



CONSULTATION PAPER

ON

JUDGMENT MORTGAGES

(LRC CP 30 - 2004)

IRELAND

The Law Reform Commission
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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the 1975 Act.

To date, the Commission has published seventy Reports containing proposals for reform of the law; eleven Working Papers; twenty-nine Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty-four Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in the Appendix to this Consultation Paper.

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INTRODUCTION

1. In examining the law in relation to judgment mortgages this Consultation Paper is a further step in the Commission's commitment made in the Second Programme for Law Reform to "continue its general review of land and conveyancing law with the assistance of its standing specialist working group".

2. The judgment mortgage is one of a number of different procedures available to a judgment creditor seeking to enforce a judgment against a judgment debtor who fails or refuses to pay, the legislative basis for which is provided by the *Judgment Mortgage (Ireland) Act 1850* and the *Judgment Mortgage (Ireland) Act 1858*. The purposes of this Paper are (a) to set out briefly the current law with relation to judgment mortgages, with particular reference to the deficiencies in current law and procedures, (b) to consider equivalent legislative schemes in other common law jurisdictions, and (c) to review the principal issues associated with a reformulation of the law and to suggest bases upon which the law could be reformed and modernised. As part of a separate project, the existing legislation (the *Judgment Mortgage Act 1850* and *1858*) will be reviewed, along with other pre-1922 property legislation.

3. The Commission considers that reform of the law in this area should be guided by two over-arching principles. First, the rights and interests attendant upon a judgment mortgage should be the same irrespective of whether the judgment mortgage is in respect of registered land or unregistered land. Secondly, the law should equate the judgment mortgage with a conventional mortgage – *ie* a mortgage consensually granted for value by a mortgagor in favour of a mortgagee – insofar as this is consistent with sensible policy aims.

4. Chapter 1 provides an introduction to the judgment mortgage procedure and its current use. In Chapter 2 the existing statutory framework is examined in detail. The operation of judgment

mortgages in respect of licensed premises and companies is also discussed. A comparative analysis of the law in England and Wales, Northern Ireland, British Columbia and New Zealand is undertaken in Chapter 3, while Chapter 4 offers provisional proposals for general reform. The particular issues which arise in the context of the family home are addressed in Chapter 5. Chapter 6 discusses the effect of a judgment mortgage on joint tenancies. Finally a comprehensive summary of recommendations is provided in Chapter 7.

5. The Commission usually publishes in two stages: first, the Consultation Paper and then the Report. The Paper is intended to form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its conclusive recommendations on this topic following further consideration of the issues and consultation, including a colloquium attended we hope by a number of interested and expert people (details of the venue and date of which will be announced later). Submissions on the provisional recommendations included in this Consultation Paper are also welcome. Secondly, the Report also gives us an opportunity not only for further thought on areas covered in the Paper, but also to treat topics not yet covered. In order that the Commission's final Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing to the Commission by **31 August 2004**.

CHAPTER 1 THE JUDGMENT MORTGAGE PROCEDURE

1.01 The judgment mortgage procedure is a valuable method of enforcing judgments available to a plaintiff (hereinafter the ‘judgment creditor’) who has obtained judgment against a defendant (hereinafter the ‘judgment debtor’) who is the owner of an interest in real property. In broad terms, it enables the judgment creditor to secure an unsatisfied claim pursuant to the judgment by way of a mortgage or charge over the judgment debtor’s real property.

1.02 Statistical evidence indicates that it is a widely used procedure. Figures provided by the Land Registry¹ indicate that the following number of judgment mortgages were registered in the Registry of Deeds over recent years:

- (a) 1992 – 927
- (b) 1993 – 1088
- (c) 1994 – 1017
- (d) 1995 – 857
- (e) 1996 – 623
- (f) 1997 – 456
- (g) 1998 – 423
- (h) 1999 – 294
- (i) 2000 – 240
- (j) 2001 – 267
- (k) 2002 – 202

¹ We are most grateful to Mr Chris Hogan, Deputy Registrar of the Land Registry, for the production of this data and to Mr P J Fitzpatrick, Chief Executive Officer of the Courts Service, for his assistance generally.

(l) 2003 – 239

1.03 Records of judgment mortgages in the Land Registry for the last five years are as follows:

- (a) 1999 – 1420
- (b) 2000 – 1356
- (c) 2001 – 1180
- (d) 2002 – 1206
- (e) 2003 – 1540

1.04 The legislative basis for the judgment mortgage procedure is the *Judgment Mortgage (Ireland) Act 1850* ('the 1850 Act')² and *Judgment Mortgage (Ireland) Act 1858* ('the 1858 Act').³ This legislation urgently requires to be updated. It relies on antiquated concepts and terminology and serves neither creditors nor debtors well. Furthermore, by reason of a number of decisions with regard to the formalities with which the judgment creditor must comply, the procedures for enforcing judgment mortgages have become unduly cumbersome. In this regard, there is a long line of cases where minor breaches of the requirements of section 6 of the 1850 Act, which have caused no prejudice whatsoever to the judgment debtor, have nonetheless invalidated the judgment mortgage.

1.05 A consideration of the law relating to judgment mortgages was included in the 1972 *Report of the Committee on Court Practice and Procedure*.⁴ At paragraph 16 of the report the members concluded:

“The judgment mortgage procedure is cumbersome and over-technical and should be replaced by a simpler more

² 13 & 14 Vict c 29.

³ 21 & 22 Vict c 105.

⁴ Eighteenth Interim Report of the Committee on Court Practice and Procedure *Execution of Money Judgments, Orders and Decrees* (The Stationery Office 1972).

expeditious system which would allow a judgment creditor to stake an immediate claim to the extent of his judgment over the immovable assets of his judgment debtor.”

The authors recommended either the immediate repeal of the Acts, or pending this, immediate modifications to the judgment mortgage procedure.

1.06 Some 30 years later, neither of these recommendations has been implemented.

1.07 The judgment mortgage is one of a number of different procedures available to a judgment creditor seeking to enforce a judgment against a judgment debtor who fails or refuses to pay.⁵ Other procedures include orders for *fiery facias*, sequestration and attachment, seizure of goods, distringas of shares, and procedures under the *Debtors Act (Ireland) 1872*.⁶ The legal source of many of these procedures is to be found in the *Rules of the Superior Courts 1986* (as amended). There appears to be some merit in considering a modernisation of these procedures also – along with judgment mortgages – so that all of the mechanisms available to a judgment creditor are contained within the same instrument – preferably an Act of the Oireachtas.⁷ However, whether such a comprehensive review is merited, and if so, what its scope should be, are issues which are beyond the remit of this Paper.

1.08 The purposes of this Paper are (a) to set out briefly the current law with relation to judgment mortgages, with particular reference to the deficiencies in current law and procedures, (b) to consider equivalent legislative schemes in other common law jurisdictions, and (c) to review the principal issues associated with a reformulation of the law and to suggest bases upon which the law could be reformed and modernised.

1.09 The Law Reform Commission considers that reform of the law in this area should be guided by two over-arching principles. First, the rights and interests attendant upon a judgment mortgage

⁵ Order 42 of the *Rules of the Superior Courts 1986* (as amended).

⁶ 35 & 36 Vict c 57.

⁷ As has been done in Northern Ireland and British Columbia: see Chapter 3 below. See, generally, the *Enforcement of Court Orders Acts 1926 and 1940*.

should be the same irrespective of whether the judgment mortgage is in respect of registered land or unregistered land.⁸ Currently there are significant aspects in which the legal treatment of a judgment mortgage differs depending on whether title is registered or unregistered. Secondly, the law should equate the judgment mortgage with a conventional mortgage – *ie* a mortgage consensually granted for value by a mortgagor in favour of a mortgagee – insofar as this is consistent with sensible policy aims.⁹

⁸ See Chapter 4.

⁹ This is the approach commended by the British Columbia Law Reform Commission and represents, in general, the position in Great Britain, Northern Ireland and New Zealand. See Chapter 3.

CHAPTER 2 THE CURRENT LAW

A The Statutory Framework

2.01 The *Judgment Mortgage (Ireland) Acts 1850 and 1858* provide a mechanism whereby a plaintiff who obtains judgment can register the judgment as a mortgage against the defendant's land in respect of the debt due on foot of the judgment.¹ In summary, the procedure to be followed is as follows. When judgment is entered,² the judgment creditor swears an affidavit setting out, *inter alia*, the terms of the judgment and reciting that the judgment debtor is the owner of particular lands. Once the affidavit is sworn the judgment is converted into a mortgage by filing the affidavit in both the office of the particular court where judgment was obtained, and the Land Registry or Registry of Deeds (as appropriate). The Registrar of Deeds, or the Registrar of Title in the Land Registry, will thereupon send both parties a note confirming registration of the judgment mortgage.

2.02 The effect of registration is provided for by section 7 of the 1850 Act. When judgment is validly registered as a judgment mortgage, registration has the effect of mortgage by deed over the judgment debtor's beneficial interest at the time of registration of lands set out in the affidavit. Accordingly such a judgment creditor has special powers in relation to the property by virtue of section 19

¹ See, generally, Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraphs 13.166-13.182; Wylie *Conveyancing Law* (Butterworths 1999) at 431 and following.

² In this regard, the judgment mortgage process can, it would appear, be availed of notwithstanding that the court imposes a stay on execution: *Barnett v Bardley* (1890) 26 LR Ir 209. The better practice currently is to request that the plaintiff be permitted to register a judgment mortgage notwithstanding a general stay on execution. In paragraph 4.39 below the Commission provisionally recommends that it be confirmed in any legislative reform that a general stay on execution does not prohibit a judgment creditor registering a judgment mortgage.

of the *Conveyancing Act 1881*.³ These include a power to appoint a receiver, and a power of sale. It is doubtful if the judgment creditor can sell out of court.⁴ The judgment mortgagee may well encounter difficulties in finding a third party buyer prepared to purchase in the absence of a well charging order issued by the court. The judgment creditor's usual remedy, accordingly, is to seek a well charging order by institution of a mortgage suit.

2.03 By virtue of section 8 of the 1850 Act a voluntary conveyance made with fraudulent intent after judgment is void as against the judgment creditor.

2.04 Under section 51 of the *Bankruptcy Act 1988* a judgment mortgage is not effective if bankruptcy occurs within three months following registration of the judgment mortgage. As regards companies, pursuant to section 284(2) of the *Companies Act 1963* a judgment mortgage is not effective if winding up occurs within three months of registration.

2.05 There appears to be a misconception on the part of some commentators that section 4 of the 1850 Act requires that a judgment mortgage must be 'renewed' every 5 years otherwise it becomes unenforceable against third parties. This is not so. Section 4 provides that a purchaser of property is only affected by notice of any judgment affecting the land within 5 years of the date of judgment unless the judgment is renewed. The drafting of section 4 is opaque but in the view of the Commission it does not go so far as to require renewal of judgment mortgages every 5 years.⁵ In any event, the Commission does not recommend that judgment mortgages be subject to a requirement that they be renewed and would propose that any new legislation should clarify this point.

2.06 The procedure to vacate a judgment mortgage requires lodgement by the judgment debtor of a document signed by the judgment creditor showing that the debt has been paid (a satisfaction piece).⁶ This is lodged in the appropriate court office. As regards

³ 44 & 45 Vict c 41.

⁴ Eighteenth Interim Report of the Committee on Court Practice and Procedure, *Execution of Money Judgments, Orders and Decrees* (The Stationery Office 1972) at 7.

⁵ See paragraphs 2.50 and 4.26 below.

⁶ See paragraph 4.32 below.

unregistered land a satisfaction piece lodged with the Registrar of Deeds operates as a reconveyance of the land and the legal or equitable estate vests in the person in whom it would have vested had no registration of a judgment mortgage been effected. The cancellation of a judgment mortgage as a burden on registered land is effected by producing to the Land Registry a certificate of satisfaction of the judgment or a requisition by the judgment creditor for its discharge.⁷

2.07 Registration of the judgment mortgage does not have any automatic immediate effect until the judgment creditor decides either (a) to force a sale as mortgagee pursuant to a mortgage suit, or (b) to claim entitlement to proceeds upon a sale by the judgment debtor. To this extent the judgment creditor is, broadly speaking, in the same position as an equitable mortgagee by way of deposit of title deeds to the extent that the judgment creditor has an estate in land which entitles him or her to payment through a court enforced sale.⁸ The jurisdiction in which to seek a well charging order is either in the High Court or the Circuit Court as appropriate. The District Court has no jurisdiction to hear such applications: it would appear that a well charging order with regard to a judgment mortgage relating to a District Court decree should be sought in the Circuit Court.

B The Requirements of the Acts in Detail

2.08 Section 6 of the 1850 Act provides that where any judgment is entered up in the High Court, the Circuit Court,⁹ or the District Court¹⁰:

“... and the [judgment creditor] shall know or believe that the [judgment debtor] ... is seised or possessed at Law or in Equity of any Lands, Tenements, or Hereditaments, of any Nature or Tenure, or has any disposing power over any such

⁷ Rule 122 of the *Land Registry Rules 1972*.

⁸ Doyle “Judgment Mortgages” Bar Council Continuing Legal Education Programme 17 October 1994 at 1.

⁹ By virtue of the *Circuit Court (Registration of Judgments) Act 1937*.

