars. The expression "tax sheriff" is used as meaning the additional sheriffs mentioned in the preceding paragraph.

8 In High Court proceedings the order directed to the sheriff is known as an order of *fiert facias* (frequently abbreviated to *fi fa*). In Circuit Court proceedings, it is called an execution order against goods.⁴ In the District Court the court's decree itself is sent to the sheriff for execution.⁵ In this Report, the expression "execution order" is used as meaning all three.

9 The special position of revenue debts should be briefly noted. Section 480 of the *Income Tax Act 1967* provides the Revenue themselves with a power to distrain the goods of a defaulting taxpayer. This provision is in fact seldom used as there are doubts about its constitutionality. Of far more practical significance is s 485 of the same Act. This provides that, once liability for taxation has been determined through the internal procedures of the Revenue Commissioners, the Collector General may issue a certificate to the sheriff of the county in which a defaulter resides or has his place of business certifying the amount of tax in default and the person upon whom the tax is leviable. Once this is done, the revenue debt may then be enforced in the same way as a judgment of a court of law would be enforced. For completeness' sake, it should be noted that revenue debts may also arise as a result of court proceedings in which case they fall for enforcement in the same way as any other judgment debts. It is only s 485 certificates, however, which are sent for execution to the tax sheriffs.

10 While execution by the sheriff is the primary method of enforcing a money judgment, it is in modern circumstances frequently an unsatisfactory one. The development of various methods of financing the purchase of goods, such as hire purchase and leasing, may mean that goods are simply not the legal property of the judgment debtor. In

the case of traders, the use of the “retention of title” machinery may also mean that the judgment debtor has no title to the goods apparently available for seizure. In the case of companies, a debenture holder such as a bank may have a “floating charge” over all the assets which takes effect when the company gets into difficulties. Even where goods are seized, it is notorious that they often do not realise the best prices. In rural areas, the sheriff may be presented with particular difficulties in this context.

11. If a person’s financial affairs have reached the stage where he is either resigned to an execution by the sheriff or sees no way of avoiding it, it is usually the case that he is insolvent or on the verge of insolvency. The questions raised in the preceding paragraph as to the availability of assets in his possession to satisfy his creditors thus have implications extending beyond the law relating to the recovery of money judgments. Questions as to the legal status which should be enjoyed by “retention of title” clauses or the powers of receivers appointed under floating charges are of great importance, but raise issues different from those addressed in this Report.⁶

12. While, for the reasons given, execution by the sheriff may frequently in modern circumstances be an ineffectual remedy (and where effectual may sometimes be unduly oppressive), the Commission is satisfied that it must remain as an important, and perhaps still the primary, method of enforcing the judgment of the court for a money sum. Apart from any other consideration, where a judgment debtor has sufficient assets to satisfy a judgment debt the prospective loss and inconvenience of an execution provides an incentive to pay up. Effectiveness as a system cannot be judged solely with reference to cases where execution actually takes place. Moreover, when the debt collection system is seen as cumbersome and inefficient, there is a tendency for creditors to petition for the bankruptcy or winding-up of their debtor rather than endure the frustration of taking proceedings in the ordinary way. Thus, what should be a drastic remedy of last resort is increasingly the first option for many creditors with recalcitrant debtors. Accordingly, it is important that the law governing execution by sheriffs should be modernised and made as efficient as is compatible with the rights of judgment debtors and third parties who may be affected by seizures.

13. In addition to the difficulties inherent in any system of enforcing money judgments by the seizure of the debtor’s property, our law of sheriffs has other unsatisfactory features. It has developed in a somewhat piecemeal fashion and has not until now been the subject of any considered independent review. Our examination of the present law has satisfied us that there are a number of areas in which useful practical reforms can be achieved and that the legislation required is in many areas relatively straightforward. Among the matters which appeared to us to call for particular scrutiny were:

- (a) the division of responsibility for the enforcement of judgments between county registrars and sheriffs;

- (b) the charges payable to sheriffs,
- (c) whether the present “first come, first served” system of enforcing execution orders should be modified,
- (d) the possible exemption from seizure under the present law of freehold land,
- (e) the provisions common in leases and hire purchase agreements under which the lease or agreement is terminated on seizure of the subject matter in execution of a judgment debt,
- (f) making legitimate so called “walking possession” arrangements under which the debtor is left in possession of the goods seized for a limited period,
- (g) modifications of the “interpleader” procedure which requires the institution of fresh proceedings by the sheriff where a third party claims to be entitled to goods which he has seized
- (h) exonerating sheriffs from liability for the seizure in good faith of goods in the possession of a judgment debtor which are subsequently established to belong to a third party,
- (i) difficulties in the seizure and sale of diseased animals arising from the relevant bovine TB and brucellosis legislation

Rules of the Superior Courts 1986 Order 42 Rules 13-25 Appendix F Part II
Court Officers Act 1926

Enforcement of Court Orders Act 1926 s. 4(1)

¹ Rules of the Circuit Court Order 33 Rule 1 Schedule of Forms Form 21

District Court Rules Rule 136 Form 3

² The Commission envisages issuing a separate report on the retention of title problem in the near future see Chapter 8 para. 10 below

CHAPTER 3: COUNTY REGISTRARS AND SHERIFFS

The Historical Background

14. The office of sheriff is of great antiquity, dating in England from before Norman times.¹ In Ireland, as in England, the sheriff, in areas where English law predominated, discharged a wide variety of functions as the representative of the Crown. These included the enforcement of judgments of the courts but in the 19th century the responsibility for such executions ceased to be that of the 'high sheriff', as he was called, and was vested in 'under-sheriffs'. In turn, they delegated the carrying out of the actual executions to 'bailiffs'.

15. After the Treaty in 1921 and the establishment of the new system of courts in 1924, it was thought that responsibility for, and the supervision of, the execution of court decrees should more properly be the province of the County Registrars who were to be responsible for the administration of the newly established Circuit Courts throughout the country. The actual work of execution was to be carried out by 'court messengers' appointed by the Minister for Justice but acting under the supervision of the County Registrars. The office of high sheriff, which by now had become purely ceremonial, was abolished. The various offices of under-sheriff were not abolished, but the relevant legislation (the Court Officers Act 1926) provided that as each office became vacant, the functions of the under-sheriff in regard to the enforcement of court judgments were to be transferred to the County Registrar.

16. The result of the 1926 legislation was, accordingly, the transfer throughout the greater part of the country of the responsibility for the execution of court orders to County Registrars and of the actual work of execution to the court messengers. The office of under-sheriff in Dublin, however, did not fall vacant until 1945 and at that stage it became obvious that to impose this additional burden of work on the Dublin County Registrar would be impractical. The result was s. 12 of the

Court Officers Act 1945 which amended the 1926 Act by providing that whenever a vacancy occurred in an office of under sheriff a new sheriff could be appointed who would perform such functions as the Minister for Justice specified (It also provided for the transfer of defined functions from the County Registrars to sheriffs.) This power was exercised in relation to Dublin City and County and Cork City and County. Hence the existence in these areas of sheriffs who are usually solicitors and who as has been noted are remunerated on the basis of 'poundage' i.e. a commission on the sums which they actually recover. As has also been noted the system has been utilised in recent times for the appointment of a number of tax sheriffs exclusively assigned to the collection of revenue debts.

Criticism of the Present System

17 In its Fifth Report the Commission on Taxation concluded that 'the enforcement of collection is in a very sorry state'. In the vast majority of cases where the Revenue had determined following its internal procedures that taxation was due or where a similar conclusion had been reached following court proceedings no money had been collected from the persons liable. While various reasons were given in the Report for this situation it was clear that there was evidence that the enforcement agents especially the County Registrars were unable to cope with the volume of work particularly the collection of revenue debts.

18 We are also satisfied that the operation of the system leaves a great deal to be desired and that some at least of its deficiencies are due to the fact that responsibility for the enforcement of judgments remains outside Dublin and Cork the responsibility of the County Registrars. The County Registrar is essentially a court official whose primary duty is the organisation and administration of the Circuit Court's business. There is no reason why he should also be called upon to ensure the execution of court orders in civil proceedings at every level. The assigning of this role to him can indeed be seen as an anomalous departure from the normal principle that the courts are solely concerned with the resolution of justiciable issues and that the implementation of their orders is in civil cases a matter for the parties in the first instance and in criminal cases a matter for the executive rather than the judicial branch of Government. It should be remembered in this context that the rationale of any sheriff system is the risk of social disorder which would arise if the parties implemented decrees of the courts by seizing goods themselves. The assigning of this function to an officer nominated by the executive is entirely understandable but there is no reason why he should be a court official already burdened with other responsibilities. Experience has shown that employing a person with relevant qualifications either on a whole time or part time basis and payable by commission is significantly more efficient.

The justification given by the Minister for Justice in 1945 for maintaining the responsibility of County Registrars in this area outside Dublin and Cork was that they had not much work to do

anyway.⁵ Whatever justification there may have been for that view in 1945, the Commission has no doubt that the workload of at least some County Registrars has increased substantially. Moreover, even a County Registrar with a relatively light workload is unlikely to attack the collection of debts with the same urgency as an independent sheriff. There will indeed be times when he is bound to give other duties priority, e.g. when the Circuit Court is in session. It may be noted in passing that, when the system of appointing tax sheriffs was adopted, it seems to have been accepted by the Revenue that there was no need to appoint such additional sheriffs in Dublin or Cork, presumably an indication that they considered that the sheriff system was operating more efficiently than enforcement by County Registrars.

19. The Commission is, accordingly, satisfied that the case has been established for ending the responsibility of County Registrars in this area. There remains the question as to whether the officers responsible for the day to day enforcement of judgments should be salaried officials of the State or private agents, such as the sheriffs in Dublin and Cork and the tax sheriffs appointed in recent years. Apart from the fact that the recruitment of the number of additional officers required to carry out the functions now being discharged by County Registrars on a full-time salaried basis would be for the foreseeable future a wholly impractical change to recommend, experience of the present system indicates that the enforcement of money judgments on a commission basis is more effective.

20. The Commission has given consideration to the suggestion that there should be a central state agency with responsibility for the enforcement of judgments to which sheriffs would be answerable. Such a system could probably be established on a self financing basis if, in addition to the sheriff's commission, a further levy was payable by the judgment debtor. The Commission is satisfied, however, that any benefits that might result from such overall supervision of the enforcement system would be heavily outweighed by its disadvantages. There is a real danger that the establishment of such an agency would merely increase the delay and expense encountered at present, with the possibility of additional searches having to be made in the relevant office when the sale of a property was being contemplated. While such a system has been in operation for some years in Northern Ireland, the Commission understands that, even allowing for the disturbed and abnormal conditions that have prevailed in that jurisdiction for the past two decades, the efficiency of the debt collection process has not noticeably improved as a result.

21. The representatives of the Revenue on the Working Group established by the Commission dissented strongly from the view taken by the other members on this matter. They did not wish to see the success of the present tax sheriff system of collection compromised in any way and they feared this would be the consequence of appointing sheriffs (whether the existing tax sheriffs or others) to be responsible for the enforcement of all money judgments and s. 485 certificates obtained or issued by the Revenue Commissioners or private citizens.

While the Commission appreciates the Revenue's concerns in this area, it is satisfied that they do not provide sufficient justification for retaining the present indefensibly anomalous system under which sheriffs alone operate in Dublin and Cork while in the rest of the country tax sheriffs and County Registrars operate independent systems of enforcement in the same counties. The latter system is rightly seen by the private citizen as unfairly discriminatory: tax warrants are enforced with relative speed and efficiency by a special sheriff while the ordinary creditor has to wait for his execution order to receive the attention of a busy County Registrar with other functions to discharge. Moreover the fact that two different systems of enforcement can be at work simultaneously in the same county is almost bound to give rise to problems as to the respective priority of tax warrants and execution orders issued in respect of the same debtor.

