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EXEMPTION OF INCOME AND ASSETS FROM GARNISHMENT AND EXECUTION

By -

Professor C. R. B. Dunlop*

I. Introduction

The purpose of this paper is to examine those categories of assets belonging to the debtor which the state has declared or should declare to be exempt from any form of execution or garnishment process brought by the individual creditor. The focus of the study will be on exemptions available to the debtor against his unsecured creditors, but some comment will be made regarding the exemptions which do or should exist as against secured or preferred creditors.

In three previous studies[1] the writer examined the English and Canadian law governing the exigibility of personal and real property, and concluded that the present law is confused and unsatisfactory. The Canadian execution legislation, taken together with the legacy of English judge-made and legislative rules and remedies, permits execution against some assets and not against others and submits exigible assets to widely differing execution procedures. These distinctions do not appear to result from any intelligible policy; instead they flow largely from the accidents of English legal history and from the confused and timid drafting of the relevant Canadian legislation. In the three papers, the writer recommended that any new execution act should make all real and personal property of the judgment debtor available to his creditors, subject to the creation of categories of assets exempt from execution and garnishment because they are necessary to the survival of the debtor and his family.

The purpose of the present paper is to examine the question of exemptions, left unanswered in the earlier essays. For the purposes of this study, the writer assumes that all real and personal property of

the judgment debtor and all forms of income received by him or debts owed to him are exigible and can be reached effectively by the creditor, so that the proposed exemptions will be the only subtraction from the whole of the debtor's assets. The assumption is not completely realistic. Even if the Alberta Legislature were to accept the recommendations of the three previous research papers, there might still be a gap between the real wealth of the debtor and the assets capable of execution by the creditor. It is possible to set up trusts analogous to the American spendthrift trust which provide assets or income to the debtor which the creditor cannot reach.[2] A more practical difficulty with the writer's assumption is that debtors can and some do conceal their assets, engage in fraudulent preferences which are undiscoverable or unprovable, and otherwise conceal part of their wealth from their creditors. Nevertheless, it seems proper to assume that all the wealth of the debtor can be effectively reached and to construct our system of exemptions on that basis. The problem of the dishonest debtor can then be dealt with by various means, including a reform of the antiquated and little-used fraudulent preferences legislation.[3]

After a brief account of the history of exemptions legislation and an analysis of the deficiencies of such legislation, the paper will attempt to develop a theory of the proper balance which the law should strike between debtor and creditor. The paper will then analyze existing exemptions legislation in Alberta and elsewhere, and will conclude with a detailed series of proposals for income and capital exemptions. The writer's intention is to concentrate on the creation of a standard system of exemptions suitable to all debt collection situations. Some attention will be given to the question whether any exceptions to the

standard system should be permitted in special cases. The position taken by the writer will be that there may be certain circumstances in which exemptions should be increased, but as a general rule exemptions should never be reduced or made subject to exceptions.

The earlier study on exemptions prepared by the writer for the Law Reform Commission of British Columbia attempted to consider the problem on its merits without taking into account the impact of federal bankruptcy legislation. At the time, this approach was acceptable because the Bankruptcy Act generally followed the exemption law of the relevant province, except as to salary and wages.[4] However the tabling in Parliament of the new Bankruptcy Bill[5] requires the writer to consider its effect on any proposed changes to the Alberta exemptions legislation. What the writer intends to do is to look at various reforms on their merits, and then to consider which of these reform possibilities are desirable if the Bankruptcy Bill becomes law in its present form.

Much of the following essay assumes that the proposed exemptions will operate in the present structure of individual creditors' remedies. In recent years, there have been many proposals for a more radical reform of the system of creditor-debtor law, in which much of the discretion as to the operation of the debt collection process would be transferred from the individual creditor to a state agency such as the enforcement office proposed by the Payne Committee in England[6] and by the Kerr Report in New Brunswick,[7] and implemented in 1969 in Northern Ireland.[8] The writer will assume for the purposes of this paper that the present system of individual creditors' remedies will continue in Alberta. There will be, however, some consideration of the proper role of the judiciary in supervising the process.