¹⁰ Sections 24 and 25 of the *Courts Act 1981*: although no provision was made for the enforcement of such judgment mortgages. See Doyle “Judgment Mortgages” Bar Council Continuing Legal Education Programme 17 October 1994 at 2.

Lands, Tenements, or Hereditaments which he may without the Assent of any other person exercise for his own benefit ... it shall be lawful for the [judgment creditor] ... to make and file in [the relevant court] an Affidavit stating the Name or Title of the Cause or Matter, and the Court in which [judgment] has been entered up, obtained, or made and the Date of such [judgment] and the usual or last known Place of Abode and the Title, Trade or Profession of the Plaintiff ... and of the Defendant or person whose estate is intended to be affected by the Registration ... of such Affidavit, and the Amount of the Debt, Damages, Costs or Monies recovered or ordered to be paid by such [judgment] and stating that, to the best of the Knowledge and Belief of the Deponent, the [judgment creditor] ... is at the Time of the swearing of such Affidavit so seised or possessed, or has such a disposing Power as aforesaid, of or over such Lands, Tenements, or Hereditaments, and such Affidavit shall specify the County and Lands to which the Affidavit relates are situate, and where such Lands lie in Two or more Counties or Baronies, or Parishes or Streets, or partly in One Barony, Parish or Street and partly in another, the same shall be distinctly stated in such Affidavit; and it shall be lawful for the [judgment creditor] making such Affidavit to register same in the Office for registering Deeds, Conveyances and Wills in Ireland, by depositing in such Office an Office Copy of such Affidavit”

2.09 By virtue of section 71 of the *Registration of Title Act 1964* registration of a judgment mortgage in respect of registered land is made in the Land Registry. In addition, the county and folio number should be described. Registered land is sufficiently described “by reference to the number of the folio of the register and the county in which the land is situate”.

2.10 The legislative basis for judgment mortgages clearly requires modernisation. The drafting of the Act is obviously archaic.¹¹ For example, the requirement that the judgment mortgage identify the judgment debtor’s interest in unregistered land by reference to its ‘parish’ or ‘barony’ is one that is often difficult to apply. Any descriptive error can be fatal to registration. In *Re*

¹¹ Described by Kenny J as “perplexing” in *Re Flannery* [1971] IR 10, 12.

*Murphy and McCormack*¹² failure to mention the ‘barony’ invalidated the registration.

2.11 However, there is another, and more important, factor which appears to merit a realignment of legislative policy. This is in respect of the overall treatment of the judgment creditor. In many different respects, the judgment creditor is not treated in the same manner as a ‘normal’ mortgagee – *eg* a financial institution lending funds to a borrower who has secured his or her obligations by way of a mortgage or charge. The precise reason for this special treatment of the judgment mortgagee is that the judgment mortgage is not created by the voluntary act of the judgment debtor; quite the opposite, in fact; it is created by the judgment creditor.

2.12 The nature of the judgment creditor as volunteer has been recognised by section 68(3) of the *Registration of Title Act 1964* and by the decision of Carroll J in *Containercare (Ireland) Ltd v Wycherly*.¹³ Of course, in most if not all cases, registration of the judgment mortgage is the act of the judgment creditor and does not involve active participation by (still less the consent of) the judgment debtor. However, the Commission doubts whether it is a fair assessment of the commercial reality of the situation to say that the judgment creditor gives no ‘value’. A judgment debtor who has permitted affairs to progress to judgment may well have deprived the judgment creditor of use of the funds constituted in the award during the period between the date of judgment and ultimate satisfaction of the judgment in full (should that ever occur). Furthermore, in debt recovery cases the judgment may well have deprived the judgment creditor of the use of funds prior to the date of the award. There is, therefore, an obvious, substantial and prolonged prejudice suffered by the judgment creditor. To say, therefore, that the judgment creditor gives no value, accordingly, does not convey the full picture. To that end, therefore, the Commission recommends that (save in two respects)¹⁴ the law be amended so that a judgment mortgage be

¹² [1930] IR 322.

¹³ [1982] IR 143.

¹⁴ First, that the law should not be amended so that a judgment mortgage is deemed to be a transaction whose validity depends on the consent of a non-owning spouse where the property is a family home for the purposes of the *Family Home Protection Act 1976*. See paragraph 4.22 below. Accordingly, in our respectful opinion the effect of Carroll J’s decision in

deemed to have been given for value. Notwithstanding, the Commission having considered this point has concluded that the priority status of a judgment mortgage should remain unchanged *ie* (*inter alia*) a judgment mortgage remains subject to prior equities affecting the property.

C Effect of Failure to Comply with Section 6

(1) Description of Parties

2.13 As Doyle has commented, “[n]on-compliance with Section 6 of the [1850 Act] has always been the great salvation of judgment debtors”.¹⁵ One of the remarkable aspects of the Acts in operation is that a judgment mortgage affidavit which breached any requirement of section 6 of the 1850 Act was void¹⁶ notwithstanding that the 1850 Act did not spell out the consequences of breach, and notwithstanding that in many if not most of the cases no prejudice whatsoever was caused by the breach concerned.

2.14 Accordingly, a reference to the judgment debtor as “now a widow and at the time that the said judgment was obtained and entered up was a married woman” failed to comply with the Act because at the time judgment was obtained the defendant was a farmer.¹⁷ In the same vein, the erroneous description of a farmer as a mechanic invalidated an affidavit.¹⁸

(2) Description of Lands

2.15 As noted above, section 71(2) of the *Registration of Title Act 1964* provides that it is sufficient to identify the lands by reference to the county and folio number. However, considerable difficulties have arisen where the title to the land is unregistered.

Containercare v Wycherly requires no legislative intervention. Secondly, the Commission considers that the law with regard to the priority of a judgment mortgage should not be changed. See paragraph 4.23 below.

¹⁵ Doyle “Judgment Mortgages” Bar Council Continuing Legal Education Programme 17 October 1994 at 13.

¹⁶ *Re Murphy & McCormack* [1930] IR 322.

¹⁷ *Allied Irish Banks plc v Griffin* [1992] 2 IR 70: see commentary by Doyle “Judgment mortgages – a false dawn” (1993) *Law Society Gazette* 70.

¹⁸ *Dardis and Dunnes Seeds Ltd v Hickey* High Court (Kenny J) 11 July 1974.

2.16 Accordingly, for unregistered land, a failure to refer to the parish will invalidate the affidavit and registration;¹⁹ so also will reference to the wrong parish.²⁰ Similarly, a failure to state the barony,²¹ or stating the wrong barony²² invalidates the affidavit and registration.

2.17 In addition, the absence of a statutory definition of a ‘town’ for the purposes of the Act has given rise to ‘some difficulty’.²³ This can be a significant issue because if the lands are not situated in a ‘town’, it has been held that it is sufficient to state the county and barony.²⁴

2.18 Strict compliance in detail has not always been required under Irish Law. In *Thorp v Browne*²⁵ it was held by the House of Lords that a purposive approach should be adopted in interpreting section 6. The purpose of the Act is identification of the parties (in particular the debtor) and the land sought to be encumbered, so that proper searches can be effected in association with conveyancing transactions. Such an approach has received a definite,²⁶ if inconsistent, endorsement in the Irish courts. Accordingly a failure to describe accurately the judgment debtor’s place of abode would not be fatal. A significant relaxation of the unduly strict approach evidenced in the earlier cases emerged from the judgment of Costello J (as he then was), and the Supreme Court, in *Irish Bank of Commerce v O’Hara*.²⁷

¹⁹ *Re Ulster Banking Co’s Estate* (1986) IR 3 Eq 264.

²⁰ *Re Flannery* [1971] IR 10. Reference must be to the official parish as listed in the census and not to unofficial, religious parishes.

²¹ *Re Murphy’s and McCormack’s Contract* [1930] IR 322.

²² *Re Earl of Limerick’s Estate* (1861) 7 Ir Jur (ns) 85.

²³ *Wylie Irish Land Law* (3rd ed Butterworths 1997) paragraph 13.174.

²⁴ *Dardis and Dunnes Seeds v Hickey* High Court (Kenny J) 11 July 1974.

²⁵ (1867) LR 2 HL 220.

²⁶ *Re Smith and Ross* (1860) 11 Ir Ch Rep 397; *Re FitzGerald’s Estate* (1861) 11 Ir Ch Rep 356; *Credit Finance Ltd v Grace* High Court (Kenny J) 29 May 1972; Supreme Court 9 June 1972.

²⁷ High Court 10 May 1989. See the excellent discussion by Doyle “Merits versus technicalities: The Judgment Mortgage (Ireland) Acts” (1993) *Irish Law Times* 52.

2.19 This case concerned a failure to indicate the parish in which lands (in Dún Laoghaire) were situated. Notwithstanding this failure, the lands affected by the judgment mortgage were identified beyond doubt. Costello J adopted a purposive interpretation of section 6 of the Act. The section was designed so as to identify the lands in question. Costello J held that any lack of compliance with section 6 which did not result in a failure to identify the lands in question should not automatically invalidate the judgment mortgage. The Supreme Court agreed.

2.20 In the Supreme Court McCarthy J recommended a common sense approach to the construction of section 6. He said as follows:

“In construing a statute and in particular the effect, if any, of non-compliance with express wording, there are a number of accepted canons of construction. An unstated one is that common sense should not be abandoned.

If the words are imperative, non-compliance is fatal; if the words are directory, non-compliance is not fatal. In determining the nature of the provision there is no rule of general application save to seek to identify the purpose of the legislation. What is the purpose here? Is it other than to secure the judgment creditor’s position both as to the date and amount of his charge if the property is clearly and adequately identified ... [I]s the legitimate charge to be defeated by the omission of a detail which few may know and with which even fewer may be concerned? I think not.”²⁸

2.21 In this regard he echoed the words of the nineteenth century Chancery judge, Lynch J, in *Re Smith and Ross*:²⁹

“No case has yet ruled that in construing these affidavits, I must lay aside all the promptings of common sense.”

2.22 In addition, the Supreme Court held that as the defendant had not proved that as of 1850 Dún Laoghaire was a ‘town’, there was accordingly no requirement to identify the lands by reference to the ‘parish’ in which they were located.

²⁸ *Irish Bank of Commerce v O’Hara* Supreme Court 7 April 1992 *per* McCarthy J at 2.

²⁹ (1860) 11 Ir Ch Rep 397 at 400.

2.23 Notwithstanding the Supreme Court decision in *O'Hara* there appears still to be areas of uncertainty which, in the view of the Commission, are unacceptable.

2.24 A review of the case law indicates that, as advocated by Doyle,³⁰ the law requires to be changed so that any description of unregistered land sufficient to identify it with reasonable certainty may be used in the affidavit. Whether one has an intellectual preference for the purposive approach or an approach which requires strict compliance with section 6 of the Act, the learned authors of *Annual Review of Irish Law 1989* commenting on the High Court's decision in *O'Hara* are surely correct in saying that "the better answer may perhaps be to streamline and improve the relevance of statutory requirements rather than to remove the real advantages which specificity offers".³¹ Either way, the need for legislative change appears inevitable.

2.25 Doyle comments³² that the Supreme Court's decision in *O'Hara* indicates a retreat from the unduly technical approach adopted by the courts in previous decisions.³³ It may, therefore, be thought that the decision in *O'Hara* (which concerns section 6 of the 1850 Act) points to the conclusion that no change in the law is required in this regard.

2.26 It is submitted that this would not be an entirely satisfactory conclusion. First, the decision of the High Court in *AIB v Griffin*³⁴ which concerned a different aspect of section 6 (namely the description of the judgment debtor), indicates that there may nonetheless be a latent culture of absolutely strict compliance which

³⁰ (1993) *Irish Law Times* at 56.

³¹ Byrne and Binchy *Annual Review of Irish Law 1989* (Round Hall 1990) at 312. See also Byrne and Binchy *Annual Review of Irish Law 1992* (Round Hall 1992) at 410-12.

³² Doyle "Judgment Mortgages" Bar Council Continuing Legal Education Programme 17 October 1994 at 14.

³³ But see his article "Judgment Mortgages – a false dawn" (1993) *Law Society Gazette* 297, where such optimism is tempered in the light of the decision of the High Court in *Allied Irish Banks plc v Griffin* [1992] 2 IR 70. Doyle does not go so far as to advocate that the *O'Hara* decision means that legislative change is unnecessary.

³⁴ [1992] 2 IR 70.

has not been entirely displaced by the *O'Hara* decision. In *Griffin* an innocuous misdescription of the occupation of the judgment debtor invalidated registration of the judgment mortgage. Secondly, *O'Hara* is potentially capable of being narrowly interpreted as applying only to place names and not to the judgment debtor's occupation. Thirdly, the 1850 Act is evidently drafted in the most archaic language, and uses concepts (baronies and parishes) which are not necessarily helpful nowadays in identifying properties.

2.27 *The Commission provisionally recommends that the law be changed so that any description of unregistered land sufficient to identify it with reasonable certainty may be used in a judgment mortgage affidavit.*

D Statement of Amount of Decree and Costs

2.28 As the amount of the decree or judgment will appear on the perfected order of the court, there would seem to be little difficulty in stating the amount of the decree in the judgment mortgage affidavit. Where judgment has been obtained in the District Court the amount of costs must not exceed the amount of the decree.³⁵

2.29 It has, however, been held that where the amount of costs is mis-stated, this will invalidate the judgment mortgage. So in *Phillips v Kilkelly*³⁶ an affidavit which incorrectly stated that the costs order included some £5-13 in witness expenses was held to have invalidated registration of the judgment mortgage.