In any event we are satisfied that the apprehensions of the Revenue as to the effect this might have on the present campaign to reduce the huge volume of arrears are probably largely unfounded. If the proposal to extend the sheriff system now operating in Dublin and Cork to the rest of the country is implemented, the volume of tax warrants given to the sheriffs for execution will still greatly outnumber the execution orders in respect of private debts. In the result there is no reason why the volume of arrears currently being collected by the Revenue as a result of the tax sheriff system should be significantly affected. It would also seem reasonable to expect that with the passage of time, the volume of arrears being collected by the Revenue as a result of the present campaign will tend to level off and the Commission's proposals are intended to deal with the collection of debts on a long term basis.

22 The Commission has accordingly concluded that the case for ending the present responsibilities of the County Registrars in the enforcement of judgments and extending the present system of sheriffs in Dublin and Cork to the rest of the country has been overwhelmingly established. This can be done by the Minister for Justice and the Government exercising the relevant powers vested in them under section 12(2) and (3) of the *Court Officers Act 1945*. There is of course no reason why the County Registrars should not continue to discharge their existing functions as returning officers save in Dublin and Cork where, as already noted, those functions are exercised by the sheriffs.

The Commission recognises that proposals of this nature which do not require new legislation might more properly be regarded as administrative matters than matters of law reform. However as it has had occasion to point out before, it is inevitable that a law reform body should attempt in assessing criticisms of the legal system to disentangle those which derive from defects in the law and those which have other causes and to point out ways in which all such defects can be remedied.

23 It should finally be pointed out that while the discussion has concentrated on the enforcement of money judgments which are the concern of this Report, the present powers of the County Registrars and the sheriffs in Dublin and Cork also extend to the execution of other

forms of judgments, principally judgments for the recovery of land or specific chattels. Our proposals would envisage that these functions also would be transferred from the County Registrars to sheriffs.

24 The Commission, accordingly, recommends that

- (1) *The Minister for Justice should avail of his powers under section 12(2) of the Court Officers Act 1945 to declare that the powers and duties of County Registrars in relation to the enforcement of judgments in civil proceedings in any court should cease to be imposed on or be vested in such County Registrars and should, for this purpose, seek the consent of the Minister for Finance.*
- (2) *The Government should appoint persons to be sheriffs of each of the counties and county boroughs in the State other than the county boroughs of Dublin and Cork and the counties of Dublin and Cork.*

Sewell on *The Law of Sheriffs* (1842) pp. 3-4.

Fifth Report *Tax Administration* para. 15.38.

For a further discussion of the deficiencies in the system see paras 15.28-37 of the Report.

¹ See the remarks of Senator M. J. Ryan in the debate in the Seanad on the Court Officers Act 1945 (Seanad Debates, Vol. 30, cols. 232-3).

Ibid. col. 243.

CHAPTER 4 THE EXECUTION ORDER

25 The *fi fa* order requires the sheriff to “have that money and interest before the High Court immediately after the execution hereof to be paid to the [judgment creditor] in pursuance of the said judgment” and to make a return to the High Court as to the manner in which the order has been executed. A judgment creditor who does not wish to wait for costs to be determined by the Taxing Master may obtain a separate order of *fi fa* for costs. Interest on costs runs from the date of the Taxing Master’s certificate. Before an order is issued, the judgment creditor or his solicitor must file a *praecipe* in the Central Office containing the title of the cause or matter, the reference to the record, the date of judgment and of the order, if any, directing the execution to be issued, and the names of the parties against whom or of the firm against whose goods the execution is to be issued.¹ He must produce in the Central Office a copy of the judgment or order and a certificate signed by his solicitor or himself containing such sum as he demands to be due to him after all just and equitable deductions. This sum is then entered in the body of the *fi fa* order as the sum to be levied on foot of the sum adjudged to be payable by the judgment or order.

26 In the Circuit Court the equivalent of the *fi fa* order is an execution order against goods which issues out of the Circuit Court Office at the request of the plaintiff or his solicitor.² In the District Court the decree recording the Justice’s decision and order in the case also contains a command to all County Registrars to take in execution the goods of the defendant to satisfy the debt, costs and witnesses’ expenses. It has been provided by statute that such execution orders of these courts of limited jurisdiction must be executed

in the like manner and with the like powers, rights and authorities, and subject to the like duties and obligations as similar writs of execution of the High Court have heretofore been executed by the under sheriff.³

27. The Commission is satisfied that the procedure for obtaining *fi fas* in the High Court can be made simpler and cheaper. In the High Court, it is still necessary for the solicitor for the judgment creditor to file a certificate as to the description of the parties and their places of residence.⁹ As already noted, a *precipe* must also be filed setting out various matters.¹⁰ No difficulty seems to have arisen from the absence of such requirements in the other courts. The Commission recommends that the relevant statutory provision be repealed and the Rules of the Superior Courts be amended so as to provide for the obtaining of a *fi fa* order in the same manner as an execution order against goods is obtained in the Circuit Court.

Return by the Sheriff

28. The sheriff is required to make his *return*, i.e. his account of the goods, if any, he has seized in execution, to the court, not to the judgment creditor. Where he has not found any goods of the debtor available for seizure, he makes a return of "no goods" or, in the traditional Latin phrase, "*nulla bona*". The judgment creditor has no right to information on the results of the execution, although he may ask the court to get a return from the sheriff. While there is a practice of making payments direct to the judgment creditor and of handing the order with the result endorsed on it to him for filing in court, it would seem that this practice is irregular. The lack of information available to judgment creditors as to the progress of executions is a legitimate source of complaint. It is recommended that there should be an express obligation on the sheriff to report to both the court and the judgment creditor within a prescribed time on the progress of the execution.

Time Limit on Issue of Order of Fieri Facias

29. The Rules of the Superior Courts provide that, as between the original parties to a judgment or order, an order of *fi fa* may issue at any time within six years from the judgment or order on which it is based.¹¹ Where six years have elapsed since the judgment or order, the leave of the court must be obtained. (It must also be obtained even within the six year period in certain other circumstances, e.g. where one of the parties has died.)¹² While the Statute of Limitations 1957 provides for a limitation period of twelve years for suing upon a judgment, it is not thought that the requirement that a *fi fa* be not issued without leave after six years is giving rise to any difficulties in practice. Accordingly, no change is recommended.

Duration of Execution Orders

30. An order of *fi fa* remains in force for one year from its issue.¹³ It may, however, be renewed at any time before its expiration upon application being made to the Master of the High Court.¹⁴ An order so renewed has effect and is entitled to priority according to the time of the original delivery of the order to the sheriff. Apparently good cause must be shown before an order is renewed and other judgment creditors whose priority may be affected must be heard and their interests

considered. An execution order in the Circuit Court similarly remains in force for one year¹⁵. A District Court decree, however, remains in force for six years¹⁶. It would seem preferable that there should be uniformity in this area and the Commission recommend that *fi fas* execution orders and District Court decrees should remain in force for six years and that this period should be capable of being extended for a further six years.

Territorial Scope of Execution Orders

31 Where a judgment debtor has goods in more than one country it may be necessary for the judgment creditor to serve execution orders on several sheriffs. As the general rule is that a sheriff must give priority to the order first delivered to him, it is not in the interests of a judgment creditor to await the results of an execution in one county before suing out an order to the sheriff in another. Under the Rules of Court, where an order of *fieri facias* has been sent out directed to the sheriff of one county, the person entitled to issue execution may sue out another order of *fieri facias* directed to the sheriff of a different county without requiring or waiting for a return to the first order and notwithstanding any seizure or partial levy under the first order¹. However, it is expressly provided that no more than the whole of the money and costs due to the persons suing out the orders shall be levied thereunder^{1a}. The sheriff of one county could find himself liable for an excessive execution on account of the proceeds of an execution in another¹.

32 In England the Rules of Court now require that where a party issues two or more writs of *fieri facias* directed to the sheriffs of different counties to enforce the same judgment or order, he must inform each sheriff of the issue of the other writ or writs. The Commission considers that a similar co-ordination should be effected here which should serve to prevent excessive executions. It accordingly recommends that *the rules of the various courts be amended so as to provide that where a party issues two or more execution orders directed to the sheriffs of different counties to enforce the same judgment or order, he must inform each sheriff of the issue of the other execution orders*.

¹ RSC, Appendix F, Part 2, No. 1

² RSC, Order 42, Rule 18

³ *West v. West* 17 L.R. (Ir) 449

⁴ RSC, Order 42, Rule 11

⁵ *Ibid.* Rule 10

⁶ Rules of the Circuit Court, Order 33, Rule 1, Schedule of Forms, Form 21

⁷ District Court Rules, Rule 136, Form 3

⁸ Enforcement of Court Orders Act 1926, Section 3(2). An exception made for cases which before 6th December 1922 had been within the jurisdiction of petty sessions of the Dublin Police Court is not of any practical significance

⁹ George IV, c. 35, s. 8

¹⁰ See para 1 above

¹¹ RSC, Order 42, Rule 23

¹² *Ibid.* Rule 24

¹³ RSC, Order 42, Rule 20

¹⁴ RSC, Order 63, Rule 1(32)

¹⁵ Rules of the Circuit Court, Order 33, Rule 12

¹⁶ District Court Rules, Rule 140

¹⁷ RSC, Order 42, Rule 34. A District Court decree includes a command to 'all County Registrars'.

¹⁸ *Ibid.*

¹⁹ See *Lee v. Danger* [1892] 1 Q.B. 231, 2 Q.B. 337, 343, also *Moore v. Lambeth County Court Registrar* [1970] 1 All E.R. 980 where it was held that such an action lay where the execution was obviously excessive and that it was not necessary to show malice on the part of the enforcement officers.

²⁰ RSC, Order 47, Rule 2

CHAPTER 5 PRIORITY OF EXECUTION ORDERS

33 The sheriff is bound to implement execution orders against a named defendant in the order in which they are delivered to him. Thus, if (as frequently happens) a number of orders are lodged with the sheriff in respect of a particular defendant, he must execute them in the order in which he receives them. (This, of course, only applies to the priority of execution of such orders against a particular defendant *inter se*: the sheriff is entitled to organise the execution of judgments as against various defendants in the manner which seems to him most efficient.) If the judgment creditor directs the sheriff not to proceed with the execution of an order delivered to him, that order will lose its priority to an order delivered before the direction is countermanded. It has also been held that a judgment creditor cannot protect his priority by delivering to the sheriff with the execution order a letter directing him not to seize so long as no other execution order comes in.¹ The obligation to execute in order of delivery does not preclude the sheriff from carrying out one execution against a judgment debtor in respect of several execution orders, but distribution of the proceeds must accord with the priority of delivery.

34 The system of execution on a "first come first served" basis is not universal in common law jurisdictions. It has been criticised as tending to favour the pressing creditor at the expense of the creditor who affords the debtor a chance to discharge his obligations gradually. It may also be regarded as arbitrary in that the creditor who gets judgment first and is thus in a position to proceed to execution is not necessarily the creditor whose debt has first arisen. It has also been suggested that it may result in more bankruptcies or liquidations, as creditors who have lost their priority attempt to counteract the advantage gained by the judgment creditor who delivers his execution order first. In England the Payne Committee, which reported in 1969, recommended that the proceeds of enforcement should be distributed among those creditors who had applied to the proposed Enforcement

of Judgments Office to have their judgments enforced on the date when those proceeds were received in the office.³ In the event of the total of the judgment debts exceeding the proceeds, they would be distributed among the creditors *pro rata*. The New South Wales Law Reform Commission made similar proposals in 1975.⁴

In the Canadian provinces, legislation provides for sharing the proceeds of execution among judgment creditors. Historically, the reason for the enactment of provincial statutes providing for a share in the proceeds was where the federal insolvency legislation had been refused and there was consequently no legislation providing for the orderly realisation of an insolvent's assets and for the distribution of the proceeds among the creditors. However, it has survived the subsequent introduction of bankruptcy legislation. It is defended as ensuring a rateable distribution in cases where it would not be worth while for a creditor to have a judgment debtor made bankrupt or wound up.⁶ In 1983, the Ontario Law Reform Commission recommended its retention, although advocating amendments in details such as the abolition of the entitlement of non judgment creditors who share in the proceeds of enforcement. On their proposals, maintenance creditors and wage creditors who filed a writ of enforcement were to be entitled to be paid in full in priority to other creditors.