II. History of Exemptions Legislation

A. England

At common law, the general rule was that "the sheriff might seize and sell all the personal goods and chattels belonging to the defendant that he could find, and which could be sold, with the exception of wearing apparel actually in use, and perhaps goods in the personal possession of the defendant."[9] The common law rule was interpreted harshly and restrictively; Holt, C.J. observed in 1697 that the sheriff "may take anything but wearing clothes; nay, if the party hath two gowns, he may take one of them."[10] As to land, the Statute of Westminster II, in creating the writ of elegit, exempted from its operation the debtor's "oxen and the beasts of his plow."[11] It was not until 1845 that legislation was enacted in England exempting from execution "the wearing apparel and bedding of any judgment debtor, or his family, and the tools and implements of his trade, the value of such apparel, bedding, tools, and implements not exceeding in the whole the value of £5."[12]

The history of exemptions against garnishment is more complex. At common law, debts could not be reached by the creditor although equity and certain borough courts did provide some limited remedies.[13] Attachment of debts as it exists in Canada today was first enacted in England by the Common Law Procedure Act of 1854,[14] but that Act provided no system of exemptions from garnishment. This situation was accepted as to non-income debts, but there was considerable argument about the propriety of attaching a workman's wages. The debate was concluded in England by the Wages Attachment Abolition Act[15] which expressly protected all manual workers from attachment of earnings, a principle which was extended by the judges to all other employees.[16] The policy appears to have been that the

wage packet should be inviolable, and that neither the employer nor the creditor should be permitted to divert from the worker any part of his income.

No sooner had Parliament established a clear policy in favour of the inviolability of the wage packet than it began to carve out exceptions to the rule.[17] Deductions from wages were permitted for income tax, and to reimburse employers for sums paid on behalf of employees under the National Insurance Acts. The Crown was permitted to attach wages in order to recover fines and legal aid contributions in criminal proceedings. The Maintenance Orders Act 1958[18] permitted attachment of earnings in respect of all maintenance orders. Despite these exceptions, the principle of inviolability of the wage packet survived until the Administration of Justice Act 1970[19] which accepted the recommendation of the Payne Committee to make earnings generally attachable by creditors.[20] Thus the English policy on wage garnishment moved from complete rejection in 1870 to complete acceptance one hundred years later.

B. North America

The Canadian and American colonies enacted statutory exemptions against execution well before the 1845 English act, the earliest Canadian legislation being passed in 1786.[21] A prominent feature of the colonial legislation was the liberality with which exemptions were granted to the debtor. The legislation commonly exempted a sizable amount of personal property, frequently specified in much detail, life and other insurance policies and their proceeds, and the matrimonial home or farm. Many American states incorporated exemptions provisions into their state constitutions, thus providing evidence of their importance to the pioneer

legislators.[22]

Unfortunately, once the early exemptions legislation was enacted, the tendency in many North American jurisdictions was to fail to keep the provisions up to date by regular review and amendment. The result of this legislative neglect is that exemptions legislation in the United States and in Canada today is characterized by extreme obsolescence. Many exemptions statutes currently in force are geared to the economy of an earlier day. Thus Connecticut confers upon each householder an exemption for "two tons of coal, two tons of hay, five bushels each of potatoes and turnips, two hundred pounds of wheat flour, two cords of wood, ten bushels each of Indian corn and rye or the meal or flour manufactured therefrom ...."[23] As the economic and social structure of North America has changed, these legislative provisions have increasingly become irrelevant, although the courts have struggled to adopt out-of-date statutes to modern conditions.[24]

Another result of legislative neglect of exemptions legislation has been that monetary limits on exemptions, which may have been liberal at the date of enactment, have become increasingly restrictive as a result of inflation. A good example is the $2,500.00 exemption for real property registered under the British Columbia Homesteads Act.[25] This financial limit was last amended in 1867[26] and must have provided liberal protection in pioneer British Columbia but today it has become ludicrously inadequate as a fair exemption from execution, partly because of inflation and partly because very few properties are now registered under the Act.