2.30 When a judgment creditor obtains judgment, he or she will wish to register a judgment mortgage quickly. This is so as to preserve priority over other – later – encumbrances. It is also sensible to do so because if the judgment debtor becomes bankrupt, or, being a company is wound up, within three months of registration of the judgment mortgage, the registration will have no effect in the judgment debtor's bankruptcy/liquidation. So it is sensible for the judgment creditor to 'start the clock running' as soon as possible.

2.31 Once judgment is obtained, however, the amount of costs may not, as a practical matter, be immediately ascertained. In practice, (save in the District Court where scale costs apply) costs are

³⁵ Sections 24 and 25 of the *Courts Act 1981*.

³⁶ High Court (Budd J) 11 July 1966.

only ascertainable where there is agreement reached as to the amount of costs recoverable, or where they are taxed in default of agreement. Accordingly, where costs are not agreed by the defendant, they must be taxed – a process which at least in the High Court (and including appeals from the Taxing Master’s decision) can take some considerable time. In the meantime, it appears unjust to force the judgment creditor to waive an entitlement to have the claim for costs secured merely so as to preserve his or her priority with regard to the actual damages awarded.

2.32 It has been suggested that it might be possible for a plaintiff to register a second judgment mortgage when the amount of costs is known.³⁷ However, there would appear to be some procedural infirmity associated with this course of action. It has been held that there cannot be two registrations against the same lands in respect of the same judgment.³⁸ Aside from this, the sum secured pursuant to the later judgment mortgage will of necessity cede priority to any charges created or registered between the plaintiff’s first and second judgment mortgages. This seems arbitrary.

2.33 Consideration might be given as to whether or not there should be a statutory requirement at all to state the precise amount of costs. It appears sensible for the application to register a judgment mortgage merely to indicate whether costs were granted (or the extent to which this is so) and for proof of the precise amount to be attested to before such date as the judgment mortgage is to be enforced.

2.34 *The Commission provisionally recommends that consideration be given as to whether there is a need for a statutory requirement to state the precise amount of costs awarded on the judgment mortgage affidavit.*

E Interest

2.35 As regards interest, in practice the effective requirement is to have the amount of interest ascertained as at the date of swearing the affidavit, or else abandon the claim for interest. This too appears arbitrary.

³⁷ Eighteenth Interim Report of the Committee on Court Practice and Procedure, *Execution of Money Judgments, Orders and Decrees* (The Stationery Office 1972) at 8.

³⁸ *Re Field’s Estate* (1877) IR 11 Eq 456.

2.36 It is open to question whether a judgment creditor should be required to state the precise amount of interest at the outset. The decree may attract interest because the creditor has contracted with the judgment debtor that the debt does not merge with the judgment and accordingly the contractual rate continues to be applied. Alternatively, the court may award interest either pursuant to the *Courts Act 1981*, or pursuant to its equitable jurisdiction. It will be impossible for an outsider to calculate with any accuracy the amount of interest involved where the rate is a private contractual matter between the judgment creditor and the judgment debtor. This will also be the case where the court awards interest pursuant to its equitable jurisdiction, for, unlike the jurisdiction under the *Courts Act*, the court is free to set its own rate – which may be a floating rate (eg x% above the European Interbank Rate). There should, of course, be certainty with regard to *Courts Act* interest because it is statutorily fixed at a certain rate per annum and applied on a simple (not compound) basis.

2.37 Accordingly, if the purpose of requiring the judgment creditor to state the amount of its decree and interest thereon is to inform outsiders of the amount secured by the judgment mortgage, this purpose is defeated where the debt does not merge with the judgment or the court, in the exercise of its equitable jurisdiction, sets a floating rate of interest.

2.38 When a creditor takes a charge from a company and registers the charge pursuant to section 99 of the *Companies Act 1963* (as amended), whilst the chargee can, if it wishes, state the precise amount covered by the charge, there is no requirement to do so. It is sufficient, for example, to state that the charge secures ‘all sums and interest thereon’ or the like. Equally, a mortgage of a ship or a share in a ship pursuant the *Mercantile Marine Act 1955*³⁹ need not explicitly state the precise amount advanced where the advance is made on current account.

2.39 The primary purpose of registration of a judgment mortgage is arguably not necessarily to inform an outsider of the amount of the judgment, but rather it is to inform outsiders that the judgment debtor’s property is encumbered. A sensible third party intending to

³⁹ Breslin *Banking Law in the Republic of Ireland* (Gill & Macmillan 1998) Chapter 37, Part 2.

purchase the land will not normally proceed until steps have been taken to remove the encumbrance from the title. The outsider is, accordingly, not so much concerned with the **amount** of the judgment, but rather with its **existence**. Accordingly an explicit statutory requirement that the judgment creditor state the amount of the judgment, and *a fortiori* interest and costs, appears to be of little practical benefit given the primary purpose of the procedure.

2.40 *The Commission is provisionally of the view that given that the primary purpose of registration of a judgment mortgage is not to inform outsiders of the amount of the judgment but rather to inform them that the debtor's property is encumbered, there is little practical benefit in having an explicit statutory requirement that the judgment creditor state the amount of the judgment and in particular to state the interest and costs.*

F Priority of Judgment Mortgages

2.41 The principal rules of priority with regard to judgment mortgages can be summarised as follows.

2.42 As far as unregistered land is concerned, the general rule is that the judgment mortgage registered in the Registry of Deeds takes effect subject to all equities or interests affecting the land at the date of registration. Accordingly, a prior unregistered deed still has priority.⁴⁰

2.43 As regards registered land, because a judgment mortgage is regarded as a voluntary transaction, by virtue of section 71(4) of the *Registration of Title Act 1964* it is subject to the following:

- (i) all registered burdens on the folio;
- (ii) all section 72 burdens (burdens which affect registered land without registration);
- (iii) all unregistered rights affecting the judgment creditor's interests prior to registration of the affidavit.

⁴⁰ See Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraph 13.181.

(1) *Tempany v Hynes*

2.44 The issue of the priority of judgment mortgages was addressed by the Supreme Court in *Tempany v Hynes*.⁴¹ In that case a majority of the Supreme Court took the view that a judgment mortgage registered against an owner of registered land who had entered into a contract to sell the land, attached to the beneficial interest retained by the judgment debtor for so long as the purchaser had not paid the full purchase price. When the purchaser paid the balance on completion, thereby becoming the full owner on registration of the transfer to him or her, the purchaser took title subject to the judgment mortgage. Henchy J, however, dissented. He took the view that the entire beneficial interest passed to the purchaser by virtue of the contract regardless of whether the purchase price was paid, so that the judgment mortgage did not affect the purchaser's interest at any stage. The judgment mortgage attached only to the vendor's/judgment debtor's interest. As this title disappears on completion, so did the judgment mortgage. Accordingly, the new owner took free of the judgment mortgage. The Commission intends that the general issues will be reviewed as part of a separate project concerned with land law and conveyancing overall, including pre-1922 property legislation.

2.45 The Commission is of the view that it is not desirable to alter the essential rules governing the priority of a judgment mortgagee. Accordingly, it is proposed that the existing rules should prevail: a judgment mortgagee over unregistered land should be subject to all equities affecting the land as at the date of registration and subject to all prior unregistered deeds. As regards registered land, the judgment mortgagee will be subject to existing registered burdens and burdens affecting the judgment debtor's interest without registration, together with all unregistered rights subject to which the judgment debtor held the interest at the time of registration of the affidavit.

(2) *Retaining the Current Law*

2.46 The Commission has considered whether it is desirable that a statutory provision be enacted so as to reverse the effect of the Supreme Court decision in *Tempany v Hynes*. On balance the Commission takes the view that it would not be appropriate to follow

⁴¹ [1976] IR 101.

this course of action. The decision in *Tempany v Hynes* raises many general issues of importance in conveyancing law and practice and the reform of the law relating to judgment mortgages may be too narrow a basis upon which the full ramifications of the decision should be addressed. The Commission intends to review all aspects of *Tempany v Hynes* in the context of its project for the reform of conveyancing law which is currently under way.

2.47 Where it is sought to register a judgment mortgage against lands, some of which are registered under the *Registration of Title Acts*, and some of which are not, separate affidavits are necessary, one for the Registry of Deeds and one for the Land Registry.⁴² This is clearly a requirement consequent on the dual system for land registration and as an operational matter continues to be necessary. The Commission considers that it is not possible or desirable to attempt to propose legal change dealing with this precise issue.

2.48 *The Commission is provisionally of the view that the law relating to judgment mortgages is too narrow a basis upon which to attempt to address the decision in Tempany v Hynes. All aspects of Tempany v Hynes will be the subject of general review in the context of the Commission's project for the reform of conveyancing law currently under way.*

G Limitation Periods

2.49 As a preliminary point to the question of the period within which a judgment creditor must move to enforce its judgment mortgage, brief reference should be made to section 4 of the 1850 Act. This provides that if a judgment is to affect subsequent purchasers of the land to which the judgment relates, it must be renewed every five years. However the Commission takes the view that this provision does not require the judgment creditor to renew the judgment mortgage every five years. The Commission sees no convincing argument for introducing a requirement to renew a judgment mortgage. A similar requirement exists under the Bills of Sale legislation⁴³ to renew registered bills of sale. Such requirements appear to operate as an unnecessary impediment for creditors.

⁴² Fitzgerald *Land Registry Practice* (2nd ed Round Hall Press 1995) at 125.

⁴³ *Bills of Sale (Ireland) Act 1879* (42 & 43 Vict c 50) as amended by *Bills of Sale (Ireland) Act Amendment Act 1883* (46 & 47 Vict c 60). The

2.50 *The Commission provisionally recommends that legislation should clarify that a judgment creditor need not renew the judgment mortgage every five years.*

2.51 Under section 32 of the *Statute of Limitations 1957* the period for bringing an action seeking a court sale is 12 years from the date when the action accrues – subject to possible extension where there has been acknowledgement or part payment. In the case of a judgment mortgage this means 12 years from the date judgment is marked – not the date when the judgment mortgage affidavit was registered.

2.52 *The Commission provisionally recommends that as regards the date when an action accrues as referred to in section 32 of the Statute of Limitations, it should be clarified by legislation that in relation to judgment mortgages this means from the date judgment is marked, not the date when the judgment mortgage affidavit was registered.*

2.53 Where a judgment mortgage has become statute barred it can be cancelled from the Land Registry pursuant to rule 111 of the Land Registry Rules, which deals with the cancellation of burdens generally, and rule 122, which deals with the cancellation of judgment mortgages in two specific instances, on lodgment of an affidavit in Form 71B. The Land Registry will usually serve notice on the judgment creditor and where no valid objections are made the judgment mortgage is cancelled.⁴⁴ The Commission notes that no corresponding procedure appears to be available in the Registry of Deeds and suggests that any amending legislation provide for such a procedure. Given that affidavits are generally not registrable such legislation would have to prescribe for the registration of the affidavit by the judgment debtor. In addition the Registry of Deeds would have to be given the power to serve notice and adjudicate the claim.

H Judgment Mortgages and Liquor Licences

2.54 Important issues can arise where the property secured by the judgment mortgage is or includes premises in respect of which a

requirement to renew a bill of sale is contained in section 11 of the 1879 Act.

⁴⁴ See Fitzgerald, *Land Registry Practice* (2nd ed Round Hall 1995) at 133-4.

liquor licence has been issued. It has been held that such a licence is personalty – notwithstanding that it attaches, in one sense, to the premises.⁴⁵ However the licence is not capable of alienation separately from the premises.⁴⁶ If this is so then it would seem to follow that the judgment mortgage does not affect the licence. It has also been held that a judgment mortgage with regard to licensed premises does not operate to assign the licence, nor to bind the judgment debtor to endorse or hand over the licence to a purchaser upon sale by the court.⁴⁷ Indeed, the licence is not an interest which is capable of being affected by the judgment mortgage procedure.⁴⁸

2.55 Treating the licence as separable from the premises in respect of which it is granted is clearly inconsistent with the position with regard to normal mortgages, where the licence is treated as inseparable from the licensed premises.⁴⁹ It might, however, be argued in this context that as the licence is issued by an organ of the State, it is not an item of property in the hands of the licensee which has an inherent value for the purposes of sale or security.⁵⁰ In other words, while the licensee may have certain procedural rights by way of legitimate expectation that the licence will only be revoked in accordance with law, he or she has no proprietary right as such in the licence. This appears to be at least implicitly recognised in some of the cases: the licensee cannot transfer the licence to other premises,

⁴⁵ *Brennan v Dorney* (1887) LR (Ir) 353.

⁴⁶ O'Connor *Irish Justice of the Peace* Vol 2 (2nd ed Ponsonby 1925) at 688. However, as Cassidy remarks, and as often happens in practice, “[w]here the holder of a licence wishes to dispose of it for consideration, he may consent to the extinguishment of that licence upon the grant of another licence after a successful application under the licensing code. As a matter of law, his licence will become extinguished, but only upon the grant of the new licence.” Cassidy *The Licensing Acts* (Round Hall 2001) paragraph 2-10.