In British Columbia, on the other hand, the Law Reform Commission recommended the adoption of a "first come, first served" system.⁷ They argued that the sharing system encouraged parasitic behaviour on the part of the judgment creditors who reaped the rewards of the diligence of the judgment creditor who embarked on enforcement. They were also influenced by the more complex administrative system required by the sharing system. In their view, the answer was to create a system under which judgment creditors could find out about seizure and attachments against their debtors and be given an adequate opportunity to obtain the right to share in the proceeds or having the debtor made bankrupt.⁸

35 The Commission has carefully considered whether the "first come first served" system should be modified. This could be done, for example by providing that the proceeds of execution over and above the costs incurred should not be distributed to a judgment creditor for, say, three months after the execution order is delivered to the sheriff or until all proceedings pending against the judgment debtor on that date have been disposed of. When the distribution is made, it could then be effected in accordance with the principles governing the payment of creditors under the law relating to insolvency.

The Commission is, however, satisfied that far from rendering the present system of debt collection more efficient, such a proposal would make it even more cumbersome and unfair to creditors. It is difficult to see how it could work without the establishment of a central enforcement agency, a proposal which we have already rejected. It would penalise the efficient creditor and give an advantage to the creditors who were dilatory in collecting their arrears. It would have a particularly inimical effect on the collection of taxes since the Revenue are frequently in the position that, where they have delivered a s 485 certificate or an execution order to the sheriff, further tax has fallen

due, necessitating additional enforcement proceedings. A mandatory delay of three months would inevitably mean the accumulation of further arrears of tax in such circumstances.

It has been said that the "first come, first served" system results in a greater number of bankruptcy petitions brought by creditors who see this as their only hope of recovering any part of their debt when a number of execution orders have already been lodged. Thus, as we have already mentioned, what should be a weapon of last resort is frequently the first option availed of by creditors. We do not think, however, that this tendency, however regrettable, outweighs the other considerations which indicate that the existing system should be maintained. We also note that, in any event, recourse to the bankruptcy procedure will now be available only to creditors owed £1,500 or more under the provisions of the Bankruptcy Act 1988, in contrast to the previous procedure where a person could be bankrupted for £40 or more.

The Commission accordingly *recommends that there be no change in the present system of priority of execution orders.*

Kirwan v Jennings (1853) 3 ICLR 48

See for example, the Creditors' Relief Act 1980 (Ontario)

Report on the Enforcement of Judgment Debts and Related Matters, paras 1126-1133

Draft Proposal Relating to the Enforcement of Money Judgments

E.g., Creditors Relief Act 1980 (Ontario)

¹⁰ See Institute of Law Research and Reform, Alberta, *Remedies of Unsecured Creditors*, (May 1986), para. 6.250

¹¹ Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* Part 5 (1983), Chapter 2.

¹² Law Reform Commission of British Columbia, *Report on Creditors' Relief Legislation A New Approach* (1979)

¹³ *Ibid.*, p. 18

CHAPTER 6 THE SHERIFF'S DUTY TO EXECUTE

Execution Within a Reasonable Time

36 Once an execution order is served on the sheriff, he is bound to execute it as soon as is reasonably practicable.¹ As it was put in one Irish case where five days elapsed between service of the writ on the sheriff and seizure, so enabling bankruptcy proceedings to be instituted by another creditor

“I am of opinion that the sub-sheriff acted with due diligence in the discharge of his duty to the plaintiffs. It would be unjust, and against public policy, to hold that a public officer is bound, at his peril, to use what may be termed railway speed in the discharge of the duties of his office. It is enough if he acted with reasonable diligence and without wilful or unnecessary delay.”

However, beyond this he has no discretion to delay execution even to avoid hardship to the judgment debtor or other creditors. Consequently a sheriff who, without the consent of the judgment creditor, desists from execution on the basis of an undertaking from a judgment debtor to pay his debt by instalments may be liable to a judgment creditor who suffers loss as a result.

37 This position of the sheriff may be contrasted with that of the Enforcement of Judgments Office in Northern Ireland which has a general power to stay enforcement of judgments.² Under their legislation, the office is given specific power to stay enforcement on the ground that, having regard to the liability of the judgment debtor, his property ought to be administered for the benefit of all his creditors.³ This power which is limited in time is designed to afford other creditors an opportunity of initiating bankruptcy or winding-up proceedings.

38 In this jurisdiction the only circumstances in which execution may be delayed is where there is an actual stay upon the judgment of

the court itself. Under s. 21 of the *Enforcement of Court Orders Act 1926*, where judgment is given by any court for a money sum, the court may stay the execution for such time and upon such conditions as it thinks reasonable, provided certain conditions are met. The court must be satisfied that the debtor is unable to discharge the amount due immediately, that this is not as a result of his own conduct, act or default and that there is reasonable ground for granting him an extension of time within which to pay the amount due. A more general power is given by Order 42 Rule 17 of the Rules of the Superior Courts which provides that:

“every person to whom any sum of money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to sue out one or more order or orders of *fieri facias* to enforce payment thereof, subject nevertheless as follows:

... (II) the court may, at or after the time of giving judgment or making an order, stay execution until such time as it shall think fit.”⁵

These procedures have, however, no relevance in the many cases where judgment is entered in default of appearance or defence.

39. The Commission considers that the power of the court to grant a stay of execution should not be extended to cases of default judgments generally. Such an alteration in the law would merely make the collection of debts even more complicated and uncertain than at present.

What Goods Should be Seized by the Sheriff

40. In levying execution, the duty of the sheriff is to seize goods of the judgment debtor sufficient to satisfy the judgment of which he has or could have had, with due diligence, notice that they are in his bailiwick.⁶ However, there is little authority on what this test means in practical terms. The view generally taken is that possession is evidence of ownership and that the sheriff should seize goods in the possession of the judgment debtor unless the debtor's ownership is denied. Where goods are not in the possession of the judgment debtor, the sheriff will not seize them unless he has positive evidence that they belong to the judgment debtor. If the judgment creditor indicates that certain goods belong to the judgment debtor, he is liable to the sheriff if the latter is sued for wrongful seizure.⁷

41. Where the judgment creditor indicates that certain goods may belong to the judgment debtor, the position is more problematical. It does not appear that the sheriff has any duty to embark on an investigation to ascertain the judgment debtor's goods. Now, under the Rules of the Superior Courts, a judgment creditor may apply to have the judgment debtor or any other person:

“orally examined as to whether any or what debts are owing to the debtor, and whether the debtor has any or what other property or means of satisfying the judgment or order.”⁸

The court may also order the production of any books or documents.⁹

There are no similar facilities in proceedings before the Circuit or District Courts. In the District Court an examination may take place, but only as a preliminary to the imprisonment of a debtor for wilful default or culpable neglect to comply with an instalment order, which can be made only where evidence is adduced that the debtor has no goods which can be taken in execution under any process of the court.¹⁰

42. The investigation of the means and assets of judgment debtors before execution is in the interest of debtors as much as creditors, for it should ensure that goods are not seized at prices far below their replacement value when the debt could be satisfied out of other assets or future income. In Northern Ireland the Enforcement of Judgments Office has been given the power and responsibility of examining judgment debtors as to their means and assets as a preliminary to choosing the method by which they will enforce a judgment.¹¹ This is part of the process under which the enforcement authorities have a discretion as to how the judgments will be enforced. Recommendations that it should be the responsibility of the enforcement authority to investigate the means and assets of the judgment debtor have also been made by law reform agencies in other jurisdictions.

It is not self evident, however, that it is desirable to impose on the enforcement authorities the role of ascertaining the assets of the judgment debtor. As we have noted, there has been criticism of the delay and expense associated with the Enforcement of Judgments Office in Northern Ireland and the view has been expressed that its investigations have not led to any greater rate of recovery of debts. The Commission considers that it should be up to judgment creditors who wish to have a judgment executed to ascertain the judgment debtor's assets: there is no particular reason why they should be relieved of responsibility for this phase of litigation to enforce their judgments.

It is recommended accordingly that it remain a matter for the judgment creditor to make application to the court to conduct an examination to discover the assets of the judgment debtor. The recommendation of the Committee on Court Practice and Procedure¹² that this jurisdiction should be extended to the Circuit and District Courts and that it should be given a statutory basis should be implemented.

43. Under the present law, the sheriff has no power to hold a sale on the judgment debtor's premises without the latter's consent. We have been told that this can create problems for the sheriff when, for example, the assets include heavy equipment the removal of which is costly and time consuming. It is recommended that *it should be permissible to hold the sale on the judgment debtor's premises if the sheriff so consents or the court so directs.*

¹⁶ *Arlington Street Investments Limited v Persons Unknown* [1987] 1 All ER 474.

¹⁷ Per Lawson, J. in *Hodgson v Lynch* (1871) IR 5 CL 353, at 355.

¹⁸ Judgments Enforcement (Northern Ireland) Order 1981, Article 13(f)(1).

¹⁹ *Ibid.*, Article 14.

²⁰ See also Circuit Court Rules, Order 30, Rule 14; District Court Rules, Rule 142.

²¹ *Yourell v Proby* (1868) IR 2 CL 460.

²² *Stratten v Lawless* (1864) 14 ICLR 432.

²³ RSC, Order 42, Rule 36.

²⁴ *Ibid.*

²⁵ Enforcement of Court Orders Act, 1926, s. 15; Courts (No. 2) Act 1986.

²⁶ Judgments Enforcement (Northern Ireland) Order 1981, Articles 26, 27.

²⁷ Committee on Court Practice and Procedure, *Execution of Money Judgments, Orders and Decrees* (Prl 2700, 1972, pp. 14-15).

CHAPTER 7: CHARGES FOR EXECUTIONS

44. At common law the sheriff was not entitled to make any charge for executing the Sovereign's writs: any entitlement to payment in respect of execution orders is the result of statute. Poundage fees were first introduced by a Statute of King Charles I and are now governed by s. 14(1) of the *Enforcement of Court Orders Act, 1926*, which provides:

- “(1) The Minister for Justice may with the consent of the Minister for Finance by order appoint and from time to time revise
- (a) scales of fees and expenses to be charged by and paid to under-sheriffs for their services in or about the execution of execution orders, and
 - (b) scales of fees to be charged by and paid to specified officers of any court for the account of the under-sheriff, and
 - (c) scales of fees and expenses to be charged by and paid to members of the Garda Síochána in respect of the execution of execution orders which under this Act are to be executed by them.”

45. The judgment creditor pays a fee of 35p to the sheriff on lodgment of the execution order with him.¹ This fee may be levied on the judgment debtor and refunded to the judgment creditor. The sheriff is entitled to poundage at the rate of 5p in the pound on the first £100 and 2½p in the pound on any additional amount actually levied.²

46. A fee of 75p is payable for each court messenger and travelling expenses of 7½p per mile are payable when the place of execution is more than 5 miles from the sheriff's office.³ The actual and necessary costs of removal of goods seized to a place of safe keeping and storage costs there are also payable.⁴ Subsistence at the rate of 45p per day, if boarded, and 62½p per day, if not boarded, is payable where a man is

left in charge of goods following seizure.⁵ The expenses of storing cattle or other animals or other chattels prior to sale are also payable.⁶ A fee of 20p is payable and leviable for every letter or notice necessarily sent by a sheriff in relation to an execution order before serving it.⁷

47. If an execution order is withdrawn prior to execution (1) by the judgment creditor, (2) on the making of a winding up order against the judgment debtor, (3) on the intervention of a court having bankruptcy jurisdiction, the sheriff is entitled to be paid, by the judgment creditor, the expenses properly incurred by him.⁸ If the debt due is paid after seizure but before removal of the property, the judgment debtor is liable to pay poundage fees on the amount due on foot of the order together with the actual costs of bringing vehicles to transport the goods to the place of seizure.⁹ Where, after seizure, but before removal, the sheriff accepts an undertaking to pay the debt and execution costs by instalments or otherwise, the judgment debtor is liable for poundage fees on the amount of such payments as well as the costs of bringing vehicles for the removal.¹⁰ If after seizure the case is settled the sheriff is entitled to be paid the poundage fee on the amount involved in the settlement up to the level of the amount due under the execution order.¹¹