The sections of the 1854 English Common Law Procedure Act creating the attachment of debts remedy were soon copied in Canada; Upper Canada passed the first garnishment statute in 1856.[27] The American colonies had created a process analogous to garnishment before 1854 by developing the

foreign attachment remedy created by certain English borough courts like the Lord Mayor's Court of London.[28] Unlike England, both the United States and Canada soon extended garnishment to wages and salaries.[29] A few American and Commonwealth jurisdictions never permitted wage garnishment,[30] and there are at least three jurisdictions which, having at first permitted the remedy, have subsequently abolished it.[31] However, the general pattern has been that those jurisdictions which initially accepted wage garnishment have retained the remedy but have restricted its scope by, for example, raising the exemptions and restricting it to a postjudgment process. Even in these jurisdictions, there have been a series of recommendations from law reform commissions and from academic writers calling for abolition or severe restriction of garnishment of income.[32]

Studies comparing wage garnishment statutes in Canada[33] and in the United States[34] reveal a considerable diversity in substance and procedure. Exemptions from garnishment vary from parsimonious to generous, although the diversity in the United States has been substantially reduced by the enactment of the Consumer Credit Protection Act of 1968.[35] Some provinces, like Alberta,[36] permit prejudgment wage garnishment, while others do not.[37] Almost all jurisdictions permit certain judgment creditors, such as landlords, or wives suing under maintenance orders, to garnishee more than other trade creditors; the norral exemption from garnishment either does not apply at all or is smaller in amount.[38] The writer will comment later on this wealth of possible models for a new attachment of debts act.

During the past ten years, there has been a considerable increase in interest in the reform of creditor-debtor law generally and exemptions specifically. While the Payne Committee[39] had relatively little to say

about exemptions (except exemption of wages), the Kerr report in New Brunswick[40] and the Baird report in Ontario[41] both devoted substantial space to the subject. In the United States, the courts have become actively engaged in the work of reform as a result of the important decisions of the Supreme Court in Sniadach v. Family Finance Corporation of Bay View[42] and Fuentes v. Shevin[43] which struck down state remedial statutes on the ground that they violated the constitutional right to due process. There is a considerable body of periodical articles in the United States on various aspects of creditors' remedies, especially the problem of wage garnishment.[44] The other great reform proposal in the field of exemptions, namely, the Bankruptcy Bill, will be discussed below.

C. Alberta - Exemptions from Execution

The principal Alberta statute regarding exemption from execution is the Exemptions Act.[45] The writer has traced the history of that statute back to the Northwest Territories Exemptions Ordinance of 1879.[46] That Ordinance provided that certain specified household furniture, necessary tools and implements, and livestock would be exempt from execution, except where the articles (except for food, clothing and bedding) had been sold to the judgment debtor by the creditor who was now suing for the price of those goods. The Ordinance also provided that the debtor was entitled to a choice if he had a greater number of the articles declared to be exempt than he was permitted to retain.

The 1879 Ordinance was shortlived; it was repealed in 1884 and replaced by a new ordinance[47] which is worth reproducing because it sets the form and the tone of Northwest Territories and Alberta exemptions legislation from that date to the present. Omitting the preamble and a

transitional section, the Ordinance read as follows:

1. The following personal and real estate are hereby declared free from seizure by virtue of all writs of execution issued by any court in these Territories, namely:

(1.) The necessary and ordinary clothing of the defendant and his family;

(2.) The furniture and household furnishings belonging to the defendant and his family, to the value of two hundred dollars;

(3.) The necessary food for the defendant's family during six months, which may include grain, flour, or vegetable, and meat, either prepared for use or on foot;

(4.) Two cows, two oxen and one horse, or three horses or mules; four sheep and two pigs, besides the animals the defendant may have chosen to keep for food purposes, and food for same for the months of November, December, January, February, March, and April, or for such of these months or portions thereof as may follow the date of seizure, provided such seizure be made between first of August and thirtieth day of April next ensuing;

(5.) The harness necessary for three animals, one wagon, one mower and horse rake, one breaking plow, one cross plow and one set harrows;

(6.) The books of a professional man;

(7.) The tools and necessaries used by the defendant in the practice of his trade or profession to the value of two hundred dollars;

(8.) Seed grain sufficient to seed all his land under cultivation, not exceeding fifty acres, at the rate of two bushels per acre, defendant to have choice of seed, and fourteen bushels of potatoes;

(9.) The homestead of the defendant, provided the same be not more than eighty acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon;

(10.) The house, barns, stables and fences on defendant's farm, subject however as aforesaid.