⁴⁷ *The Irish Industrial Benefit Building Society v O'Brien* [1941] IR 1.

⁴⁸ *Ibid* at 11 per Meredith J.

⁴⁹ *Re Sherry-Brennan* [1979] ILRM 113, per Hamilton J at 117: see also Cassidy *The Licensing Acts* (Round Hall 2001) paragraph 2-15.

⁵⁰ *Hempstall v Minister for the Environment* [1994] 2 IR 20.

and equally a transfer of the premises does not and cannot constitute a transfer also of the licence.⁵¹

2.56 Similar considerations also arise in the context of milk quotas with regard to agricultural land.⁵²

2.57 On balance, the Commission does not consider that there is any need for reform of this particular aspect of the law relating to judgment mortgages.

I Priority of Judgment Mortgages in Company Liquidation

2.58 A judgment mortgagee enjoys no priority as such in the liquidation of a corporate judgment debtor if liquidation occurs before the judgment creditor has completed the execution process. Section 291 of the *Companies Act 1963*, provides as follows:

“(1) ... where a creditor has issued execution against the ... lands of a company ... and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution ... against the liquidator in the winding up of the company unless he has completed the execution ... before the commencement of the winding up

(5) For the purposes of this section ... an execution against land shall be deemed to be completed by seizure and, in the case of an equitable interest, by the appointment of a receiver.”

2.59 The then equivalent of the provision under the law of England and Wales⁵³ was considered by the Court of Appeal in *Re Overseas Aviation Engineering (GB) Ltd.*⁵⁴ In that case a majority of the Court of Appeal⁵⁵ held that since the judgment creditor had not

⁵¹ *Ibid.* See Cassidy *The Licensing Acts* (Round Hall 2001) paragraphs 2-9 and 2-10.

⁵² *Lawlor v Minister for Agriculture* [1988] ILRM 400; *O'Brien v Ireland* [1991] 2 IR; *Swift v Dairywise Farms Ltd* [2003] 2 All ER 304.

⁵³ Section 325 of the *Companies Act 1948*, as amended by 36(4) of the *Administration of Justice Act 1956*.

⁵⁴ [1963] 1 Ch 24.

⁵⁵ Denning MR and Harman LJ; Russell LJ dissenting.

completed execution by seizing the land and appointing a receiver over the equitable interest, the judgment creditor had no rights under its judgment mortgage in the liquidation of the company.⁵⁶

2.60 The effect of the provision was considered in a 1976 report of the Law Commission of England and Wales.⁵⁷ For reasons which are more complex than those which require to be addressed in this Paper, the Law Commission recommended a change in the law. This was subsequently effected.⁵⁸

2.61 Section 291 of the *Companies Act 1963* clearly has a number of undesirable effects.

2.62 First, it represents a stark difference between the treatment of a judgment mortgagee when compared to a normal mortgagee. The latter can stand outside the fray of a liquidation or bankruptcy and rely on his or her security to recover the debt – whether or not the judgment creditor has completed execution in the sense contemplated by section 291 of the *Companies Act 1963*. A judgment creditor is treated as an unsecured creditor unless he or she has completed execution within the meaning of the section.

2.63 Secondly, in the vast majority of cases, it will be impossible for a judgment mortgage to achieve expeditiously complete execution as contemplated by the provisions of the *Companies Act 1963*. A judgment creditor will seldom, in practice, ‘seize’ the lands: as noted above it is the well established practice for the judgment creditor to seek a well charging order and an order for sale. Neither of these procedures necessarily involves ‘seizure’ of the property in the sense of occupation (adverse to the judgment debtor) without ownership. Furthermore, appointing a receiver over the equitable interest in the property will serve no useful purpose where the property does not generate income. Accordingly, in order to comply with these provisions, the judgment mortgagee will have to go to the trouble and expense of appointing a receiver for no purpose other than to comply

⁵⁶ The court unanimously confirmed that registration of a judgment mortgage by a judgment creditor did not require to be registered under the then equivalent of section 99 of the *Companies Act 1963*.

⁵⁷ The Law Commission for England and Wales *Charging Orders* (No 74) Cmnd 6412.

⁵⁸ *Charging Orders Act 1979*.

with a seemingly unnecessary strict statutory precondition to the enjoyment of the status of secured creditor.

2.64 Thirdly, the requirement that a receiver be appointed over the equitable interest represents a trap for the uninitiated that serves no ascertainable policy objective.

2.65 *Accordingly, it is provisionally recommended that the law be changed to provide for the repeal (to the extent necessary) of section 291 of the Companies Act 1963 and replacement with a provision that a judgment mortgage registered against an interest in land held by a company should enjoy priority as if it were a consensually created security.*

2.66 For the avoidance of doubt, as regards the bankruptcy of individuals, it is recommended that section 50 of the *Bankruptcy Act 1988* be amended so as to preserve the priority of a judgment mortgage in bankruptcy. Section 50 provides that where a leasehold interest in land has been seized pursuant to an execution order, the sheriff, county registrar or execution creditor must retain the proceeds for 21 days. If the judgment debtor becomes bankrupt within that period the money must be paid over to the Official Assignee. In order to provide for the integrity of judgment mortgages contemplated by the amending legislation, the Commission recommends that this provision should not apply to a judgment creditor who has duly registered his or her judgment as a mortgage.

2.67 *The Commission provisionally recommends that section 50 of the Bankruptcy Act 1988 be amended so as to preserve the priority of a judgment mortgage in bankruptcy and that this provision should not apply to a judgment creditor who has duly registered his or her judgment as a mortgage.*

J Judgment Mortgages and ‘Risk Periods’: Liquidation and Bankruptcy

2.68 Under section 284(2) of the *Companies Act 1963*, and section 51 of the *Bankruptcy Act 1988*, if the judgment debtor is wound up (being a company), or is adjudicated bankrupt (being an individual) within three months of the registration of a judgment mortgage, the judgment mortgagee has no priority in the winding

up/bankruptcy.⁵⁹ No change is recommended to these provisions. They accord with the general policy in individual and corporate bankruptcy law that securities created close to the insolvency of the subject should enjoy no priority at the expense of the general body of unsecured creditors.

K Judgment Mortgages and Registration Under the Companies Act 1963

2.69 Where the judgment debtor is a company, section 102 of the *Companies Act 1963* requires the judgment creditor to send two copies of the affidavit within three weeks to the company. Within three days of receipt of the affidavit the judgment debtor company must furnish a copy to the Registrar of Companies. The *Companies Act 1963* does not specify the consequences of failure by the judgment creditor to comply with section 102.⁶⁰

2.70 The failure of the 1963 Act to specify the consequences of failure by the judgment creditor to comply with section 102 stands in stark contrast to the failure to register a charge created by the company under section 99 of the 1963 Act within the required period. In such circumstances the charge is void as against a liquidator or other creditor of the company. Expert opinion differs as to whether or not the absence of this consequence is justified. Courtney⁶¹ considers that there is no difficulty in this regard because the judgment mortgage is not **created** by the company. In contrast, Keane⁶² contends that the same consequences should ensue for failure to comply with section 102 as ensue when there is a failure to comply with section 99.

2.71 Whilst recognising the undoubted inherent merit in Courtney's contention, it is considered that on balance it might be

⁵⁹ In the context of companies, see *Re Shannonside Holdings Ltd* High Court (Costello J) 10 May 1993.

⁶⁰ Compare with section 99 of the *Companies Act 1963* which provide that failure to register a charge or mortgage **created** by a company within the prescribed period renders the charge void against a liquidator and creditors of the company.

⁶¹ Courtney *The Law of Private Companies* (2nd ed Butterworths 2002) paragraph 21.071.

⁶² Keane *Company Law* (3rd ed Butterworths 2000) paragraph 21.38.

preferable if a failure to comply with section 102 resulted in the judgment mortgage being void against a liquidator or creditor of the judgment debtor company. This is because the purpose of the scheme for the registration of charges in Part IV of the *Companies Act 1963* (containing sections 99 and 102) is to provide a publicly available register of company charges to enable debtors to gain some (albeit imperfect) insight into the extent to which a company with which they are dealing, or about to deal, is indebted to third parties. To the extent that such a public register does not also include details of judgment mortgages registered against the company, there would appear to be a clear deficiency in the effectiveness of that register.

2.72 On balance the Commission considers that Keane's contention should be implemented so that the same consequences flow from a failure by the judgment creditor to comply with section 102. This would render the judgment mortgage void as against a liquidator and other creditors of the company.

2.73 *The Commission provisionally recommends that a judgment mortgage should be subject to the same registration requirements as applied to the other forms of security set out in section 99 of the Companies Act 1963. Accordingly failure by the judgment creditor to register particulars of the charge within 21 days of its creation should render the judgment mortgage void as against a liquidator and other creditors of the company.*

L Judgment Mortgages Over Equitable Interests

2.74 In *Irani Finance v Singh*⁶³ the Court of Appeal held that the beneficial interest of a beneficiary under a trust for sale of land could not be made the subject of a charging order – the then English equivalent of a judgment mortgage. The thrust of the decision is that such an interest is not an interest in land at all, rather it is an interest in the proceeds of sale of land. We are not aware of this decision having been considered in Ireland. However, for the avoidance of doubt the Commission recommends that it be clarified that such an interest is capable of being made the subject of a judgment mortgage. It would appear that the interest is so closely connected with the very interest in property itself that any purported distinction between the

⁶³ [1973] Ch 59.

asset and its proceeds is not a valid basis to defeat the interests of the judgment creditor.⁶⁴

2.75 *The Commission provisionally recommends that it be clarified that the beneficial interest of a beneficiary under a trust for sale of land is capable of being made the subject of a judgment mortgage.*

M Judgment Mortgages and Proceeds of Sale

2.76 It is generally accepted that where a judgment mortgage is registered and sold, the judgment creditor holds the proceeds of sale for the account of prior encumbrancers. There appears to be no significant difficulty with the operation of this principle in practice. However, the Commission considers that the interests of prior encumbrancers could be protected through the mechanism of a statutory hearing to consider ordering sale (the equivalent of the well-charging application currently applicable) and a provision stating explicitly that the judgment creditor holds the proceeds of sale to the account of all encumbrancers with a prior interest in the property as at the date of sale.

2.77 *The Commission provisionally recommends that consideration be given to protecting the interests of prior encumbrancers through the mechanism of a statutory hearing to consider ordering sale and a provision stating explicitly that the judgment creditor holds the proceeds of sale to the account of all encumbrancers with a prior interest in the property as at the date of sale.*

⁶⁴ This raises issues similar to those considered by the Privy Council in *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, now followed by the English High Court in *National Westminster Bank plc v Spectrum Plus Ltd* [2004] EWHC 9 (Ch), in relation to the nature of a fixed charge over book debts of a company. In that case Lord Millett considered that in the circumstances of that case the asset was effectively indivisible from its proceeds.

CHAPTER 3 THE LEGAL POSITION IN SELECTED JURISDICTIONS

3.01 The judgment mortgage procedure exists, in one form or another, in other common law jurisdictions. It is instructive to consider briefly the position in some of those other jurisdictions.

A England and Wales

3.02 Under the *Charging Orders Act 1979* it is open to a judgment creditor obtaining a decree from the High Court or County Court to apply to court for a charging order for the purpose of enforcing judgment. The court has discretion as to whether or not to make a charging order. If the order is made, it imposes on specified property of the judgment debtor a charge for securing the payment of any money due under the judgment. The charge covers any interest of the judgment debtor under a trust, land held on bare trust for the judgment debtor, and land held by two or more judgment debtors who together are entitled to the whole unencumbered beneficial interest under a trust.

3.03 The 1979 Act provides that the statutory charge is enforceable “in the same manner as an equitable charge created by the debtor by writing under his hand”.¹ Accordingly, the judgment creditor is entitled to invoke legal process for the purpose of realising his or her security together with appropriate interest and the costs of enforcing the charging order. The judgment creditor can apply to court for an order for sale, or for the appointment of a receiver.

3.04 A judgment mortgage is not capable of being registered as a mortgage against the jointly owned interest of the judgment debtor. In such circumstances only a caution may be registered in the case of registered land. With regard to unregistered land, no registration against jointly owned interests is possible. Accordingly, a judgment

¹ Section 3(4) of the *Charging Orders Act 1979*.

creditor in such circumstances will lose priority to a later mortgagee of the legal interest.²

3.05 As noted above, in England and Wales the court has a discretion as to whether or not to make a charging order. Furthermore, it has the discretion as to whether an existing order should be varied or rescinded, and as to whether an order for immediate sale should be made. The court must consider all the circumstances of the case, the personal circumstances of the debtor, and whether any other creditor would be unduly prejudiced by the making of the order. Where the charging order is over the family home, there is no “presumption one way or the other”³ as to whether the court will make an order.

B Northern Ireland

3.06 The procedure for the enforcement of judgments by way of charging order is governed in Northern Ireland by the *Judgments Enforcement (Northern Ireland) Order 1981*.⁴ That order establishes the Enforcement of Judgments Office (“the Office”).⁵ A judgment creditor whose judgment remains unsatisfied may apply to the Office upon payment of a fee for the enforcement of a judgment. The Office may impose on any land of the judgment debtor as may be specified in the order, a charge for securing the payment of the amount recoverable on foot of the judgment. An order may be expressed as absolute, or subject to conditions as to notification of the judgment debtor or otherwise. Article 46(3) provides that the order does not take effect until it is registered in the Land Registry (in the case of registered land) or the Registry of Deeds (in the case of unregistered land).