48. Where after seizure, the execution order is withdrawn by reason of the intervention of a court having bankruptcy jurisdiction or by reason of a winding-up order against the judgment debtor, the sheriff is entitled to poundage on the amount stated to be due for debt and costs in the execution order.¹² It appears that poundage is not payable where execution is withdrawn because a receiver is appointed but there is no winding-up order.¹³ The judgment creditor is liable for the execution expenses and poundage fees payable on a settlement, bankruptcy or winding-up.¹⁴ Where, after seizure but before sale, the sheriff is notified that a provisional liquidator has been appointed or that a winding-up order has been made or a resolution for winding-up has been passed, the sheriff is obliged to deliver the goods and any monies seized or received in part satisfaction of the execution to the liquidator but the costs of the execution are a first charge on the goods or monies so delivered.¹⁵ The liquidator is entitled to sell the goods or a sufficient part of them for the purpose of satisfying that charge.¹⁶ Section 50(5) of the *Bankruptcy Act 1988* extends this provision to bankruptcy. If the goods have been seized and sold, prior to the receipt by the sheriff of the notice of appointment of a liquidator, etc. the sheriff is entitled to deduct the costs of execution from the proceeds of sale which must be paid over to the liquidator.¹⁷ Similar provisions are contained in s. 50 of the *Bankruptcy Act 1988*. It has been held in Ireland that where a sheriff has been unable to seize any goods and makes a return of *nulla bona* where there is a winding-up or bankruptcy, he is unable to recover bailiffs' and messengers' fees.¹⁸

49. Under s. 485 of the *Income Tax 1967*, a sheriff is authorised to levy execution on foot of a certificate issued by the Collector General of Revenue that income tax is owed by a tax payer. Similarly the Land Commission and the Agricultural Credit Corporation have statutory powers under which they can authorise a sheriff to levy execution for

monies due to them without any court judgment. In these cases a sheriff is entitled to levy his expenses and poundage.¹⁹

It is clear that the 35p fee on lodging an order, the 75p and 7½p per mile figures and the *per diem* charges of 45p and 62½p have been rendered completely inadequate by inflation. It has been represented to the Commission that a larger lodgment fee would finance an investigation by the sheriff into the judgment debtor's assets and encourage effective executions.

It has also been represented to the Commission that a larger lodgment fee would enable the sheriff to make arrangements to furnish reports to the judgment creditor on the status of the execution. *It is recommended that the fees payable on lodgment of a court order and the per mile and per diem sums referred to should be increased to levels reflecting current money values and should be indexed to increases in the cost of living.*

50. It was suggested by the Revenue Commissioners that poundage should be paid by a debtor even if no seizure was made by the sheriff. Apparently it was the practice for sheriffs to include poundage in demands issued by them on foot of s. 485 certificates or court orders although no poundage was payable unless a seizure was made. Poundage was very often paid in response to such demands when the debt was paid without a seizure being made. It was a cause of some surprise to us to learn that sheriffs were requesting payments which were not due to them in law. We considered, however, that there might be something to be said for increasing the liability of a debtor once the creditor had to incur the trouble and expense of sending an enforcement order to the sheriff. But if a debtor was made liable to pay poundage even when he paid up before seizure, there would seem to be less incentive to pay up before seizure. The result might be more seizures rather than less.

51. The view of the Revenue on this matter has now, however, been accepted by the Oireachtas. Section 71 of the *Finance Act 1988* provides that where a s. 485 certificate or execution order in respect of unpaid tax or interest on unpaid tax is lodged with the sheriff, an appropriate notice given to the defaulter and the whole or part of the relevant demand paid to the sheriff or the Collector-General after the notice is given, the sheriff is to be entitled to be paid poundage and other fees as if there had been a seizure. For the reason we have already mentioned, we are not persuaded that this is a desirable change. We accordingly do not recommend that it be extended to the execution of all money judgments. We do, however, recommend that *in the case of money judgments other than for unpaid tax the judgment debtor should be liable to pay the judgment creditor the amount of any costs of enforcement (including the increased lodgment fees which we are proposing) incurred up to the time of payment.*

52. *It is recommended that the provisions on the remuneration of sheriffs should be re-stated as they are difficult to ascertain as a result of the multitude of amendments made since 1926.* It is not considered that differences of rules and scales as between different courts are

justified. *It is recommended that the same rules governing charges by the sheriff should obtain for all debts which are enforced.* It may be questioned whether the solicitor for the judgment creditor should be personally liable to the sheriff for his fees. He is not liable in England.²⁰ *It is recommended that he be not so liable.* It may also be questioned whether in cases where the execution order is withdrawn by reason of bankruptcy or a winding-up order the sheriff should be entitled to poundage on the debt due irrespective of the value of the goods seized. In England, as under Irish law before 1926, no poundage is payable in these circumstances. *It is recommended that where goods seized in execution have to be handed over to the Official Assignee or liquidator, poundage should be calculated on the value of the goods realised in the bankruptcy or winding-up.*

It might also be considered logical to allow poundage where an execution is aborted by the appointment of a receiver, even when there is no winding-up. But in the absence of a winding-up it would not be possible to assess the value of the goods seized for the purposes of poundage. Having regard to this it is not considered that poundage should be payable to the sheriff when an execution is aborted by the appointment of a receiver over goods which have been seized by the sheriff except in cases where a winding-up order is made.

53. The present rules make the judgment debtor liable for poundage fees and certain other charges where he pays the debt due or gives an undertaking to pay by instalments between the time when the sheriff enters into possession and the time when the goods are removed. This leaves a lacuna in the situation where the debt is paid or instalment payments promised after removal but before sale. *It is recommended that poundage fees should be payable by the judgment debtor if he discharges the debt at any time after the sheriff has entered into possession of goods but before their sale.*

- ¹ Under-Sheriff's Fees Order, 1926 First Schedule 1. Smaller fees are prescribed in the Second and Third Schedules for awards under £15 in the Circuit Court and District Court.
- ² Under-Sheriff's Fees Order, 1926, Third Schedule 2, Under-Sheriff's Fees Order, 1931 Sections 1-3.
- ³ Under-Sheriff's Fees Order, 1926, First Schedule 5, Second Schedule 5, Under-Sheriff's Fees (No. 2) Order 1934, Section 4. Sheriff's Fees Order, 1958 Section 8(b) 10-11.
- ⁴ Under-Sheriff's Fees Order, 1926 First Schedule 6, Second Schedule 6 Third Schedule 4.
- ⁵ *Ibid* First Schedule 8, Second Schedule 8, Third Schedule 6.
- ⁶ *Ibid* First Schedule 9, Second Schedule 9, Third Schedule 7.
- ⁷ Under-Sheriff's Fees Order, 1934, Section 4. Sheriff's Fees Order, 1958 Section 9.
- ⁸ Under-Sheriff's Fees Order, 1931 Section 2. See *Farrell v Lynch* [1897] 21 R 455. *Kirk v Purchase* (1893) 32 L.R. (Ir) 359 at p. 366.
- ⁹ Sheriff's Fees Order, 1958 Section 4.
- ¹⁰ *Ibid* Section 5.
- ¹¹ Under-Sheriff's Fees Order, 1931, Section 2.
- ¹² *Ibid*.
- ¹³ *Re Thomas* [1899] 1 Q.B. 4.
- ¹⁴ 34 I.L.T.R. 19.
- ¹⁵ *Companies Act 1963* s.292(1).
- ¹⁶ *Ibid*.
- ¹⁷ *Companies Act 1963* s.292(2).
- ¹⁸ *Ryan v Richardson* 25 I.L.T.R. 24. *Wren v Stokes* [1897] 1 I.R. 451.
- ¹⁹ *Land Act 1933* s.28(1). *Land Act 1936* s.17. *Agricultural Credit Act 1978* s.28(3). See *Halpin v Attorney General* [1936] I.R. 226.
- Royce v Busby* (1880) 3 Q.B.D. 171.

CHAPTER 8 PROPERTY LIABLE TO SEIZURE

Freeholds and Leaseholds

54 At common law under a writ of *fi fa* property could not be seized unless it was such as would go on the owner's death to his executor and not his heir and unless the judgment debtor had a saleable interest in it in his own right. The requirement that it should descend to the executor excluded freehold interests in land (and fixtures appurtenant thereto) but not leaseholds or chattels. The rules as to the devolution of freehold and leasehold property on the death of the owner were assimilated by the *Administration of Estates Act 1959* and the *Succession Act 1965* and the distinction is now of practical significance only in conveyancing terms. There has, however, been no reported decision in Ireland as to whether the sheriff's power to seize land is still confined to leaseholds.

55 The sheriff's power to seize land is accordingly confined to unincumbered land (since where the land is mortgaged the mortgagor ceases to be the legal owner) and possibly leasehold land. There are further limiting factors which render the seizure by sheriffs of land comparatively rare. The seizure by the sheriff does not vest the legal ownership in him. While he can sell the land, he can only sell whatever title the judgment debtor has, and in the case of unregistered land he has no means of ascertaining this. Nor is he entitled to possession of the land and consequently cannot assure a purchaser from him of vacant possession.

56 Because the undoubted power to sell unincumbered leaseholds is rarely exercised by sheriffs, it has been argued that there is no necessity to clarify the law by providing that for the avoidance of doubt it should be regarded as extending to freeholds. Instead, it is suggested that the power to seize leaseholds should itself be abolished. In support of this view, it is said that the advantage to creditors of the infrequent

occasions when the power is exercised are more than outweighed by the unnecessary inconvenience to purchasers of leaseholds who must now search in the sheriff's office for lodgment of an execution order.³ The Anderson Report in Northern Ireland also stated other objections to the seizure of leaseholds under an execution order:

"First, the legal estate continues in the judgment debtor until the sale thereof and therefore the title of a *bona fide* purchaser without notice of the writ before the sale by the under-sheriff could not be impugned. Furthermore, if there is a clause in the lease voiding it on its being taken in execution (and this is a fairly common provision) it cannot be sold under a writ of *fieri facias*...⁴"

57. The office of the sheriff is essentially a vehicle for ensuring the orderly seizure of the judgment debtor's *movable* property for the benefit of the judgment creditor. Seizure by the sheriff is not an effective means of enforcing a money judgment against land and we understand is only rarely invoked in the case of leaseholds. If it be the case, it is undoubtedly anomalous that it is confined to the seizure of leaseholds as distinct from freeholds. The Commission considers that there is much to be said for abolishing the power to seize leaseholds, leaving judgment creditors to the more appropriate remedy of a judgment mortgage. It proposes, however, to defer further consideration of the matter until it has had an opportunity of examining what reforms might usefully be introduced in the judgment mortgage procedure. A short additional Report will be issued later.

Money

58. Since at common law nothing could be taken in execution which could not be sold, the sheriff had no power to seize money. However, by virtue of the *Common Law Procedure Act (Ireland) 1853*, s.131, the sheriff may seize money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the judgment debtor, pay the money or bank notes to the judgment creditor and sue for the amount secured by the cheques, bills of exchange or securities as soon as they become due. The sheriff is not bound to sue on the security, however, unless he is indemnified against costs by the execution creditor.

No difficulties appear to have arisen in practice from the operation of this section. It has, however, been suggested to us that the powers of the sheriff under the section could be usefully strengthened by giving him express power to negotiate cheques and bills of exchange by endorsing them. It is not clear that he enjoys this power under the section as it stands. The Commission agrees with this proposal and accordingly recommends that *section 131 should be amended so as to confer expressly on sheriffs the power to negotiate any negotiable instruments coming within the terms of the section.*

Joint Ownership

59. The requirement that the judgment debtor should have a saleable interest in property in his own right excludes most cases where the

judgment debtor is not the sole unencumbered owner. However, where a judgment debtor owns chattels as co-owner, whether as joint tenant or tenant in common, it has been held that they can be seized under a writ of *fi fa*.⁷ This was because each of the two persons who had an interest in the goods is entitled to possession and could sell them without the consent of the other. The co-owner, who was not the judgment debtor was entitled to claim his share of the proceeds of the sale of the goods in accordance with his interest in them. Similarly it has been held that goods belonging to a judgment debtor but subject to a lien for work done upon them may be seized and sold by the sheriff provided that he pays over the amount owed to the holder of the lien.⁸

Hiring and Leasing Agreements

60 Where the judgment debtor, although not the owner of the goods, had a saleable interest in them, as when they were hired for a term, and was in rightful possession of them, it was held that they could be seized by the sheriff and the interest of the judgment debtor sold.⁹ However, where a hiring agreement was made determinable by the fact of seizure it was held that there was no saleable interest for the sheriff to seize.¹⁰ It is commonplace for leases and hiring agreements to contain such clauses by which the agreement is terminated on the bankruptcy or liquidation of the lessee or hirer or if the lease or the goods hired are seized in execution of a judgment debt. The Bankruptcy Law Committee considered that such clauses gave the lessor or owner an inequitable advantage over other creditors and should be declared void as against the official assignee in whom a bankrupt's property vests for the benefit of creditors.¹¹ Their recommendation has been given effect in s 49 of the Bankruptcy Act 1988.