2. The defendant shall be entitled to a choice from the greater quantity of the same kind of articles which are hereby exempted from seizure.

> 3. Nothing in this Ordinance shall exempt from seizure any article (except for the food, clothing and bedding of the defendant and his family) the price of which forms the subject matter of the judgment upon which execution against the defendant is issued.
>
> 4. No judgment or action for debts, contracted outside of the North-West Territories, shall be enforced against any settler coming into the said North-West Territories, within six years of the date of his arrival; provided always that nothing herein shall prevent the collection of debts, contracted outside the North-West Territories, for goods purchased to be brought into the said Territories, and provided further that nothing herein contained shall affect the rights of mortgagees, and shall not apply to debts nor contracts acknowledged in the said Territories, provided nevertheless that the Ordinance respecting limitation of actions shall not run during the said six years.

Section 4 was deleted from a redrafted Exemptions Ordinance passed in 1885,[48] but the section is still important because it tells the reader something of the policy which underlay the passage of the Exemptions Ordinance as a whole. William Vukowich, in an excellent American article on exemptions, has analyzed the thinking which led to the enactment of American exemptions legislation, particularly in the southern and western states:

> Exemption laws in some southern and western states were enacted in response to the devastating effects of the economic depressions of the eighteenth and nineteenth centuries, which took their toll among borrowers in all economic classes. Having borrowed when prices, wages, and expectations were high, people were called upon to repay their debts when the economy became depressed, and as a result, many families lost their homes and possessions. The realization that hard times could fall upon anyone engendered tolerance for debtors which led to debtor protection laws. To some extent early exemption laws in the rural West and South also were influenced by a general dislike for urban creditors.
>
> Early exemption laws also were passed to attract settlers. The federal Homestead Act of 1862 encouraged settlement by offering land at nominal prices and by providing that the land was exempt from debts contracted prior to the official grant of the land. State homestead laws applied the exemption either to debts whenever

> incurred or to debts incurred after the homestead was acquired or declared. States also exempted some personal property, thus offering further security to potential settlers in economically unstable times. [49]

Section 4 suggests that the same considerations must have dominated the minds of the legislators who passed the 1884 Exemptions Ordinance. The Institute will want to consider whether those considerations remain significant today and, if not, what is the modern justification for an exemptions statute.

The 1884 Ordinance provided the basic structure of the exemptions legislation of the Northwest Territories and of Alberta. Subsequent ordinances added to the legislation and brought it up to date, but left that structure intact. In 1897, the benefit of the Exemptions Ordinance was extended to the widow, children and representatives of a deceased debtor.[50] In the next year, it was enacted that an absconding debtor could not claim any exemptions, where he left no wife or family behind.[51] In 1901, a similar exception was created where the creditor was a wife executing on a judgment or order for the payment of alimony.[52]

Between 1884 and 1905, there was some modification of the list of exempt goods. The Exemptions Ordinance as it appeared in the 1905 General Ordinances contained the following exemptions:

> 2. The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely:
>
> 1. The necessary and ordinary clothing of himself and his family;
>
> 2. Furniture, household furnishings, dairy utensils, swine and poultry to the extent of five hundred dollars;
>
> 3. The necessary food for the family of the execution debtor during six months which may include grain and flour or vegetables and meat either prepared for use or on foot;

> 4. Three oxen, horses or mules or any three of them, six cows, six sheep, three pigs and fifty domestic fowls besides the animals the execution debtor may have chosen to keep for food purposes and food for the same for the months of November, December, January, February, March and April, or for such of these months or portions thereof as may follow the date of seizure provided such seizure be made between the first day of August and the thirtieth day of April next ensuing;
>
> 5. The harness necessary for three animals, one waggon or two carts, one mower or cradle and scythe, one breaking plough, one cross plough, one set of harrows, one horse rake, one sewing machine, one reaper or binder, one set of sleighs and one seed drill;
>
> 6. The books of a professional man;
>
> 7. The tools and necessary implements to the extent of two hundred dollars used by the execution debtor in the practice of his trade or profession;
>
> 8. Seed grain sufficient to seed all his land under cultivation not exceeding eighty acres, at the rate of two bushels per acre, defendant to have choice of seed, and fourteen bushels of potatoes;
>
> 9. The homestead, provided the same be not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon;
>
> 10. The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of fifteen hundred dollars. [53]