3.07 A charging order ceases to have effect when the period of 12 years has expired from the date of judgment.⁶

² *Perry v Phoenix Assurance plc* [1988] 1 WLR 940.

³ *Harman v Glencross* [1985] Fam 49, 57B.

⁴ SI 1981/226 (NI 6).

⁵ See *An End Based On Means* (Free Legal Advice Centre 2003) at 79.

⁶ See Article 47 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

3.08 Article 48 of the 1981 Order provides that an order charging the estate of registered land of which the judgment debtor is not the registered owner may not be made: instead a caution may be registered against the judgment debtor's interest.

3.09 Article 49 provides that, subject to certain exceptions, a charging order has the same effect on the land as a charge created by the debtor in favour of the creditor. The exceptions are as follows:

- (a) the order does not take effect until registered;⁷
- (b) the order expires 12 years after judgment;⁸
- (c) an order charging the estate of registered land may not be registered;⁹
- (d) subject to the terms of the order, the judgment creditor has all the powers of sale of a mortgagee under a mortgage by deed pursuant to the *Conveyancing Acts 1881 to 1911*.

3.10 The Office may give notices of eviction in order to deliver vacant possession of premises, and remove goods to a place of safety. However, where the premises are used as a dwelling, it must give not less than seven days notice to the local Health and Social Services Board.

C Canada – British Columbia

3.11 The statutory scheme for execution of judgments against land in British Columbia is contained in sections 33 to 63 of the *Execution Act 1969*.¹⁰ If a plaintiff obtains judgment from a court in the province he or she may obtain a certificate of such judgment from the court and tender it for registration in the appropriate Land Registry office.

3.12 Before 1981 the situation was that upon registration the name of the debtor was entered in an index known as the register of judgments. This register was referable to the name of the defendant.

⁷ See Article 46(3) of the *Judgments Enforcement (Northern Ireland) Order 1981*.

⁸ Article 47 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

⁹ Article 48 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

¹⁰ RSBC 1969 c 135.

It was not referable to the folio numbers of land held by the defendant. Notation was also made on any certificate of title held by the defendant. Registration was effective for two years and was renewable.

3.13 At this point it is worth noting two practical effects of this type of system. First, the judgment creditor need not find out if the judgment debtor actually owns an interest in land. The judgment creditor could simply register the judgment and if the judgment debtor happens to own land the registration would catch that land. Secondly, such a system was capable of affecting not only interests in land as at the date of registration, but also interest in land acquired by the judgment debtor after registration.

3.14 The provisions of the *Execution Act* were amended by the *Execution Amendment Act 1978*.¹¹ The amendment Act provided for registration of the judgment directly against the title of property owned by the judgment debtor in the same manner as any other charge. The effect of this was therefore to eliminate the indices of judgments in the various land registry offices.

3.15 Such a change broadly corresponds with the current situation under Irish law where the judgment creditor must identify the specific property in which the judgment debtor has an interest before registration can occur. Under the scheme in British Columbia the judgment creditor could register against the judgment debtor on the speculative possibility that the judgment debtor owned an interest in land.

3.16 Another side effect of the amendment was that the registration would not affect interests in land acquired by the judgment debtor after registration.

3.17 It is also worth noting that the 'name only' register pertained in England and Wales until amendment was effected requiring the judgment creditor to identify the lands which were to be affected by the charge.

3.18 Registration effects a lien or charge on all the lands of the judgment debtor in the district covered by the relevant Land Registry office. The procedure to enforce the charge is initiated by the

¹¹ 1978 *British Columbia Bill No 32* proclaimed effective and coming into force in July 1981.

judgment creditor applying to the Supreme Court calling on the debtor and any other person having the legal estate in the land to show cause why the land should not be sold to realise the amount of the judgment debt.

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

3.20 The British Columbia Law Reform Commission ('BCLRC') issued a report on execution of judgments against land in 1978.¹² It did not consider the question of whether exemptions should be granted for certain types of property (*eg* family homes or 'homesteads').

3.21 The report made some observations on the rights of third parties – such as a joint tenant of the judgment debtor. Under British Columbia law registration of judgment against the judgment debtor's interest in land does not effect a severance of the joint tenancy. Accordingly, if the judgment debtor predeceases the other joint tenant, the judgment mortgage will be defeated. This aspect of British Columbia law received criticism from eminent sources – including a former Chief Justice of the British Columbia Supreme Court.¹³

3.22 Notwithstanding, the BCLRC concluded that registration of the judgment should continue not to effect a severance of the joint tenancy. Instead, the registration should attach to the interest of the surviving joint tenant. To temper the potential injustice to the surviving joint tenant, the BCLRC proposed a complex form of statutory 'marshalling' so as to limit the judgment creditor's claim.

¹² Law Reform Commission of British Columbia *Report on Execution against Land* (LRC 40) 1978.

¹³ Davey CJ.

3.23 As regards tenants in common, the BCLRC recommended that a judgment creditor who registered judgment should have standing to bring proceedings for partition and sale of the property. Furthermore, this should be done in the context of execution proceedings under the *Execution Act* rather than under separate partition proceedings.

3.24 The BCLRC also considered whether it should be possible to register execution against land **before** judgment is obtained. The BCLRC was in favour of such a proposal: however this 'useful innovation' should be subject to certain safeguards:

- (a) the application to register should be made to court and on notice to the defendant;
- (b) the order should not be granted unless the court is satisfied that the defendant is 'insecure' in the sense that judgment might not otherwise be satisfied if the order were not to be made;
- (c) a balance of convenience test should be applied;
- (d) the order should only be granted to a plaintiff who has verified under oath that there is no reasonable defence to the claim and that the plaintiff's action has a reasonable chance of success;
- (e) if the defendant is successful he or she should be granted any damages occasioned by the pre-judgment charge.

3.25 The question as to whether such a procedure is desirable is discussed in Chapter 4 below.

D New Zealand

3.26 The equivalent procedure in New Zealand is provided for under the High Court rules dealing with charging orders and writs for sale. Under these provisions a judgment creditor can obtain a charging order the effect of which is to freeze the dealings with the land. The judgment creditor loses any security if the judgment debtor becomes bankrupt while the charging order is in place. Sale is effected by writ of sale.

3.27 Under rule 567 of the New Zealand High Court Rules a plaintiff may only obtain a charging order **before** judgment upon proof that the defendant is making away with his or her property, or is

absent from or about to quit the jurisdiction, with intent to defeat the interests of his or her creditors or the plaintiff.

3.28 After judgment has been entered, a charging order may be issued without leave, at the request of the judgment creditor. Under rule 570 any person claiming to be prejudicially affected by a charging order may apply to court to have the order varied or rescinded, or to have the registration thereof cancelled or modified. Any person appearing to have a charge, lien or other claim on the land, may be summoned to appear, and is entitled to be heard in any application concerning the land.

3.29 When issued, the charging order is deemed absolute in the first instance. The charging order is then registered against the certificate of title to the land. The charging order must either:

- (a) contain a description of the land affected sufficient to identify it; or
- (b) refer to a certificate of title or other instrument containing such a description; or
- (c) contain a plan showing its extent, boundaries and relative position (unless the land is the whole of the land comprised in a certificate or certificates of title, or is shown separately on a plan deposited under the transfer of registered land legislation – the *Land Transfer Act 1952*).

3.30 Where the charging order is made in respect of land which is not registered under the *Land Transfer Act 1952*, it must be registered in the appropriate registry of deeds. A charging order in respect of such land must contain:

- (a) a description of the land affected sufficient to identify the land; and
- (b) a plan of the land showing its extent, boundaries and relative position.

3.31 Until registration of the charging order, no sale or transfer of the land or any part thereof under a writ of sale has any effect against a purchaser for valuable consideration, notwithstanding that the writ of sale may have actually been delivered for execution at the time of purchase, and that the purchaser may have had actual or constructive notice of the delivery of the writ of sale for execution.

3.32 Unless an instrument of transfer or a deed of conveyance or assignment consequent on a writ of sale of the land is registered within two years after the date of the charging order, the charging order ceases to bind the land and is deemed to be discharged. However, the court has the power to extend the period during which the charging order shall bind the land.

CHAPTER 4 PROPOSALS FOR GENERAL REFORM

A Introduction and Terminology

4.01 The following is a summary of the proposals for reform of the general law and procedure relating to judgment mortgages and the reasons for those proposals. As a preliminary matter, the Commission recommends that the terminology ‘judgment mortgage’ be retained, given that its import is well known to most practitioners. Furthermore, the effect of the suggested reform does not radically alter the nature of the process such that a change in terminology requires to be considered.

B Procedure

(1) *Type of Record*

4.02 One of the central policy issues to be decided in considering reform of the law relating to judgment mortgages is whether the existing system whereby the record is kept with regard to interests in land, by the Land Registry or Registry of Deeds (as appropriate), should continue; or whether it should be replaced with a central register of judgments referable to the names and addresses of judgment debtors. The latter would have the advantage of potentially operating to cover all existing and after-acquired interests in land obtained by the judgment debtor, and avoiding the difficulties associated with some of the case law with regard to identification of the property.

4.03 Equally, the Commission notes that a ‘name only’ register pertained in British Columbia until the enactment of amending legislation in 1981, and in England and Wales until legislative amendment. This change appears to have been prompted by a recurrence of situations of ‘mistaken identity’ – *ie* registration of a

judgment mortgage against the wrong ‘Joe Murphy’.¹ It is also notable that this system of registration does not currently operate in any of the jurisdictions surveyed in this Paper. Instead, the prevalent system appears to be one which operates by reference to a description of the land, and which is maintained by the appropriate land registry.

4.04 In the light of the fact that the jurisdictions of which we are aware which did operate a ‘name register’ subsequently changed to a ‘land register’, and in the light of our view (see paragraphs 4.12 – 4.16 below) that the difficulties presented by some of the case law dealing with identification of the land can be overcome, the Commission recommends that the register be maintained in the Land Registry, and the Registry of Deeds, (as appropriate) with regard primarily to the property.

4.05 *The Commission provisionally recommends that the record of judgment mortgages be maintained in the Land Registry and Registry of Deeds as appropriate, with regard primarily to the property.*

(2) Procedure for Applying for Judgment Mortgage

4.06 There are a number of different options with regard to the process by which the judgment mortgage is obtained by the judgment creditor. One is for application to the court which may grant the order at its discretion.² Another is for application to be made to a central office for the enforcement of judgments.³ The third is for the judgment creditor to be automatically entitled to register a judgment mortgage once judgment is made.⁴

4.07 On balance, the Commission considers it to be preferable to maintain the *status quo* and to provide that a judgment creditor be automatically entitled to choose to enforce an unsatisfied judgment by way of judgment mortgage. It should be borne in mind that the judgment mortgage is essentially a method of enforcing a judgment against a judgment debtor who is unable or unwilling to satisfy a judgment debt. In the Commission’s view there should be no bar *ab initio* to a judgment creditor availing of the judgment mortgage

¹ It would appear that such a statement is capable of being defamatory.

² As in England and Wales.

³ As in Northern Ireland.

⁴ As is currently the position in Ireland, New Zealand and British Columbia.

process. We believe the proper function for judicial discretion is with regard to disposal of the property – particularly where the property is a family home (see Chapter 5 below).

4.08 *The Commission provisionally recommends that legislation should provide that a judgment creditor be automatically entitled to choose to enforce an unsatisfied judgment by way of judgment mortgage.*

4.09 The Commission has not, for the purposes of this Paper, reached any view on whether the system for enforcement of judgments by way of judgment mortgage should be delegated to an office with the power to impose charges unilaterally. This raises questions as to the compatibility of such powers with the Constitution and which extend beyond the reform of the law relating to judgment mortgages. Furthermore, such considerations seem more appropriate in the context of a general review of the law relating to enforcement of judgments.

4.10 The judgment creditor need not indicate precisely the amount of costs and/or interest decreed. It is sufficient for the judgment creditor to state whether, and, if applicable, the extent to which costs were awarded. The precise amount of costs and interest can be verified later by a supplemental form or affidavit (if the matter has reached the stage of application to sell the property thereby requiring court sanction).

4.11 *The Commission provisionally recommends that the precise amount of costs and/or interest decreed need not be stated but can be verified later by a supplemental form or affidavit.*

(3) Issues as to Identification

4.12 As regards identification of the parties and the property to be affected by the judgment mortgage, the guiding principle here is that the judgment mortgagee should be required to identify with reasonable precision whom the judgment debtor is and the lands to be affected.

4.13 As regards identification of the judgment debtor, this should be straightforward and the judgment creditor should be entitled to refer to the information in any pleadings or affidavits in the proceedings. Any innocent error should be capable of rectification and should not affect the validity of the judgment mortgage.