In the view of the Commission, the case has not been established for altering the general law on this topic in the somewhat narrow context of the law as to sheriffs. It has however been strongly represented to us by sheriffs that the law should at least be altered so far as public houses are concerned. Leases of such premises normally include a provision for forfeiture in the event of the lessee's interest being taken in execution and this, of course, will also mean the loss of the licence by the lessee. Thus, the sheriff is deprived of a valuable asset which could otherwise be sold for the benefit of the creditors. Section 2(2) of the *Conveyancing Act 1892* which enables a lessee to apply for relief against forfeiture in such circumstances does not apply to leases of public houses. Hence, the sheriff is precluded from preserving the licence in existence by paying off any arrears of rent that may be owing. The policy considerations underlying the exclusion of public houses in the 1892 Act are not relevant in Ireland¹² and the Commission, accordingly, is satisfied that the Act should be amended so as to remove this exclusion. (We are assuming, of course that, until the entire question of enforcing judgments against land is reviewed the power of the sheriff to seize leaseholds will remain but will be inhibited in the case of licensed leasehold premises by the provisions under consideration.)

It has also been pointed out to us by sheriffs that it would be in the interests of judgment creditors if a sheriff in an appropriate case,

had the option of paying up the balance outstanding under a hire purchase or leasing agreement in respect of chattels, such as motor cars, thus enabling him to obtain a clear title to the goods in question. The Commission is satisfied that such a provision would be desirable and would not be unfair to hire purchase and finance companies, since it would merely enable the sheriff to exercise rights which would have been available under the terms of the lease or hire purchase agreement to the hirer or lessee.

The Commission accordingly recommends that:

- (1) *Section 2(2) of the Conveyancing Act 1892 be amended by deleting the exception as to public houses and beer shops, thereby enabling sheriffs to obtain relief against forfeiture of licensed premises and so avoiding the loss of the licence;*
- (2) *provision be made for conferring on sheriffs the option of paying up the balance owing in respect of chattels the subject of a lease or hiring agreement and taken in execution by the sheriff, thus enabling the sheriff to obtain a clear title to the chattels in question.*

Goods in which Third Parties have an Interest

61. As a writ of *fi fa* was a form of legal execution the sheriff was not entitled to seize property in which the judgment debtor had an equitable interest only, such as an equity of redemption under a mortgage.¹¹ In the case of goods and chattels, however, the court could order the sale of the relevant property under s. 13 of the *Common Law Procedure Act (Ireland) 1853*, the machinery now being provided by Order 57, Rule 11 of the Rules of the Superior Courts as follows:

“When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court or the Supreme Court, and any claimant alleges that he is entitled under a bill of sale or otherwise to the goods or chattels by way of security for debt, the court may order the sale of the whole or a part thereof and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.”

It has also been provided by statute that specific goods subject to a chattel mortgage made pursuant to the *Agricultural Credit Act 1978* may be seized if the execution creditor has obtained the consent of the mortgagee or has paid to the sheriff or County Registrar executing the execution order the full amount of the principal money and interest and costs then owing and unpaid on the security of the chattel mortgage. That legislation also provides that a floating chattel mortgage shall not prevent or restrict a lawful seizure and sale under an execution order of any stock comprised therein or affected thereby.

62. The rights of third parties should not be prejudiced because the judgment debtor has failed to discharge his debt to a judgment creditor. On this basis the sheriff should be entitled to seize and sell goods where the judgment debtor has a right to possession and a right to sell either

the goods or his interest in them. Similarly, where the judgment debtor can acquire a right of sale by the payment of money the sheriff should be entitled to seize and sell them upon the requisite payment being made. It is considered that the existing law (reproduced in the Judgments Enforcement (Northern Ireland) Order 1981) that goods may be seized if "the judgment debtor has a saleable interest in them in his own right" requires clarification. *It is recommended that provision be made that goods may be seized and the interest of the judgment debtor in them sold if he has a right to possession and a right to transfer his interest in them. It should also be provided that where the judgment debtor has a right to the possession of the goods and will be entitled to sell those goods or an interest therein upon making a payment to a third party, then, if the judgment creditor pays that amount to the sheriff, the sheriff should be entitled to seize those goods under an execution order.*

63. It has been emphasised to us by sheriffs — particularly those concerned with the greater Dublin area — that the greatest single problem confronting them in executions today is the prevalence of "retention of title" clauses. Briefly stated, retention of title clauses provide that the ownership of goods remains in the seller until payment has been made.^{1,2} Their frequent use in modern business conditions means that, when a sheriff effects a seizure, he will often find that the only saleable assets of the debtor consist of goods which are immediately claimed by his suppliers as belonging to them because they have not been paid for. The Commission appreciates the anxieties of sheriffs in this regard and, while it would be inappropriate to deal with the difficult legal problems arising from such clauses which have provoked much litigation in recent years in the relatively limited context of sheriff law, it has already decided to undertake an immediate examination of the problem. It will accordingly be making a further Report to the Attorney General on this topic in the relatively near future.

Goods Belonging to the Family of the Judgment Debtor

64. The seizure of goods on the premises of a judgment debtor may be inhibited by claims (spurious or otherwise) that they belong to other members of the judgment debtor's family. To deal with this difficulty, s. 13 of the *Enforcement of Court Orders Act 1926* was enacted. It provides that no action is to lie against the sheriff for seizing any goods, animals or other chattels found in the house of which the debtor is the occupier, either alone or jointly with another, which are claimed or alleged to be the property of any parent or child of the debtor residing with the debtor, whether or not the claim or allegation proves to have been well founded. The section provides that the person to whom the goods seized belonged shall, if they prove not to be property of the debtor, be entitled to recover their value and any other damage they have sustained from the debtor. The section does not make it obligatory for the sheriff to seize any such goods as are mentioned in the section.

65 It has been suggested that to allow the seizure of one person's goods in execution of the judgment debt of another in circumstances where there is no dispute as to the facts of ownership is unjustifiable in principle and may indeed be inconsistent with the Constitution. It is pointed out that the remedy given to the person whose property is seized against the judgment debtor is of doubtful value. The judgment debtor may not be a mark. Even if he is, monetary compensation may not make up for the loss of some goods.

The view of some sheriffs is that any repeal or substantial amendment of the provision would be a retrograde step since it is found to be very useful in practice. Some indeed would favour the extension of the protection given to the sheriff by this section to other analogous circumstances e.g. where a number of different companies are trading on one premises and all the companies appear to have the same officers and directors. Similarly, the sheriff may be faced with a claim that some of the goods on the premises are the property of a company and some of a sole trader who appears in fact to be the owner of the company.

66 The Commission is satisfied that s. 13 affords a valuable protection to the sheriff and that executions would be unduly hindered by its repeal. However, at the time of writing, the constitutionality of the section has been challenged in proceedings by way of judicial review in the High Court. Accordingly, the Commission thinks it more appropriate to defer any recommendation in this area until such time as the question of the constitutionality of s. 13 has been definitively resolved.

Insurance Policies

67 In this jurisdiction, a policy of insurance on the debtor's life is not seizable.¹³ This is the result of some nineteenth century decisions of the Irish courts which on this point differed from decisions in England.¹⁴ In Northern Ireland, the Anderson Committee recommended that a whole life or endowment policy on the debtor's own life and in which the debtor alone has a beneficial interest should be capable of seizure. They limited their recommendations to policies to a value of £100 or more in order to exempt small industrial policies. These recommendations were implemented and the relevant law is now contained in the Judgments (Enforcement) (Northern Ireland) Order 1981. Article 39(3) of which provides:

Where any life policy has been seized under an order of seizure the office may surrender the policy to the assurer and thereupon the assurer shall notwithstanding anything contained in the policy pay to the office such monies as would have been payable to the assured if he had surrendered the policy to the assurer and the receipt of the office in respect of any moneys so paid should be as effective as is given to the assurer by the assured.

This would seem to be preferable to the present practice under which it is necessary to make an application for the appointment of a receiver

by way of equitable execution. Accordingly, it is recommended that a life policy in which a judgment debtor has a sole beneficial interest should be capable of being seized under an execution order and the assurer should then, upon a request, be required to pay the proceeds over to the sheriff for the benefit of the judgment creditor.

Dixon and Gilliland *Law of Sheriffs* p 41

Hence on a sale by a sheriff no warranties as to title are implied. *Griffith v Caddell* IR 9 CL 492

A seizure by a sheriff takes priority over a subsequent assignment even if the latter is registered first. *O'Connor v Stevens* 13 ICLR 631

⁴Para 87

Farrar v Beswick (1836) 1 M & W 682. *Mayhew v Herrick* (1849) 7 CB 229

Duncan v Garrett (1824) 1 C & P 169. *Proctor v Nicholson* (1835) 7 C & P 67

Leggs v Evans 6 M & W 36 at p 42

Jelks v Hayward (1905) 2 KB 460

Report of the Committee on Bankruptcy Law and Procedure Para 13.3.1

It is one of a number of exclusions all of which appear to be cases in which it is arguable that the personal qualities of the tenant are of particular importance in relation to the property let. (Law Commission *Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies* (Law Com No 142) para 548.) In the case of licensed premises this presumably relates to the English 'tied houses' custom where the tenant is effectively a manager on behalf of a brewery. This has never been common in Ireland. The removal of the corresponding exclusions has been recommended in England as part of a general reform of the law of landlord and tenant (*Ibid* para 552.)

Scarlett v Hanson (1884) 12 QBD 213

Cf Keane *Company Law in the Republic of Ireland* pp 170-175. *Ussher Company Law in Ireland* pp 458-63

Allvine v Davey 5 Ir Ch 53. *Re Sargent's Policy* 7 LR (Ir) 66

Stokoe v Cowan 29 Beav 637

CHAPTER 9 EXEMPTIONS FROM SEIZURE

68 In order that the judgment debtor should not be deprived of the means of earning his livelihood and of the minimum necessities of life, the law provides that chattels to a certain value should be exempt from seizure. The relevant provision is section 7 of the *Enforcement of Court Orders Act 1926*

“The necessary wearing apparel and bedding of a person against whom an execution shall be levied and the necessary wearing apparel and bedding of his family and the tools and implements of his trade, not exceeding in the whole the value of £15 shall be exempt from liability to seizure ”

Clearly, a minimum monetary figure of exempt goods which was appropriate in 1926 is unlikely to be appropriate today. The Bankruptcy Law Committee considered the problem in the context of exempting certain goods from vesting in the assignee upon the bankruptcy of a debtor. Reporting in 1972, it recommended a monetary limit of £100. However, the Bankruptcy Act 1988 is more generous, providing that

A bankrupt shall be entitled to retain, as excepted articles, such articles of clothing, household furniture, bedding, tools or equipment of his trade or occupation or other like necessities for himself, his wife, children and dependant relatives residing with him as he may select, not exceeding in value £2,500 or such further amount as the court on an application by the bankrupt may allow.”¹

It is obviously desirable that the figure of £15 should be increased so as to reflect present day money values. The Commission considers however that different considerations should apply in determining the level of the exemption in the case of an execution from those which would apply in the case of bankruptcy. The effect of an adjudication in bankruptcy is far more sweeping than that of the lodging of an

execution order with the sheriff. In the former case, all the assets of the bankrupt vest automatically in the official assignee. However, while the ceiling fixed by the 1988 Act is not, in the view of the Commission, appropriate in the case of an execution by the sheriff, the wording of the relevant section is in other respects preferable to s. 7 of the 1926 Act, since it extends to "necessaries" generally and is not simply confined to "wearing apparel and bedding" and "the tools and implements of his trade". *Accordingly, it is recommended that s. 6 of the Enforcement of Court Orders Act 1926 should be repealed and a provision enacted along the lines of s. 45 of the Bankruptcy Act 1988 to the effect that there shall be excepted from seizure under an execution order such articles of clothing, household furniture, bedding, tools or equipment of his trade or occupation or other like necessities for the judgment debtor, his spouse, children and dependant relatives residing with him as he may select not exceeding in value £500.*

¹ S. 45(1).