The Alberta Act creating the province of Alberta continued in force all of the laws of the Northwest Territories including the legislation regarding exemptions.[54] There were minor amendments to the Northwest Territories Ordinance,[55] but it was not until 1922 that the Alberta Legislature enacted its own Exemptions Act which simply reproduced the Northwest Territories legislation as amended.[56] In 1935, the Act was amended to provide that a person who executed a chattel mortgage of goods declared exempt by the Act had

the right to claim as exempt from seizure and from sale any such chattels covered by the mortgage which cannot be seized or sold without depriving the mortgagor of the number or part of the number of the kind of such chattels which by virtue of section 2 of this Act he may hold free from seizure under execution. [57]

The section has been continued in Alberta exemption legislation to the present.[58]

In 1941, the exemptions legislation was repealed and a new Exemptions Act was passed.[59] The list of exempt assets was again modified. The new section 2 read as follows:

> 2. The following real and personal property of an execution debtor is hereby declared exempt from seizure by virtue of all writs of execution, namely:
>
> (a) The necessary and ordinary clothing of himself and his family;
>
> (b) Furniture and household furnishings and household appliances to the value of seven hundred dollars;
>
> (c) Cattle, sheep, pigs, domestic fowls, grain, flour, vegetables, meat, dairy or agricultural produce whether prepared for use or on foot, or any of them as will be sufficient either by themselves or when converted into cash to provide,---
>
> (i) food and other necessaries of life required by the execution debtor and his family for the next ensuing twelve months;
>
> (ii) the payment of any sums necessarily borrowed or debts necessarily incurred by the execution debtor in growing and harvesting his crop, or any sums necessarily borrowed or debts necessarily incurred by him during the preceding period of six months for the purpose of feeding and preparing his live stock for market;
>
> (iii) the payment of any current taxes and one year's arrears of taxes or in case taxes have been consolidated, one year's instalment of the consolidated arrears;

(iv) for the necessary cash outlays for the ordinary farming operations of the execution debtor during the next ensuing twelve months and the repair and replacement of necessary agricultural implements and machinery during the same period;

(d) All horses or animals and farm machinery, dairy utensils and farm equipment which are reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next ensuing twelve months;

(e) One tractor and one automobile valued at eight hundred dollars or motor truck required by the execution debtor for agricultural purposes or in his trade or calling;

(f) Seed grain sufficient to seed the execution debtor's land under cultivation;

(g) The books of a professional man required in his profession;

(h) The necessary tools and necessary implements and equipment to the value of five hundred dollars used by the execution debtor in the practice of his trade or profession;

(i) The homestead of an execution debtor actually occupied by him, provided the same be not more than one hundred and sixty acres; in case it be more, the surplus may be sold subject to any lien or encumbrance thereon;

(j) The house actually occupied by the execution debtor and buildings used in connection therewith, and the lot or lots on which the same are situate according to the registered plan of the same; provided the value of such house, building and lots does not exceed three thousand dollars, but if such value does exceed three thousand dollars, the house, building and lots may be offered for sale, and if the amount bid thereat, after deducting all costs and expenses exceeds three thousand dollars, the property shall be sold, and the amount to the extent of the exemption shall at once be paid over to the execution debtor and shall till then be exempt from seizure under any legal process, but no such sale shall be carried out or possession given to any person thereunder, until the execution debtor shall have received three thousand dollars.