4.14 *The Commission provisionally recommends that an innocent error as regards identification of the judgment debtor should be capable of rectification and should not affect the validity of the judgment mortgage.*

4.15 Equally, the position with regard to registered and unregistered land needs to be equated. No amendment is required with regard to registered land. Section 71 of the *Registration of Title Act 1964* appears to operate well and so the position should continue that the judgment creditor should refer to the county and folio number. As regards unregistered land, it should be provided that the land should be identified with reasonable precision. Any innocent error, misdescription or absence of detail should be capable of rectification and should not affect the inherent validity of the judgment mortgage.

4.16 *The Commission provisionally recommends that unregistered land should be identified with reasonable precision and that any innocent error, misdescription or absence of detail should be capable of rectification and should not affect the inherent validity of the judgment mortgage.*

(4) *Availability of Pre-judgment Relief*

4.17 The Commission does not recommend that reform of the law in this area include provision for pre-judgment relief, as appears to be available in New Zealand and British Columbia. In our opinion, a plaintiff who has a genuine case that a defendant might wilfully dispose of property in order to become ‘judgment proof’ already has adequate remedies in the form of *Mareva* relief.

(5) *Modernisation of Mode of Application*

4.18 As regards implementing the procedure, the Commission’s preference is for a form to be promulgated by Rules of Court, subject to adaptation as the situation requires, setting out the necessary particulars, including the parties to the action, and details of the property to be subject to the judgment mortgage sufficient to identify it. Procedures should also be adopted for the High Court, the Circuit Court and the District Court to issue ‘certificates of judgment’, setting out on a *pro forma* basis the money judgment or decree. The form of application should have the status of a statutory declaration.

4.19 Given the special treatment which the Commission recommends should be enjoyed by the family home, a judgment

creditor should be asked to indicate whether, to the best of the deponent's knowledge or belief, the property is a residential dwelling.⁵ It would appear to be unreasonable to ask it to confirm if it is 'family home' within the meaning of the *Family Home Protection Act 1976* as the judgment creditor is unlikely to be able to form a view on the matter. However, this request for information, together with a legend on the form (and in any accompanying documentation) setting out the special procedures concerning how the family home is dealt with should bring home to the judgment creditor the implications of the legislation in this regard.

4.20 Once the form is completed, it should be lodged, together with the certificate of judgment, with the Land Registry or the Registry of Deeds (as appropriate).

4.21 It should be confirmed that the judgment creditor can apply for registration of the judgment mortgage notwithstanding that the judgment debtor has obtained a stay on the execution of the judgment by order of the court. In the Commission's view this should apply irrespective of the reason for which the stay is granted (*eg* to give the judgment debtor time to pay, or to enable the judgment debtor to bring an appeal).

C Effect of Registration

4.22 Registration should be provided to operate as a charge by the judgment debtor over the property specified in the form. It should be provided that the charge shall be deemed to have been granted for valuable consideration (save for the purposes of the *Family Home Protection Act 1976* – see Chapter 5 below). It should be provided that the charge has priority over the following:

- (a) all later registered judgment mortgages;
- (b) all later encumbrances whether registered or not.

4.23 The charge should not have priority over any prior charges or equitable interests, whether registered or not. In this regard the Commission considers that the law should be left unchanged.

4.24 A judgment mortgage should 'travel with the land' and should bind all subsequent purchasers for value and volunteers.

⁵ See paragraph 5.17 below.

4.25 Registration of a judgment mortgage should constitute notice to all subsequent encumbrancers, purchasers and volunteers.

D Renewal of Judgment Mortgage

The 1850 Act imposes no requirement that a judgment mortgage be renewed periodically and the Commission sees no convincing argument for introducing such a provision in any new legislation.

E Enforcement

4.26 The Commission recommends that the judgment creditor have all the rights of a chargee who has provided consideration. Whilst this, in theory, could include a power of sale under the *Conveyancing Acts*, in practical terms, it is difficult to envisage how to provide for enforcement of sale without a hearing to declare the property well charged with the judgment mortgage.⁶ This is because if the judgment mortgagee is given the power to sell outside court, this will inevitably cause difficulties in that the interests of third parties could be overridden (such as other mortgagees, or family members with rights in equity or under the *Family Home Protection Act 1976*). Enacting a procedure for sale directly by the judgment creditor could lead to a proliferation of applications for injunction to restrain a judgment mortgagee from proceeding with a sale out of court. Accordingly, the Commission suggests that the existing system whereby the judgment mortgagee proceed by way of mortgage suit should continue.

4.27 *The Commission recommends that a judgment creditor should have all the rights of a chargee who has provided consideration but that, given the practical difficulties of providing for enforcement of sale without a hearing to declare the property well charged with the judgment mortgage, the existing system whereby the judgment mortgagee proceeds by way of mortgage suit should continue.*

4.28 However, once again, the Commission considers that it is appropriate to draw a distinction between situations where the property is a family home, and situations where it is not. It seems to

⁶ See *An End Based on Means* (Free Legal Advice Centre 2003) at 22, 79-80 and 113.

the Commission that there is merit in providing that, save where the property is a family home, the court should only grant relief to a party objecting to a sale pursuant to a judgment mortgage where it is shown that the sale would result in a clear and substantial prejudice to that party. In many instances, a judgment mortgage enforcing a sale of the property will to all practical intents and purposes be acting for the benefit of prior encumbrancers. This is because they will have a prior interest in the proceeds of sale and it is very likely that the judgment mortgage will be last in the line of secured creditors.

4.29 As noted above a judgment creditor should be required to indicate whether the property is a residential dwelling.⁷

4.30 In this regard, the Commission recommends a provision that the mere fact that a contract of mortgage or loan is terminated before its due date should not be a sufficient reason on its own for refusing to order a sale. The position we have in mind here is that it should not be open to a bank or other financial institution to object to an order for sale sought by a judgment creditor merely because to grant the order will mean that its loan or mortgage contract with the judgment debtor will be terminated early (thereby depriving the bank or other financial institution of resultant profits).

F Discharge and Satisfaction

4.31 Section 9 of the *Judgment Mortgage (Ireland) Act 1850* makes provision for noting on the entries relating to a judgment mortgage in the Registry of Deeds a memorandum of satisfaction of the judgment mortgage. The section further provides that satisfaction of the judgment mortgage shall be stated in every official search issued by the Registry of Deeds.⁸ Section 5 of the *Judgment Mortgage (Ireland) Act 1858* provides for the further step of actual cancellation of the judgment mortgage. In the event of a judgment debtor discharging the amount due under a judgment mortgage, a Satisfaction Piece is filed in the Judgments Office of the relevant court where it is noted and a Certificate of Satisfaction is issued. This is then lodged with the Registrar of Titles in either the Land Registry or the Registry of Deeds as appropriate and a memorandum of

⁷ It is envisaged that a particular form will be prescribed for this purpose.

⁸ The memorandum is entered onto the Registry of Deed's computerised database.

satisfaction appended to the affidavit of judgment. Pursuant to section 5 of the 1858 Act the registration of the judgment mortgage is deemed to be null and void. Without any further deed or conveyance the legal or other interest or estate in the lands affected by the mortgage automatically reverts in the debtor. In other words, the entry of the memorandum of satisfaction has the same effect as execution of a deed of reconveyance.⁹ Under Rule 122 of the *Land Registry Rules* a Form 76 requisition by a judgment creditor or his or her personal representative may also serve to cancel a judgment mortgage.¹⁰

4.32 The Commission is of the view that there appear to be no particular legal issues arising from the process by which judgment mortgages are discharged. Accordingly, the Commission recommends that the current procedures be preserved with any necessary modifications consequent upon the updated forms and procedures recommended.

G Miscellaneous

4.33 *A judgment mortgage registered against a company, and an individual, should, subject to section 284(2) of the Companies Act 1963, and section 51 of the Bankruptcy Act 1988, enjoy the same priority as if the judgment mortgage were a validly created charge for valuable consideration.*

4.34 *Section 291 of the Companies Act 1963 (which deprives a judgment creditor of priority in a liquidation if the judgment creditor has not seized the land or appointed a receiver) should be repealed.*

⁹ Wylie, *Conveyancing Law* (Butterworths 1999) at 454.

¹⁰ Rule 122 of the *Land Registry Rules 1972* (SI 230 of 1972) states: "Subject to an inhibition in the register to the contrary, an entry of notice of the deposit of an affidavit of judgment may be cancelled on production in the Registry of the certificate specified in section 9 of the *Judgment Mortgage (Ireland) Act 1850*, of the satisfaction of the judgment, decree or order in respect of which the affidavit was deposited, or of a requisition by the judgment creditor or his personal representative, in Form 76, for its discharge." See *Browne v Mariena Properties Ltd* [1998] 1 IR 568 at 585 where Laffoy J points out that in addition, any person having an interest in a registered burden or registered property may apply on affidavit in form 71B to have the burden cancelled.

4.35 *Section 102 of the Companies Act 1963 should be amended so that there is a duty on a judgment creditor to register a judgment mortgage in the same manner as a charge under section 99 of the Companies Act 1963. Failure to register the judgment mortgage should render the judgment mortgage void as against any liquidator or other creditor of the company.*

4.36 *It should be confirmed that it is possible to register a judgment mortgage over the proceeds of sale of an equitable interest, as well as the equitable interest itself.*

4.37 *Any amendments to be made to the judgment mortgage procedure should take into account prospective changes to be effected pursuant to the introduction of electronic conveyancing.*

4.38 *It is recommended that a stay on execution of judgment should not inhibit the ability of the plaintiff to register immediately a judgment mortgage save where the court makes an explicit order restraining such registration.*

4.39 *There should be a statutory declaration that a judgment creditor who has effected a sale holds the proceeds for the account of any prior incumbrancers.*

CHAPTER 5 JUDGMENT MORTGAGES OVER THE FAMILY HOME

A Current Law

5.01 Although there is no specific statistical data which indicates the number of judgment mortgages registered against properties which constitute the family home of the judgment debtor, it seems reasonable to assume that a significant proportion of judgment mortgages are registered against such properties.

(1) *Judgment Mortgages and the Family Home Protection Act 1976*

5.02 It was held by Carroll J in *Containercare (Ireland) Ltd v Wycherly*¹ that the consent of a non-owning spouse to a judgment mortgage registered against the interest of the judgment debtor is not required under the *Family Home Protection Act 1976* (FHPA). The reason for this decision is, by way of summary, because a judgment mortgage is not a voluntary act on the part of the judgment debtor – rather it comes into being by operation of law.² So where X, being the owner of the family home, incurs debts which he or she fails to pay, and has judgment entered against him or her, Y, the spouse, would not benefit from the protection normally afforded by the FHPA were X voluntarily to mortgage his or her interest in the family home to a creditor. If the transaction were a voluntary mortgage by X, Y could prevent its completion by withholding consent under the FHPA. This protection is not available to Y under the law as it currently stands in respect of a judgment mortgage.

¹ [1982] IR 143.

² See also *Murray v Diamond* [1982] ILRM 113. The Supreme Court has not yet pronounced on the issue although Doyle in “Judgment Mortgages” Bar Council Continuing Legal Education Programme 17 October 1994 at 12 notes that in *Bank of Ireland v Purcell* [1989] IR 327, it dropped a heavy hint that it disapproved of the idea that judgment mortgages were not covered by the *Family Home Protection Act 1976*.

5.03 There is a great deal of merit in the view that this rule could operate unfairly against the non-owning spouse. A non-owning spouse could find, as a result of the owning spouse's financial irresponsibility, that a judgment mortgage is registered against the family home – thereby putting the non-owning spouse and family at risk. The logical extension of this would be to provide that the registration of a judgment mortgage should be a transaction which requires the consent of the non-owning spouse for the purposes of the FHPA.

5.04 On balance, however, it is not recommended that the law be amended to provide that the consent of a non-owning spouse be required for the purposes of registration of a judgment mortgage. The reason for this is explained in some more detail in Part B of this Chapter. However, in summary, it is submitted that placing such a bar on the effectiveness of a judgment mortgage would, in practical terms, virtually rule out the possibility of any judgment mortgage being registered over a property that was a family home for the purposes of the FHPA. It is reasonable to assume that few – if any – spouses would grant their consent to registration of a judgment mortgage against the family home.

5.05 Instead, in order to protect the interests of the non-owning spouse and the family, it is proposed that no order for sale of a family home pursuant to a judgment mortgage should be possible unless the court so orders, having heard all interested parties. Again, the manner in which this should proceed is set out in more detail below.

5.06 *The Commission does not recommend that the law be amended to provide that the consent of a non-owning spouse be required for the purposes of registration of a judgment mortgage but rather proposes that no order for sale of a family home pursuant to a judgment mortgage should be possible unless the court so orders.*

(2) *Judgment Mortgages and Prior Equities in the Family Home*

5.07 A related issue is whether a judgment mortgage should override the equitable interest of the non-debtor spouse, partner or other person in the property. In this regard we conclude that the existing law protects the interests of those with a prior equity. We consider that Lyall is correct³ in stating that it does not necessarily

³ Lyall *Land Law in Ireland* (2nd ed Round Hall 2000) at 487.

flow from Carroll J's decision in *Containercare (Ireland) Ltd v Wycherly*⁴ that a judgment mortgagee can obtain an order for sale against the judgment debtor's spouse whose interest appears on the title, or against a spouse with an equity in the family home:

“That would be contrary to the decision in *Tempany v Hynes* in which the Supreme Court held that a judgment mortgage is a transaction without valuable consideration and, as such, is subject to all the equities which bound the judgment mortgagor. Where the non-debtor spouse has an equity it therefore takes priority over the judgment mortgage. It is submitted that it is then for the court to decide how that equity is to be satisfied. It may be that in some cases the just result would be to order sale. In other cases the circumstances may require that the non-debtor spouse should remain in possession. The court has a discretion.”