CHAPTER 10: PRIORITY OF TAXES AND RENTS

Revenue Debts

69. The right of the sheriff to seize goods in execution of a judgment is subject to certain priorities of the Revenue in respect of income tax. The relevant provision is s. 482 of the *Income Tax Act 1967*:

“No goods or chattels whatever, belonging to any person at the time any tax becomes in arrear, shall be liable to be taken by virtue of any execution or other process, warrant or authority whatever, or by virtue of any assignment on any account or pretence whatever, except at the suit of the landlord for rent, unless the person at whose suit the execution or seizure is made, or to whom the assignment was made, pays or causes to be paid to the collector before the sale or removal of the goods and chattels all arrears of tax which are due at the time of seizure or which are payable for the year in which seizure is made.”

It would appear that this section is rarely operated in practice. This is not surprising, since there is no machinery in the section for ensuring on the one hand that the judgment creditor or sheriff is aware of the claims of the Revenue or on the other that the Revenue are aware that goods of a tax defaulter have been seized in execution. The provision has also been criticised as affording unnecessary protection to the Revenue; unlike the preference given to Revenue debts in bankruptcy and winding-up, the amount is not limited to one year's arrears. Moreover, the section affords to the Revenue an advantage denied to other preferential creditors, such as employees whose wages or salaries have not been paid. Its repeal is, however, resisted by the Revenue on the ground that they are in an essentially different position from other creditors, in that they are typically involuntary creditors, who do not wish to go on extending credit but who have no means of ending the debtor's line of credit by cutting off supplies.

70. Whether s. 482 should be repealed or amended cannot be considered in isolation from the more general question as to whether revenue debts should enjoy any preferential status in bankruptcy or liquidations. Since its repeal or amendment would appear to be a matter of small practical significance, the Commission accordingly considers it more desirable that any changes should be considered in the general context of insolvency law. *Accordingly, it makes no recommendation in this area.*

71. It is also the case, of course, that the revenue have available to them methods of collecting tax which are not available to the private citizen. The fact that a s. 485 certificate can be given to the sheriff for execution without any necessity for court proceedings means that, unlike the private citizen, the revenue does not have to endure the delay and expense involved in court proceedings. We think, however, that it would be generally agreed that there is a special public interest in the efficient collection of tax which justifies the existence of such a system.¹ It is, of course, essential that there should be built into the system a proper degree of protection for the tax payer at every stage which will ensure that he is given proper notice of his tax liabilities and of any appellate procedures open to him. These safeguards exist in the present system and we are not aware of any widely held view that they are inadequate, although there will inevitably be occasions on which they will fail to operate. It should, of course, be remembered that the High Court has, in any event, a general supervisory jurisdiction over the activities of bodies such as the Revenue Commissioners which can be invoked, where appropriate, under the judicial review procedure.

Priority of Rent Owed

72. The right of the sheriff to seize goods in execution of a judgment is subject to certain rights in respect of payment of rent enjoyed by landlords. Thus, under the *Distress Rent Act (Ireland) 1710*, no goods or chattels lying or being on lands held under any tenancy may be taken in execution unless the judgment creditor pays to the landlord any arrears of rent (not exceeding one year) which may then be due. Under the *Landlord and Tenant Act 1851*, s. 2, growing crops of the tenant of any farm or land which has been seized and sold by the sheriff shall, so long as they remain on the farm or lands, be liable to the rent which may accrue or become due to the landlord after any such seizure and sale.

73. These provisions were repealed in Northern Ireland in 1969 following the recommendation to that effect of the Anderson Committee. In contrast, the Ontario Law Reform Commission considered such provisions justifiable, but they were influenced in that context by the fact that landlords are given a measure of priority for arrears of rent where tenants have become bankrupt.² That is also the case in this jurisdiction under s. 321 of the *Irish Bankruptcy and Insolvent Act 1857*, which entitled the landlord to distrain on the bankrupt's goods in respect of six months rent due before the filing of

the petition. However, the Bankruptcy Law Reform Committee considered this an anomalous survival from the "high water mark of the landlord's protection in Ireland" and recommended its discontinuance.¹ The Commission understands that it is, in any event, rarely employed in practice.

74. The Bankruptcy Act 1988 gives effect in part to the last mentioned recommendation by repealing the 1857 Act and not including a landlord among the preferential creditors. It also provides, however, in line with English legislation that in cases where a landlord distrains within three months before the order of adjudication of bankruptcy, he is to pay out of the proceeds preferential debts such as rates, taxes and wages, but takes over the same rights of priority as the creditor to whom the money is paid. Again, this issue must be considered in relation to the law of insolvency generally and, accordingly, *the Commission makes no recommendation in this area.*

¹ It should be noted that the Revenue is not the only state agency which enjoys special powers of this nature. The Land Commission and the Agricultural Credit Corporation are also empowered to collect sums due to them by the use of similar machinery: see Chapter 7, para. 49 above.

² Volume 2, pp. 58-61.

³ *Report of the Committee on Reform of Bankruptcy Law and Procedure*, p. 352.

CHAPTER 11 "WALKING POSSESSION" ARRANGEMENTS

The Present Law

75 Doubts exist as to the legal position in cases where the sheriff, having seized goods belonging to the judgment debtor leaves them in the possession of that debtor or whoever was holding them. It is clear that if this is done without making any arrangement with the judgment debtor or other person holding the goods the sheriff will be held to have abandoned the goods and the seizure will be invalidated.¹ However where the sheriff enters into an arrangement with the judgment debtor by which the judgment debtor agrees to hold the goods for the sheriff and return them to him when required, the position is less clear. In several common law jurisdictions, the legitimacy of such "walking possession" arrangements has been upheld and the validity of the seizure is unaffected by the abandonment of possession by the sheriff in these circumstances.² In Northern Ireland to resolve doubts, a specific provision was inserted in their legislation under which an enforcement officer executing an order of seizure was empowered to defer the removal of the property upon his receiving in writing

- (a) an admission by the debtor that the property in question was in his possession, and
- (b) an undertaking by the debtor to pay the amount recoverable on foot of the judgment or a substantial part of it by a date specified in the undertaking.³

The Commission on Taxation recommended that "walking possession" arrangements should be permitted in this country

Desirability of "Walking Possession" Arrangements

76 While doubts have been expressed to us as to whether "walking possession" arrangements would be practicable in rural areas, it seems clearly desirable that they should be available to sheriffs to employ

where they consider them appropriate. When he has made his first visit to the debtor's premises and ascertained what assets appear to be available for seizure in satisfaction of the judgment debt, the sheriff may need an interval of time, however short, during which he can decide how most effectively to proceed with the collection of the debt. It is essential that during this period the property remains "frozen". Such an interval may, moreover, afford the debtor an opportunity of settling the claim.

77. In the event of the judgment debtor purporting to sell any of the property during the period of "walking possession", a problem arises as to whether the law should recognise that there has been an effective transfer of the property to a third party. If, for example, the goods seized include a large amount of stock in a retail premises, it might seem unreasonable that customers of the shop buying in good faith without notice of the seizure should find that they do not own the goods which they have bought. However, in England, it has been held that a *bona fide* transferee for value without notice does not get a good title to goods which have been seized.⁶ But the Ontario Law Reform Commission recommend that, in the interests of free commerce and unfettered business dealings, a good title should pass in such circumstances.⁷

78. The Commission considered whether some protection could be afforded to *bona fide* purchases by limited sales in "market overt". The concept of "market overt" is, however, so limited in its application that such an alteration would hardly be of any practical benefit to *bona fide* purchasers.⁸ On the other hand, to provide for a greatly extended definition of "market overt" — so as to cover, for example, all sales at retail outlets — would inevitably result in a large number of cases in which the true owner of goods (in this instance, the judgment creditor) lost his title to them in circumstances for which he was in no way responsible. While it is always difficult to balance the public interest in freedom of commerce against the right of the individual to his property, it seems to the Commission that the latter consideration is of more weight in the present context.

79. *The Commission accordingly recommends that a provision should be enacted to the effect that the sheriff shall not be deemed to have abandoned possession of the goods which he has seized if he permits them to remain in the possession of any person, including a judgment debtor, who acknowledges that the goods have been seized and agrees to hold them for the sheriff until they are demanded by him. The Commission does not consider that any special protection should be provided to bona fide purchasers for value of goods held under a "walking possession" agreement. It should also be provided that the sheriff's right to remuneration and any other relevant charges and the judgment creditor's corresponding right to recover such remuneration and charges from the judgment debtor should not be affected by any such "walking possession" agreements.*

¹ Dixon & Gilliland, p 35, citing *Bales v Arundale*, (1813) 1 M & S 77

² It should be noted that there is no provision in any of the regulations governing sheriffs charges which appears to cover such arrangements

³ *National Commercial Bank of Scotland Ltd v Arcan Demolition and Construction Ltd* [1966] 2 Q.B. 593, *Re Bishop & Traders Finance Corporation Ltd.*, [1916] 2 O.R. 343

⁴ Judgments Enforcement (Northern Ireland) Order 1981 Article 35
5th Report, *Tax Administration* para 15.56

⁵ *Lloyd & Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 Q.B. 764, at 781

⁶ *Report on the Enforcement of Judgment Debts and Related Matters* (1981) Part 2 p 118

⁷ See *Chitty on Contract* 25th ed., para 4222. In England the Law Reform Committee recommended the abolition of the market overt rule in its present form (Cmnd 2985 para 331, 1966)

CHAPTER 12 RIGHT OF ENTRY ON PREMISES

The Existing Law

80 The sheriff may enter a debtor's premises for the purpose of seizing his goods in execution and may do so forcibly. He must, however, first make reasonable efforts to enter "peaceably and without violence". He may also forcibly enter the premises of a third party where he either had reasonable grounds for believing that there were goods of the judgment debtor in such premises or he actually finds the goods there. Again, he can only do so after having first made a reasonable attempt to enter peaceably. This is provided for in s. 12 of the *Enforcement of Court Orders Act 1926*. Prior to the enactment of the legislation, the sheriff was never entitled to break into the dwelling-house of the judgment debtor, although he was free to enter without breaking or using force.¹ This privilege did not extend to other premises occupied by the judgment debtor.² Entry on to a stranger's property by the sheriff could be justified only if he actually found the judgment debtor's goods there, although even a forcible entry was justified in that event. This is still the law in England.

Criticism of the Present Law

81 The constitutionality of s. 12 of the 1926 Act may be questioned, having regard to the provisions of Article 40.5 of the Constitution which provides that

"the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

Some support for such misgivings may be found in the Bankruptcy Law Committee Report which considered that the power of a court messenger to enter a bankrupt's premises for the purpose of seizing his goods should only extend to the premises of other persons where the court granted a search warrant.³ This recommendation was made

because of the doubts entertained by the Committee as to the constitutionality of any other form of procedure.

With every respect to the Committee, it is not clear why such doubts should arise. The powers of the sheriff only arise in the first place as the result of a judicial determination and the making of the appropriate order which leads to the issuing of the execution order. It is difficult to see why a forcible entry made in such circumstances should be treated as not having been made "in accordance with law". Moreover, if, contrary to the view of the Commission, the section is constitutionally suspect, it is not clear how this would be cured by the obtaining of a further order, in the form of a search warrant.