5.08 As noted above, the Commission does not recommend any change to the law so as to improve the priority status of a judgment mortgagee. A judgment mortgage is not a charge on land created for valuable consideration within the meaning of section 68(3) of the *Registration of Title Act 1964*. Accordingly, under section 74(4)(c) of the 1964 Act the judgment mortgage is subject to all unregistered rights subject to which the judgment debtor held the land at the time of registration of the judgment mortgage. It would appear, therefore, that where a spouse has an equitable interest in the family home (*eg* by reason of payments attributable to the purchase price or discharge of any mortgage over the home) this will prevail over the interests of the judgment mortgagee.

5.09 The position is less clear with regard to unregistered land. It may very well currently be the same because the judgment mortgagee is a mere volunteer, whose interest must perforce yield to those of the spouse whose equity has been obtained by valuable consideration. The contest with regard to priority is won by the spouse by reason of his or her interest having been obtained (a) first in time and (b) for valuable consideration. As already noted, the Commission recommends that the position should be the same whether title to land is registered or unregistered. The Commission

⁴ [1982] IR 143.

also recommends that a judgment mortgage should be subject to any prior legal or equitable rights.

5.10 *As regards judgment mortgages and prior equities in the family home, the Commission provisionally recommends that a judgment mortgage should be subject to any prior legal or equitable rights. The Commission also provisionally recommends that the position should be the same whether title to the land is registered or unregistered.*

B Proposals for Reform

(1) General

5.11 The potential effects of a judgment mortgage over a family home (within the broad, non-technical, meaning of that phrase) raise a number of policy issues which would have to be addressed by the Oireachtas were it to enact legislation updating the law and procedure with regard to judgment mortgages.

5.12 An obvious issue is whether, for the purposes of new legislation on judgment mortgages, a family home should have the same relatively narrow meaning as under the *Family Home Protection Act 1976* (ie a home in which the owner and his or her spouse reside), or whether it should have a broader meaning. For example, the Oireachtas may seek to cast the net more broadly so that a broader range of households is caught by the definition.

5.13 It is not the purpose of this Paper to prejudge these issues, still less to express a preference one way or the other as to which (if any) policy objectives should be pursued. Instead, this Paper will proceed on the basis that special considerations will apply where a judgment mortgage is registered with regard to the family home – whilst leaving aside the issue as to how the legislature intends to define the family home for these purposes.

(a) Availability of Remedies in Respect of Family Home

5.14 One policy issue is whether the remedy of the judgment mortgage should be available against a family home at all; another is whether or not the further remedy of sale of the premises should be available in respect of the family home if a judgment mortgage is obtained in respect of it. Once again, this is straying into the area of legislative policy to an extent – albeit to a lesser extent than with

regard to the process of defining the family home. In this regard the Commission would suggest that it would appear sensible that there should be no bar to registering a judgment mortgage over property which is the family home. However, we consider that there should be control, in the form of court approval, for any order for sale of a family home pursuant to a judgment mortgage (see paragraphs 5.17 – 5.19 below).

(b) Family Home Protection Act 1976

5.15 As noted above, it was held by the High Court in *Containercare (Ireland) Ltd v Wycherly*⁵ that registration of a judgment mortgage was not a transaction to which the non-owning spouse was required to consent pursuant to the *Family Home Protection Act 1976*. Although the Commission recommends that generally a judgment mortgage should be treated as if it were a consensual transaction, the Commission does not consider that there is any reason to require the consent of the judgment debtor's spouse before the judgment creditor may register a judgment mortgage against the family home. In practical terms, it is reasonable to assume that most spouses would refuse to give their consent. Few spouses would consent to putting in train a process which could eventually entail the family being put out on the street. Accordingly, it appears to us that imposing such a requirement would render the judgment mortgage procedure unworkable.

(2) Order for Sale Pursuant to a Judgment Mortgage

5.16 In the Commission's view whilst the family home should not be made automatically immune from the judgment mortgage procedure, there should be no order for sale of the family home save by order of the court. In this regard an analogy should be drawn between the judgment mortgage situation and the procedure under section 61(4) of the *Bankruptcy Act 1988* whereby the Official Assignee should not be permitted to dispose of the bankrupt's family home without the sanction of the court. This aim can be achieved, in our view, by providing that a judgment creditor before seeking an order for sale should serve on all interested parties an application to sell so that if those parties wish to be represented at the hearing and have their views heard they are given the opportunity to do so. Further, there should be a provision that no disposition of a family

⁵ [1982] IR 143.

home shall be permitted unless the spouse⁶ and minor children of the judgment debtor resident in the premises have been afforded the opportunity of being heard at the hearing to sanction disposal.⁷

5.17 The Commission recommends that no order should be made that a family home be sold without the approval of the court. Furthermore, a judgment creditor having registered a judgment mortgage over any other type of property would have to apply to court for an order for sale of the property.

5.18 A further issue which must be considered are the principles which should apply when the court is dealing with a judgment creditor's application to sell a property which is the family home of the judgment debtor.⁸

5.19 It is suggested that the following principles be applied. In exercising its discretion legislation should provide that the court take into account the following:

- (i) the financial means of the judgment creditor;
- (ii) the financial means of the non-debtor owner;
- (iii) the financial means of the family of the non-debtor owner residing in the property;
- (iv) whether, upon a sale of the property, sufficient proceeds would be available to the non-debtor owner to purchase reasonably similar accommodation in the same locality;
- (v) the amount of the judgment mortgage as a proportion of the value of the property;⁹

⁶ As noted above, the Oireachtas may wish to expand on the definition of family home: no specific recommendations are being made in this regard.

⁷ Similarly, consideration might be given to affording this opportunity to adult children with special needs.

⁸ *First National Building Society v Ring* [1992] 1 IR 375.

⁹ If the amount of the judgment debt is small in comparison to the value of the property, this could point to an incentive to the judgment debtor refinancing the property so as to pay off the judgment creditor. Equally, if the amount of the judgment debt is large in proportion to the value of the property, this may militate against a sale of the property because there may be insufficient equity to enable the judgment debtor to purchase an alternative property.

- (vi) the ability of the judgment debtor to provide¹⁰ reasonable alternative accommodation from the proceeds of sale of the property;
- (vii) any other matters which seem relevant to the court.

5.20 Clearly, as a basic matter, it is vital that the court have available to it evidence as to the value of the property. Otherwise it will not have all the material necessary to enable the court to do justice between the parties. The matter will have to be adjourned so that inquiries and an account can be taken, as occurred in *First National Building Society v Ring*.¹¹ This is clearly undesirable and unfair to the court. Accordingly, the Commission recommends that it be provided by statute that should any party object to the sale of the property by the judgment mortgagee, that party should adduce evidence as to the current value of the property.

5.21 *The Commission provisionally recommends that it be provided by statute that should any party object to the sale of the property by the judgment mortgagee, that party should adduce evidence as to the current value of the property.*

¹⁰ The use of the word 'provide' rather than 'purchase' is reasonable. It appears to us that if there is evidence that the judgment debtor could provide (eg rented) accommodation for his or her family (rather than purchase a freehold) then this should be taken into account by the court. In other words, the mere fact that there is insufficient equity to purchase an alternative property should not of itself be a bar to ordering a sale, so long as the judgment debtor has sufficient means to provide reasonable alternative accommodation.

¹¹ [1992] 1 IR 375.

CHAPTER 6 SEVERANCE OF JOINT TENANCIES AND PARTITION

A Introduction

6.01 Co-ownership describes the situation where two or more persons are simultaneously entitled to a single piece of land. The common forms of co-ownership are joint tenancies and tenancies in common.¹ Four criteria, known as the four unities, must be present in order for a joint tenancy to exist, namely unity of possession, interest, title and time. Where present together, these four unities give rise to a right of survivorship, the defining attribute of a joint tenancy. By way of contrast, only the unity of possession need be present for there to be a tenancy in common, whereby each owner has a distinct share in the property and there is no right of survivorship upon death of one of the owners.

6.02 Unity of interest requires that each joint tenant has precisely the same estate so that, for example, a joint tenancy could not exist between the holder of a life estate and the owner of a fee simple. That said, unity of interest is maintained notwithstanding that one joint tenant obtains an additional interest in the property either before or at the time that the joint tenancy was created. In order for there to be unity of title all of the joint tenants must have acquired their interest in the land by the same title, for example by the same will or deed or the same act of adverse possession. Finally, by unity of time it is meant that the interest of each of the joint tenants must have vested at the same time.

6.03 Because property under a joint tenancy is held in indistinct shares, upon death of a joint tenant his or her interest will be unable to pass under a will or according to the rules on intestacy, but will pass by survivorship. In contrast, because each tenant in common has a distinct share from the commencement of the tenancy in common

¹ Another form of co-ownership is coparcenary. See Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraphs 7.40, 7.48 and 7.52.

which is capable of passing to their successors in title, there can be no question of the other tenants in common enjoying a right of survivorship. Frequently the motivation for severing a joint tenancy so as to convert it into a tenancy in common is to terminate the right of survivorship.

B Severance

6.04 Destruction of one of the four unities will terminate a joint tenancy.² However it is only where either the unity of interest or unity of title are destroyed that the joint tenancy will be converted into a tenancy in common. This is because (a) unity of possession is essential to both forms of co-ownership and (b) unity of time is a precondition which must have existed in order for there ever to have been a joint tenancy and so cannot be destroyed. Lyall identifies four ways in which a joint tenancy may be severed at law.³

(1) *Subsequent Acquisition of Another Interest*

6.05 If, after a joint tenancy has been created, one joint tenant acquires an additional interest in the property, the unity of interest will be destroyed and the tenancy severed creating a tenancy in common.⁴

(2) *Alienation by One Joint Tenant to a Third Party*

6.06 An *inter vivos* transaction by a joint tenant transferring all or part of his or her interest to a third party will destroy the unity of title, thereby severing the joint tenancy. Both of these methods, subsequent acquisition of another interest and alienation to a third party, apply to both severance at law and severance in equity.⁵

² See Chapter 5 of the Law Reform Commission's *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70 – 2003).

³ Lyall *Land Law in Ireland* (2nd ed Round Hall 2000) at 436.

⁴ *Connolly v Connolly* (1866) 17 Ir Ch R 208; *Flynn v Flynn* [1930] IR 337.

⁵ In line with the general precept that equity will regard as done that which ought to be done, it is possible to sever the equitable title (though not the legal title) by entering into a specifically enforceable contract to alienate. Moreover, in *Burgess v Rawnsley* [1975] 1 Ch 429 it was held that an agreement between the parties by which one agreed to convey an interest in the property to another need not be enforceable as a contract in order to

(3) Unilateral Dealing

6.07 By conveying an interest to feoffees (a person to whom land is conveyed for the purpose of holding it to the use of another) to hold to the use of oneself and by operation of the *Statute of Uses 1634* a joint tenant can sever a joint tenancy and create instead a tenancy in common. However, because the *Statute of Uses 1634* does not apply to leasehold interests the joint tenant would first have to assign the property to a third party on trust for the joint tenant as a tenant in common, and secondly, the trustee would assign the premises to the joint tenant as tenant in common.⁶ In a previous Report the Commission came to the conclusion that, since each joint tenant has the chance of ultimately ending up with the entire property through the right of survivorship, it is unjust that a joint tenant may be deprived of this chance by the unilateral actions of a fellow joint tenant.⁷ Consequently the Commission recommended that unilateral severance by alienation, whether to a nominal feoffee so as to retain an interest or to a third party, be prohibited in all cases. Following this approach a joint tenancy may only be severed where all the joint tenants consent to the alienation. Furthermore, since the same policy arguments apply to unilateral severance effected by a joint tenant acquiring a further interest, the Commission recommended that a joint tenant should not be able to sever the joint tenancy by acquiring another interest without first obtaining the consent of all the other joint tenants.⁸

(4) Act of a Third Party Under Statutory Powers

6.08 An involuntary alienation such as the vesting of a joint tenant's interest in the Official Assignee upon bankruptcy will have the same effect as alienation by a joint tenant.⁹ Furthermore partial

sever the joint tenancy in equity. Equity may also infer such an agreement from the joint tenants' conduct, for example, where they seem to have treated their interests in the property as severed over a substantial period of time.

⁶ See Law Reform Commission *Report on Land Law and Conveyancing Law (7) Positive Covenants over Freehold Lands and other Proposals* (LRC 70-2003) at 50.

⁷ *Ibid* at 56.

⁸ *Ibid* at 57.

⁹ *Re Hayes' Estate* [1901] 1 IR 207.

alienation involving such rights in the property as are inconsistent with the right of survivorship will also effect severance, for example the granting of a mortgage or the creation of a life estate.¹⁰ While a mere incumbrance will not effect a severance, in *McIlroy v Edgar*¹¹ it was held that the registration of a judgment as a mortgage against the interest of a joint tenant has the effect of severing the joint tenancy. This was followed in *Containercare (Ireland) Ltd v Wycherley*¹² where Carroll J held that as registration had transferred the husband's interest to the judgment creditor as security, it had the effect of severing the joint tenancy. According to Wylie doubt remains as to whether Irish law regards a mere charge as being capable of severing a joint tenancy, although following the decision in *Northern Bank Ltd v Heggarty*¹³ this is currently the position in Northern Ireland.

C Judgment Mortgages and Joint Tenancies

6.09 Where land is owned jointly by the judgment debtor and another, the legal position where a judgment mortgage has been registered against a joint tenancy is potentially highly complex.¹⁴

6.10 Rather anomalously, the legal situation is different depending on whether the land is registered land or unregistered land. Under the law as it currently stands, a judgment mortgage will operate to sever a joint tenancy of unregistered land, but with regard to registered land the position is less clear. It is unclear if the effect of section 71(4) of the *Registration of Title Act 1964* is that the registration of a judgment mortgage severs a joint tenancy. The Irish courts have yet to decide this issue. There is authority that any alienation by a joint tenant – including by way of mortgage – severs the joint tenancy.¹⁵ Of course, a judgment mortgage is not a

¹⁰ See Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 440.

¹¹ (1881) 7 LR Ir 521.

¹² [1982] IR 143.

¹³ High Court of Northern Ireland 8 February 1995. See Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 440.

¹⁴ See Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraph 13.181; Lyall *Land Law in Ireland* (2nd ed Round Hall 2000) at 486-489.

¹⁵ Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 440.

consensual act of the ‘mortgagee’: rather it is an enforcement procedure invoked by the judgment creditor.

6.11 There is a strong argument that there should be no difference between the effect of a judgment mortgage over registered and unregistered land respectively. The Commission recommends that the position be the same with regard to both types of interest in land – registered and unregistered.

6.12 *The Commission provisionally recommends that the effect of a judgment mortgage on a joint tenancy should be the same whether the property is registered or unregistered.*

6.13 This then raises the question as to whether there should be a severance (as with unregistered land) or not (as is possibly the case with regard to registered land). Were there to be no severance, and if the judgment debtor dies before the judgment mortgage is enforced, the joint interest of the judgment debtor passes upon his or her death to the non-debtor owner apparently free from the encumbrance created by the judgment mortgage. However, if there is a severance, then the interest of the judgment creditor pursuant to the judgment mortgage would appear to pass with the title to the newly created tenancy in common. So if the judgment debtor dies before enforcement of the judgment mortgage, the interests of the judgment creditor are not thereby defeated where there is a severance.

6.14 Conversely, if the non-debtor owner dies before enforcement of the judgment mortgage, the judgment mortgage would appear to take effect over the whole property as there is no longer a severable interest held by the judgment debtor in the property.

6.15 The Commission as a matter of policy does not favour the operation of unilateral severance.¹⁶ Accordingly the Commission considers that it is preferable that the existing law be amended so that registration of a judgment mortgage should not effect a severance.

6.16 *The Commission provisionally recommends that the law be amended so that registration of a judgment mortgage should not effect a severance.*

¹⁶ Law Reform Commission *Report on Land Law and Conveyancing Law (7) Positive Covenants over Freehold Lands and other Proposals* (LRC 70 – 2003)

6.17 Subject to the property being a family home, the usual principles should apply in a partition suit – namely that the party with over half the interest in the property who seeks a declaration of sale should be granted it in the normal course.

D Partition

6.18 There appears to be some merit in modernising the system established under the *Partition Acts* insofar as it applies within the context of a judgment mortgage. The Commission recommends that the *Partition Acts* no longer apply to judgment mortgages but that the judgment creditor bring its application under the new legislation. The new legislation should then set out the guidelines to be applied by the court when considering whether to order a sale. Those guidelines will, of necessity, vary according to whether the property is a family home or not.

6.19 *The Commission provisionally recommends that the Partition Acts should no longer apply to judgment mortgages and that new legislation should set out the guidelines to be applied by the court when considering whether to order a sale.*

CHAPTER 7 SUMMARY OF PROVISIONAL RECOMMENDATIONS

Chapter 2 The Current Law

7.01 The Commission recommends that the law be changed so that any description of unregistered land sufficient to identify it with reasonable certainty may be used in a judgment mortgage affidavit (paragraph 2.27).

7.02 The Commission recommends that consideration be given as to whether there is a need for a statutory requirement to state the precise amount of costs awarded on the judgment mortgage affidavit (paragraph 2.34).

7.03 The Commission is provisionally of the view that given that the primary purpose of registration of a judgment mortgage is not to inform outsiders of the amount of the judgment but rather to inform them that the debtor's property is encumbered, there is little practical benefit in having an explicit statutory requirement that the judgment creditor state the amount of the judgment and in particular to state the interest and costs (paragraph 2.40).

7.04 The Commission is of the view that the law relating to judgment mortgages is too narrow a basis upon which to attempt to address the Supreme Court decision in *Tempany v Hynes*. All aspects of *Tempany v Hynes* will be the subject of general review in the context of the Commission's project for the reform of conveyancing law currently underway (paragraph 2.48).

7.05 The Commission recommends that legislation should clarify that a judgment creditor need not renew the judgment mortgage every five years (paragraph 2.50).

7.06 The Commission recommends that as regards the date when an action accrues as referred to in section 32 of the *Statute of Limitations 1957*, it should be clarified by legislation that, in relation to judgment mortgages, this means from the date when judgment is

marked, not the date when the judgment mortgage affidavit is registered (paragraph 2.52).

7.07 The Commission recommends the repeal, to the extent necessary, of section 291 of the *Companies Act 1963* and its replacement with a provision to the effect that a judgment mortgage registered against an interest in land held by a company should enjoy priority as if it were a consensually created security (paragraph 2.65).

7.08 The Commission recommends that section 50 of the *Bankruptcy Act 1988* be amended in order to preserve the priority of a judgment mortgage in bankruptcy and that the provision does not apply to a judgment creditor who has duly registered his judgment as a mortgage (paragraph 2.67).

7.09 The Commission recommends that a judgment mortgage should be subject to the same registration requirements as applied to the other forms of security set out in section 99 of the *Companies Act 1963*. Accordingly failure by the judgment creditor to register particulars of the charge within 21 days of its creation should render the judgment mortgage void as against a liquidator and other creditors of the company (paragraph 2.73).

7.10 The Commission recommends that it be clarified that the beneficial interest of a beneficiary under a trust for sale of land is capable of being made the subject of a judgment mortgage (paragraph 2.75).

7.11 The Commission recommends that consideration be given to protecting the interests of prior encumbrancers through the mechanism of a statutory hearing to consider ordering sale and a provision stating explicitly that the judgment creditor holds the proceeds of sale to the account of all encumbrancers with a prior interest in the property as of the date of sale (paragraph 2.77).

Chapter 4 Proposals for General Reform

7.12 The Commission recommends that the record of judgments be maintained in the Land Registry and the Registry of Deeds as appropriate, with regard primarily to the property, rather than being replaced by a central register of judgments referable to the names and addresses of judgment debtors (paragraph 4.05).

7.13 The Commission recommends that legislation should provide that a judgment creditor be automatically entitled to choose to enforce an unsatisfied judgment by way of judgment mortgage (paragraph 4.08).

7.14 The Commission recommends that the precise amount of costs and/or interest decreed need not be stated but can be verified later by a supplemental form or affidavit (paragraph 4.11).

7.15 The Commission recommends that an innocent error as regards identification of the judgment debtor should be capable of rectification and should not affect the validity of the judgment mortgage (paragraph 4.14).

7.16 The Commission recommends that unregistered land should be identified with reasonable precision and that any innocent error, misdescription or absence of detail should be capable of rectification and should not affect the inherent validity of the judgment mortgage (paragraph 4.16).

7.17 The Commission recommends that a form of application, having the status of a statutory declaration, should be promulgated by Rules of Court setting out the necessary particulars, including the parties to the action and details of the property to be subject to the judgment mortgage sufficient to identify it (paragraph 4.18).

7.18 The Commission recommends that a judgment creditor should be asked to indicate on the form of application whether, to the best of his knowledge or belief, the property is a residential dwelling (paragraph 4.19).

7.19 The Commission recommends that it be confirmed by legislation that a judgment creditor can apply for registration of the judgment mortgage notwithstanding that the judgment debtor has obtained a stay on the execution of the judgment by order of the court (paragraph 4.21).

7.20 The Commission recommends that registration should be provided to operate as a charge by the judgment debtor over the property and the charge shall be deemed to have been granted for valuable consideration save for the purposes of the *Family Home Protection Act 1976* (paragraph 4.22).

7.21 The Commission recommends that it should be provided that a registered judgment mortgage has priority over (a) all later

registered judgment mortgages and (b) all later encumbrances whether registered or not. However the registered judgment mortgage should not have priority over any previous charges or equitable interests, whether registered or not (paragraphs 4.22 and 4.23).

7.22 The Commission recommends that a judgment mortgage should ‘travel with the land’ and should bind all subsequent purchasers for value and volunteers (paragraph 4.24).

7.23 The Commission recommends that registration of a judgment mortgage should constitute notice to all subsequent encumbrancers, purchasers and volunteers (paragraph 4.25).

7.24 The Commission recommends that a judgment creditor should have all the rights of a chargee who has provided consideration but that, given the practical difficulties of providing for enforcement of sale without a hearing to declare the property well charged with the judgment mortgage, the existing system whereby the judgment mortgagee proceeds by way of mortgage suit should continue (paragraph 4.28).

7.25 The Commission recommends that it should be provided that the mere fact that a contract of mortgage or loan is terminated before its due date should not be a sufficient reason on its own for a court to refuse an order for sale pursuant to a judgment mortgage (paragraph 4.31).

7.26 The Commission recommends that a judgment mortgage registered against a company, and an individual, should, subject to section 284(2) of the *Companies Act 1963* and section 51 of the *Bankruptcy Act 1988*, enjoy the same priority as if the judgment mortgage were a validly created charge for valuable consideration (paragraph 4.34).

7.27 The Commission recommends that section 291 of the *Companies Acts 1963*, which deprives a judgment creditor of priority in a liquidation if the judgment creditor has not seized the land or appointed a receiver, should be repealed (paragraph 4.35).

7.28 The Commission recommends that section 102 of the *Companies Act 1963* should be amended so that there is a duty on a judgment creditor to register a judgment mortgage in the same manner as a charge under section 99 of the *Companies Act 1963*. Failure to register the judgment mortgage should render the

judgment mortgage void as against any liquidator or other creditor of the company (paragraph 4.36).

7.29 The Commission recommends that it be confirmed that it is possible to register a judgment mortgage over the proceeds of sale of an equitable interest, as well as an equitable interest itself (paragraph 4.37).

7.30 The Commission recommends that a stay on execution of judgment should not inhibit the ability of the plaintiff immediately to register a judgment mortgage save where the court makes an explicit order restraining such registration (paragraph 4.39).

7.31 The Commission recommends a statutory declaration to the effect that a judgment creditor who has effected a sale holds the proceeds for the account of any prior encumbrancers (paragraph 4.40).

Chapter 5 Judgment Mortgages Over the Family Home

7.32 The Commission does not recommend that the law be amended to provide that the consent of a non-owning spouse be required for the purposes of registration of a judgment mortgage but rather proposes that no order for sale of a family home pursuant to a judgment mortgage should be possible unless the court so orders (paragraph 5.06).

7.33 As regards judgment mortgages and prior equities in the family home, the Commission recommends that a judgment mortgage should be subject to any prior legal or equitable rights. The Commission also recommends that the position should be the same whether title to the land is registered or unregistered (paragraph 5.10).

7.34 The Commission recommends that no order should be made that a family home be sold without the approval of the court. Furthermore, a judgment creditor having registered a judgment mortgage over any other type of property would have to apply to court for an order for sale of the property (paragraph 5.17).

7.35 The Commission recommends that the following principles be applied in a situation where the property is co-owned by the judgment debtor and his or her spouse. In exercising its discretion legislation should provide that the court take into account the following:

- (i) the financial means of the judgment creditor;
- (ii) the financial means of the non-debtor owner;
- (iii) the financial means of the family of the non-debtor owner residing in the property;
- (iv) whether, upon a sale of the property, sufficient proceeds would be available to the non-debtor owner to purchase reasonably similar accommodation in the same locality;
- (v) the amount of the judgment mortgage as a proportion of the value of the property;
- (vi) the ability of the judgment debtor to provide reasonable alternative accommodation from the proceeds of sale of the property;
- (vii) any other matters which seem relevant to the court (paragraph 5.19).

7.36 The Commission recommends that it be provided by statute that should any party object to the sale of the property by the judgment mortgagee, that party should adduce evidence as to the current value of the property (paragraph 5.21).

Chapter 6 Severance of Joint Tenancies

7.37 The Commission recommends that the effect of a judgment mortgage on a joint tenancy should be the same whether the property is registered or unregistered (paragraph 6.12).

7.38 As a matter of policy the Commission does not favour the operation of unilateral severance and accordingly recommends that the law be amended so that registration of a judgment mortgage should not effect a severance (paragraph 6.16).

7.39 The Commission recommends that the *Partition Acts* should no longer apply to judgment mortgages and that new legislation should set out the guidelines to be applied by the court when considering whether to order a sale (paragraph 6.19).



The Law Reform Commission

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