82. Any requirement that the sheriff should obtain a warrant before entering the premises of a person other than the judgment debtor to seize the latter's goods would inevitably produce delays in some cases which would enable the goods to be removed out of the reach of the execution process. The Commission is not satisfied that the doubts which have been expressed as to the validity of these provisions (which have, of course, not been challenged during the fifty years of the Constitution's existence) are sufficiently cogent to justify our proposing such an alteration in the law.

83. It is, however, clear that a third party whose premises are entered by the sheriff under the powers conferred by s. 12 could be afforded additional protection without necessarily inhibiting efficient execution by the sheriff. It is clearly reasonable to afford a person other than the judgment debtor who is in possession of goods an opportunity to assert a claim to them. This need not preclude the sheriff from physically removing the goods from the premises. There should, however, be provision prohibiting the sheriff from selling the goods or otherwise disposing of them until a specified time has elapsed from the giving of notice in writing by the sheriff to the person affected by the seizure.

There are doubts as to whether the protection afforded by s. 12 extends to court messengers or bailiffs employed by the sheriff for the purposes of an execution. It would be desirable to amend s. 12 so as to make it clear that its provisions apply to such persons.

84. The Commission, accordingly, recommends that:

- (1) *The powers conferred by section 12 of the Enforcement of Court Orders Act 1926 should remain.*
- (2) *Provision should be made, however, that where goods are seized by the sheriff on the premises of a person other than the person against whom he has been called to enforce an execution order, such goods shall not be sold or disposed of by the sheriff until a period of 7 days has elapsed from the giving of notice in writing by the sheriff to the first named person of the seizure.*
- (3) *The sheriff should be entitled to proceed with the sale or other disposition unless within the period of 7 days mentioned in*

(2) above an affidavit is received by him from the first named person setting out his alleged entitlement to the goods and enabling the sheriff, on receiving any such affidavit, to apply to the court under the revised interpleader procedure recommended below.

- (4) *Section 12(2) of the Act should be amended so as to make it clear that the protection afforded to a sheriff by its terms extends also to servants or agents employed by the sheriff for the purpose of his office.*

Semayne's Case (1604), 5 Co. Rep. 9112; *Vaughan v McKenzie* [1969] 1 Q.B. 557.

Hodder v Wilkins [1893] 2 Q.B. 663

Morrish v Murray, (1844) 13 M. & W. 52.

¹Report, p. 90.

CHAPTER 13: CLAIMS OF THIRD PARTIES

The Interpleader Procedure

85. The process of execution by the seizure of goods is inhibited by the difficulty of ascertaining their ownership. Under the present law, the sheriff bears the risk of any error as he is liable to any third party whose rights in relation to goods are infringed by seizure under an execution order. The liability of the sheriff is absolute and it is no defence that he has no reason to suppose that they did not belong to the judgment debtor.¹ Faced with this dilemma, it is not surprising that sheriffs have protected themselves by declining to seize goods unless they have uncontrovertible evidence of the title to them. This has been particularly marked where the County Registrar is the enforcing authority as, unlike a sheriff who is rewarded on the poundage system, he has no incentive to take any risk which may expose him to liability. Some measure of relief has, however, been available to enforcing authorities confronted with conflicting claims to property since the *Interpleader Act 1846*. Where a claim is made to any goods or chattels taken or intended to be taken in execution, the sheriff or other officer may apply to the court and the court may thereupon resolve the issue.²

86. The interpleader procedure is now regulated by Order 57 of the Rules of the Superior Courts. An application may be made by the sheriff to the High Court where a claim is made to any money, goods or chattels taken or intended to be taken in execution under any process or to the proceeds or value of any such goods or chattels by any person other than the judgment debtor. The claim must be made in writing and upon receipt of it the sheriff must give notice to the judgment creditor who must indicate within four days after receiving the notice whether he admits or disputes the claim.³ If the judgment creditor does not admit the title of the claimant to the goods and chattels and the claimant does not withdraw his claim by notice in writing to the sheriff, the latter may apply for an Interpleader Order and the court

may make all such orders as may be "just and reasonable".⁴ There are provisions enabling the issue to be decided in a summary manner⁵ and, where the question is a question of law and the facts are not in dispute, the court may dispose of the matter without directing the trial of an issue.⁶ The court may also order the sale of any of the goods pending its decision.⁷ Similar procedures are provided in Rule 39 of the Rules of the Circuit Court and by the District Court Rules (rules 180-189).

Notices and Time Limits

87. Under s. 6 of the *Enforcement of Court Orders Act 1926*, the sheriff must cause an itemised inventory of the goods seized by him to be made out. A duplicate of this must be furnished to the defendant (or whoever appears to be in possession of the goods) within 24 hours of their seizure and, if practicable, before they are removed.

Under s. 8 of the Act, the sheriff may sell the seized goods at any time after the expiration of a period of 48 hours from seizure. There is also a requirement that he should not allow any "unreasonable delay" to occur. The Commission understands that, in practice, many sheriffs attach to the duplicate inventory referred to above a notice warning the defendant or person in possession that the goods will be sold after the expiration of 48 hours.

Defects in the Present System

88. The interpleader procedure has been criticised in Northern Ireland by the Anderson Committee as "cumbersome, antiquated and costly".⁸ In that jurisdiction, there is provision for the hearing of an interpleader application by the Enforcement of Judgments Office. It seems doubtful, however, whether this represents a satisfactory solution: it is undesirable that the legal question of ownership could be determined by an enforcement agency and in Ireland it might be repugnant to the separation of powers provisions of the Constitution. It was indeed thought necessary in the Northern Ireland legislation to allow for an appeal to the High Court, so that in the result no great change appears to have been effected.

89. The major flaw, in the view of the Commission, in the present procedure is the obligation on the sheriff to institute entirely new proceedings which inevitably involves the parties affected in delay and expense. The requirement that independent proceedings be instituted by the sheriff is anachronistic and without any obvious rationale. It is true that the parties to the interpleader issue are usually not the same as the parties to the original proceedings: the contest will generally be between the plaintiff and a third party claiming ownership of the debtor's goods. In recent times, the law has comfortably accommodated the resolution of disputes between the original parties and other parties arising out of the same circumstances in the interests of economy and expedition under the third party procedure provided under the *Civil Liability Act 1961* and the Rules of the Superior Courts. *The Commission accordingly recommends that the Rules should provide that an application may be made by the sheriff to the court*

where a claim is made to any money, goods or chattels taken or intended to be taken in execution under any process or to the proceeds of value of any such goods or chattels by any person other than the judgment debtor and that such an application may be made in the same proceedings in which the judgment sought to be enforced was given.

90. The Commission is satisfied that there are other respects in which the relevant procedure could be improved. In the first place, it is undesirable that a bald claim in writing by a third party should be enough to bring the interpleader procedure into operation. In fairness to the judgment creditor, the sheriff should only be empowered to apply to the court under the interpleader procedure where the third party has made his claim to ownership on affidavit. In the second place, the provision in the 1926 Act under which goods may be sold at any time after 48 hours from the time of seizure is unduly short. The same could be said of the time within which the judgment creditor must give notice to the sheriff that he admits or disputes the third party's claim. The Ontario Law Reform Commission recommended that a claimant should have 30 days to make his claim and the judgment creditor should have 15 days to respond.⁹ In England the Payne Committee was of opinion that the judgment creditor should have 5 days to respond to a claim.¹⁰

The Commission accordingly recommends:

- (a) *that a provision should be enacted that an application under the interpleader procedure may only be made by the sheriff where he has received a claim to the money, goods or chattels supported by affidavit by a person other than the person against whom the process issued and that, in the event of no such affidavit having been furnished to the sheriff within 72 hours from the time of seizure, any title of any such person to the goods should be deemed to be extinguished;*
- (b) *that s. 8 of the Enforcement of Court Orders Act 1926 should be amended by providing that the goods may be sold at any time after 72 hours from the time of seizure rather than 48 hours as at present;*
- (c) *that s. 6 of the 1926 Act should be amended so as to require the duplicate inventory furnished to the defendant or person in possession to incorporate a notice warning the defendant or person in possession that the goods will be liable to be sold after the expiration of 72 hours from the seizure;*
- (d) *that the rules should be amended so as to provide that any claim to the goods by a third party must be made by the claimant within 72 hours from the seizure of the goods by the sheriff;*
- (e) *that the rules should be further amended by providing that the judgment creditor has 7 days within which to admit or dispute any such claim.*

91. The present rules provide that:

“When the execution creditor has given notice to the sheriff or his officer that he admits the claim of the claimant, the sheriff may thereupon withdraw from the possession of the goods claimed.”

This phraseology does not allow for the fact that a claimant, such as the holder of a lien, may not wish to dispute the right of the sheriff to seize and sell property as long as the amount secured by the lien is discharged. It is obviously desirable that the sheriff should be in a position to proceed with the sale where a claimant, such as the holder of a lien, is happy that he should do so on an undertaking that the amount secured by the lien will be discharged out of the proceeds of sale. It is accordingly *recommended that Order 57 Rule 16 of the Rules of the Superior Courts should be amended so as to require the sheriff to act in a manner consistent with the nature of the admitted claim.*

Unjustifiable or Vexatious Claims

92. It has been represented to the Commission that the process of execution is inhibited by unjustifiable claims to goods about to be seized. This mischief can be avoided to some extent by requiring claimants to pay money into court or enter into some form of security when the interpleader procedure is invoked. Orders of this nature are frequently made by the High Court and the Circuit Court pursuant to their jurisdiction:

“to make all such orders as to costs and all other matters as may be just and reasonable.”¹¹

Similarly, under the District Court Rules the Country Registrar may request the claimant to lodge an amount equal to the value of the goods seized and may apply to the court for the sale of the goods in default of such lodgment.¹²

While these are useful deterrents to vexatious or unreasonable claims, some further protection would be desirable and *the Commission accordingly recommends that an action for damages should lie against any person who makes a fraudulent or vexatious claim to goods which are, or which, but for the claim, would have been seized in execution of the judgment. It is also recommended that such conduct should be made a criminal offence.*

Liability of Sheriff for Wrongful Seizure

93. Even if no third party claim is made when goods are seized or about to be seized, the sheriff remains liable to compensate a third party whose rights in the goods seized are infringed by seizure in the course of an execution, if such a claim is made subsequently. It has been represented that this has inhibited the enforcement of judgments because sheriffs are reluctant to seize goods unless they have incontrovertible proof that goods belong to the judgment debtor. This reluctance is likely to be most marked where executions are carried out by County Registrars who have no financial incentive to maximise

seizures at the risk of incurring liability to third parties whose goods are seized in error. Sheriffs who are awarded on the poundage system have an incentive to proceed without actual proof if they believe that the goods belong to the judgment debtor; consequently they are likely to take a more robust view of the probabilities of the situation.

94 In order that sheriffs may not be unduly reluctant to seize goods in execution it is suggested that they should no longer be absolutely liable when it turns out that they have infringed the rights of a third party in those goods. This solution has been adopted and proposed in other common law jurisdictions. In England, if a sheriff sells goods found in the judgment debtor's possession without any claim having been made to them by a third party, he is protected unless he

'had notice or might by making reasonable enquiry have ascertained that the goods were not the property of the execution creditor'.¹

In their Report on the Enforcement of Judgment Debts, published in 1981, the Ontario Law Reform Commission recommended that the law within that jurisdiction should be amended on similar lines. The essence of their proposal was that the sheriff should be relieved of liability where, acting in good faith, he seized property in the judgment debtor's sole possession. Where the property was in the possession of a third party, they envisaged that the sheriff would not have to seize it unless he received instructions from the execution creditor. If he followed such instructions and was not aware of any facts that would involve the commission of an illegality, they recommended that the execution creditor and not the sheriff should be liable. Seizure of goods in the possession of a third party was also to be subject to that third party not making any claim to possession of them. If the third party sold these goods and it was subsequently determined that they belonged to the judgment debtor, he was to be liable to account to the execution creditor. Where the third party whose rights and goods were infringed in the course of an execution recovered damages from an execution creditor who proved unable to pay, recourse was to be available to an assurance fund which they proposed should be established.

95 In Northern Ireland, where the execution of judgments is carried out by the Enforcement of Judgments Office, there is a general provision that the Crown is not to be liable for anything done by a member of that office in the purported performance of any of its functions unless that member has wilfully or negligently failed to comply with the provisions of the legislation.¹ This provision affords protection to the Enforcement of Judgments Office not only when goods are seized on the premises of a judgment debtor but also where they are seized elsewhere. This legislation went beyond the recommendation of the Anderson Committee which had proposed that no liability should attach to the Enforcement of Judgments Office in respect of a wrongful seizure on the debtor's premises provided the office made reasonable enquiries as to the ownership of the goods and notified any one appearing to have a claim to such ownership. Under that legislation

a person applying for the enforcement of a judgment could not be made liable on account of information given by him unless he knew it was incorrect or was reckless or malicious in giving incorrect information.¹⁷

96. The Commission thinks it is abundantly clear that sheriffs should be protected where they seize in good faith property in the joint or sole possession of the judgment debtor. It is not thought, however, that any change should be made in the existing law as to the seizure by the sheriff of goods in the possession of a third party. At present, he can only effect such a seizure at his own risk. Nor is the judgment creditor liable for such a seizure, unless it is effected as a result of his assertion that the goods belong to the judgment debtor. We would not favour a proposal that the sheriff should not be obliged to seize goods in the possession of a third party unless he received instructions to that effect from the execution creditor. Sheriffs would appear to be satisfied with a proposal that they be relieved of liability where they seize in good faith goods in the possession of the judgment debtor. It is accordingly recommended that *a sheriff should not be liable to a third party if he seizes goods in the joint or sole possession of the judgment debtor unless he had notice (actual or constructive) of any right of that third party infringed by the seizure. The person to whom the goods seized belonged should, if they prove not to be the property of the debtor, be entitled to recover their value and any other damage he has sustained from the debtor.*

In making this recommendation, the Commission has had regard to the fact that the aggrieved third party has a right of action against the execution creditor to the extent of any benefit received by the latter as a result of the wrongful seizure.¹⁸ But this would probably not result in full compensation for the loss suffered. Under the existing law a judgment creditor is liable to a third party where goods are seized as a result of his assertion that they belong to the judgment debtor.¹⁹ He does not seem to be liable (over and above any benefit he receives) merely on the basis that he withholds information or approves the seizure subsequently.²⁰

It is recommended that a judgment creditor should be liable to a third party whose goods are seized in execution from the possession of the judgment debtor if he knew of their seizure and knew or ought to have known that the judgment debtor had not such an interest in them as entitled the sheriff to seize them and did not so inform the sheriff. This would be in addition to the present right to recover from the judgment creditor to the extent of any benefit received by him as a result of the wrongful seizure.

- ¹ Dixon & Gilliland, *op. cit.*, pp. 3-7.
- ² Section 6.
- ³ RSC, Order 59, Rule 15.
- ⁴ RSC, Order 57, Rule 17.
- ⁵ RSC, Order 57, Rule 8.
- ⁶ Order 57, Rule 9.
- ⁷ *Davis v Fahn*, [1967] 2 All E.R. 1274.
- ⁸ Para. 95.
- ⁹ Report, Volume 2, pp. 261-2, 269-70.
- ¹⁰ Para. 704.
- ¹¹ RSC, Order 57, Rule 14; Rules of the Circuit Court, Order 39, Rule 14
- ¹² Rules 183-185.
- ¹³ Bankruptcy and Deeds of Arrangement Act, 1913, s. 15.
- ¹⁴ Volume 2, pp. 32-3, p. 39.
- ¹⁵ Judgments Enforcement (Northern Ireland) Order 1981, Article 134.
- ¹⁶ Para. 87.
- ¹⁷ Article 135.
- ¹⁸ *Jones v Woodhouse* [1922] 2 K.B. 117.
- ¹⁹ *Stratten v Lawless* (1864) 14 I.C.L.R. 432.
- ²⁰ *Wilson v Tumman*, (1843) 6 M. & G. 236.

CHAPTER 14 SEIZURE AND SALE OF DISEASED ANIMALS

97 It has been said that the law relating to the control of bovine tuberculosis and brucellosis in cattle is inhibiting the seizure of animals under the execution orders. The difficulties arise from the provisions of the *Diseases of Animals Act 1966*, the *Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1978*, and the *Brucellosis in Cattle (General Provisions) Orders 1978 and 1980*. Generally speaking this legislation imposes restrictions on the movement and sale of cattle (other than for slaughter) unless certain specified documents are available, e.g. identity cards or permits allowing the movement or sale of the animal. The object is to ensure that animals are not moved from holdings or sold (except for slaughter) unless there is evidence that they have reacted negatively to the appropriate test.

98 Compliance with these requirements by the sheriff may result in some difficulty and delay unless he simply sells the animals in respect of which he has not got the necessary documents to the factory. This will however inevitably mean that the cattle will be sold at a lesser price than they would fetch at the mart and exposes the sheriff to possible proceedings for selling at an under value.

The Commission understands that this has ceased to be a problem since there is no longer a prohibition on cattle being moved unless they pass the appropriate test not more than 30 days before the movement; the period has now been extended to 120 days.¹ We understand that, in any event, the sheriff if necessary can obtain duplicates of the necessary documentation and arrange to have the cattle tested himself. It is undesirable however, that a potential difficulty should remain which could become acute were circumstances to change.

99 It is accordingly recommended that legislation should provide that *no action shall lie against a sheriff in respect of the sale of cattle for slaughter when compliance with the relevant provisions of any*

legislation for the time being in force relating to diseases in animals would render a sale otherwise than for slaughter unreasonably difficult or result in unreasonable delay in the relevant execution.

· Brucellosis in Cattle (General Provisions) (Amendment) Order 1988; Bovine Tuberculosis (Attestation of the State and General Provisions) (Amendment) Order 1988.

CHAPTER 15: SUMMARY OF RECOMMENDATIONS

1. The present responsibilities of County Registrars in the enforcement of judgments in civil cases should be ended and the sheriff system in Dublin and Cork extended to the entire country: para. 24.
2. The Rules of the Superior Courts should be amended so as to provide for the obtaining of a *fi fa* order in the same manner as an execution order against goods is obtained in the Circuit Court: para. 27.
3. There should be an express obligation on the sheriff to report to both the Court and the judgment creditor within a prescribed time on the progress of an execution: para. 28.
4. The legal life of an execution order should be the same irrespective of the court from which it is obtained. Consequently, *fi fas*, execution orders and District Court decrees should all remain in force for six years and this period should be capable of being extended for a further six years: para. 30.
5. The rules of the various courts should be amended so as to provide that when a party issues two or more execution orders directed to the sheriffs of different countries, to enforce the same judgment or order, he must inform each sheriff of the issue of the other orders: para. 32.
6. There should be no change in the present system of priority of orders of execution: para. 32.
7. A judgment creditor should have the same facility of having the judgment debtor examined as to his property and means in the Circuit Court and District Court as he already has in the Superior Courts: para. 42.
8. The sheriff should be empowered to hold a sale on the judgment debtor's premises if he so consents or the court so directs: para. 43.

9 The fees payable to sheriffs on lodgment of court orders and other like fees should be increased to levels reflecting current money values and should be indexed to increases in the cost of living para 49

10 The judgment debtor should be liable to pay the judgment creditor the amount of any costs of enforcement (including such increased lodgment fees) incurred up to the time of payment para 51

11 The provisions on the remuneration of sheriffs should be re stated in legislative form para 52

12 The same rules governing charges by sheriffs should obtain for all debts which are enforced *Ibid*

13 It should be provided that the solicitor for the judgment creditor should not be personally liable to the sheriff for his fees *Ibid*

14 Where goods seized in execution have to be handed over to the official assignee or liquidator poundage should be calculated on the value of the goods realised in the bankruptcy or winding up *Ibid*

15 Poundage fees should be payable by the judgment debtor if he discharges the debt at any time after the sheriff has entered into possession of goods but before their sale para 53

16 The sheriff should be empowered to endorse any negotiable instruments such as cheques payable to the judgment debtor so as to enable him to negotiate them for the benefit of the judgment creditor para 58

17 Sheriffs should be enabled to obtain relief against forfeiture in respect of leases of licensed premises thus avoiding the loss of the licence para 60

18 Sheriffs should be given the option of paying up the balance owing in respect of chattels such as cars the subject of leases or hiring agreements and taken in execution by the sheriff thus enabling the sheriff to obtain a clear title to the chattels *Ibid*

19 Provision should be made that goods may be seized and the interest of the judgment debtor in them sold if he has a right to possession and a right to transfer his interest in them It should also be provided that where the judgment debtor has a right to the possession of the goods and would be entitled to sell those goods or an interest therein upon making a payment to a third party then if the judgment creditor pays that amount to the sheriff the sheriff should be entitled to seize those goods in execution of the judgment debt para 62

20 A life policy in which a judgment debtor has a sole beneficial interest should be capable of being seized under an execution order and the assurer required upon a request to pay the proceeds over to the sheriff for the benefit of the judgment creditor para 67

21 The present law should be amended so as to except from seizure under an execution order such articles of clothing, household furniture, bedding, tools or equipment of his trade or occupation or other like necessities for the judgment debtor, his spouse, children and dependant relatives residing with him as he may select not exceeding in value £500 para 68

22 The validity of “walking possession” arrangements — under which the sheriff leaves the judgment debtor in possession of goods for a relatively short time — should be put beyond doubt para 79

23 Where goods are seized by the sheriff on the premises of a person other than the person against whom he has been called to enforce an execution order, such goods should not be sold or disposed of by the sheriff until a period of 7 days has elapsed from the giving of notice in writing by the sheriff to the first named person of the seizure para 84

24 The sheriff should be entitled to proceed with the sale or other disposition mentioned in (23) above unless within the period of 7 days an affidavit is received by him from the first-named person setting out his alleged entitlement to the goods and enabling the sheriff, on receiving any such affidavit, to apply to the court under the revised interpleader procedure recommended below *Ibid*

25 Section 12 of the *Enforcement of Court Orders Act 1926* should be amended so as to make clear that the protection afforded to a sheriff extends to court messengers or other bailiffs employed by the sheriff for the purposes of an execution *Ibid*

26 The interpleader procedure under which the sheriff may apply to the court to adjudicate upon a claim made by a third party to goods seized by him should be altered so as to enable the application to be made by the sheriff in the same proceedings as the judgment was given, rather than requiring him to institute independent proceedings para 89

27 The sheriff should be entitled to make an application under the interpleader procedure only where he has received a claim to the goods supported by affidavit para 90

28 The *Enforcement of Court Orders Act 1926* should be amended so as to provide that goods may be sold at any time after 72 hours from the time of seizure rather than 48 hours as at present *Ibid*

29 The duplicate inventory which the sheriff is at present required to furnish to the defendant or person in possession of the goods should incorporate a notice warning the defendant or the person in possession that the goods will be liable to be sold after the expiration of 72 hours from the seizure *Ibid*

30 Any claim to the goods by a third party should be made by the claimant within 72 hours from the seizure of the goods by the sheriff

and the judgment creditor should have seven days within which to admit or dispute any such claim *Ibid*

31 It should be made clear that a sheriff may proceed with a sale where a claimant such as the holder of a lien is happy that he should do so on an undertaking that the amount secured by the lien will be discharged out of the proceeds of the sale para 91

32 An action for damages should lie against any person who makes a fraudulent or vexatious claim to goods which are or which but for the claim would have been seized in execution of the judgment. Such conduct should also be made a criminal offence para 92

33 A sheriff should not be liable to a third party if he seizes goods in the joint or sole possession of the judgment debtor unless he had notice (actual or constructive) or any right of that third party infringed by the seizure. The person to whom the goods seized belonged should, if they prove not to be the property of the debtor, be entitled to recover their value and any other damage he has sustained from the debtor. A judgment creditor should be liable to a third party whose goods are seized in execution from the judgment debtor if he knew of their seizure and knew or ought to have known that the judgment debtor had not such an interest in them as entitled the sheriff to seize them and did not so inform the sheriff para 96

34 No action should lie against a sheriff in respect of the sale of cattle for slaughter when compliance with the relevant provisions of any legislation for the time being in force relating to diseases in animals would render a sale otherwise than for slaughter unreasonably difficult or result in unreasonable delay in the relevant execution para 99