Besides modifying the list of exempt goods, the 1942 Act made three substantial changes in the old legislation:

(1) The section regarding exempt goods subject to chattel mortgages was declared not to apply

> "to a crop lien note under The Harvesting Liens Act or to a mortgage or bill of sale for necessaries or the purchase price of seed grain given under section 32 of The Bills of Sale Act." [60]

(2) In case of a dispute over a claim for exemptions, the sheriff was required to refer the matter to a judge of the District Court for summary determination.[61]

(3) Hospitals were excepted from some of the exemptions provisions in the following section:

> 8. The real and personal property set out in clauses (ii), (iii) and (iv) of paragraph (c) of section 2 and in paragraph (e) of section 2 shall not be exempt from seizure under any execution issued upon a judgment for a debt owing to a hospital for hospital services, provided, however, that the amount recoverable upon any such execution in any calendar year shall not exceed the sum of two hundred dollars. [62]

All three modifications have continued in the Exemptions Act in much the same form to the present.[63]

Since 1941, there has been much redrafting of the list of exemptions to bring them up to date, but there have been only three substantial amendments to the legislation. In 1942, the section providing for exemptions from distress was moved from the Distress Act[64] to the Exemptions Act[65] where it has remained. In 1966, a new section was added prohibiting the sheriff from seizing any goods "that appear to him to be exempt from seizure under this Act" but protecting him from liability for seizures of exempt goods made in good faith.[66] The 1966 Act also provided that the exemptions against distress were not available to an absconding tenant

debtor if he left no wife, husband or infant children in the Province.[67] Apart from these amendments, the basic approach of the Exemptions Act has not changed substantially since the Northwest Territories ordinances discussed above. The writer will analyze the present Exemptions Act in section VII of this paper.

Besides the Exemptions Act, there are several statutes which create exemptions provisions. These statutes will also be reviewed in section VII.

D. Alberta - Exemptions from Garnishment

The history of general exemptions from garnishment can be told much more briefly than the history of exemptions from execution. If the debt sought to be attached is a non-income debt, the simple answer is that there has never been in the Northwest Territories or the Alberta legislation any general exemption provisions. The Exemptions Act is clearly not applicable to debts owed to the debtor.[68]

As to salary or wages incurred by the debtor, the answer is different. The Alberta garnishment provisions find their source in the Northwest Territories Administration of Civil Justice Ordinance of 1878.[69] The 1878 Ordinance was relatively primitive; among other deficiencies, it said nothing about exemptions. However, in 1884 the Territories passed an expanded Administration of Civil Justice Ordinance [70] which contained an exemption provision borrowed from the Ontario Attachment of Wages Act.[71] The principal garnishment section including the exemption provision read as follows:

> 74. Whenever any debt or sum of money, not being a claim strictly for damages, is due and owing to any party from any other party, either on a judgment of the court or otherwise, and any debt is due or owing to the debtor from any other party, it shall be lawful for the party to whom such first mentioned debt or sum of money is so due or owing (hereinafter designated the primary creditor) to attach and recover in the manner herein provided, any debt due or owing to his debtor (hereinafter designated the primary debtor), from any other party (hereinafter designated the garnishee), or sufficient thereof to satisfy the claim of the primary creditor: subject always to the rights of other parties to the debts owing from such garnishee; provided that no debt due or accruing to a mechanic, workman, labourer, servant, clerk or employee or in respect of his wages or salary shall be liable to seizure or attachment under this Ordinance to the extent of one month's wages not exceeding fifty dollars.

The 1884 Ordinance followed the common North American pattern of permitting garnishment of wages but of limiting its impact by imposing a minimum monthly wage which was completely exempt. Above that level, however, the employee's wages were completely exposed.

In 1893, the exemption provision was redrafted to clarify its effect and, surprisingly, to reduce the amount of the exemption:

> 378. No debt due or accruing to a mechanic, workman, laborer, servant, clerk or employee for or in respect of his wages or salary shall be liable to seizure or attachment under this Ordinance or any other Ordinance unless the said debt exceeds the sum of twenty-five dollars, and then only to the extent of the excess.
>
> 379. Nothing in the next preceding Section contained shall apply to any case where the debt has been contracted for board or lodging. [72]

Sections 378 and 379 with some procedural changes remained the law of the Northwest Territories until 1905 when they became the law of Alberta.[73] The sections were incorporated verbatim into the 1914 Alberta Rules of Court,[74] and it was not until 1923 that any substantive change was made. In that year, the rules were amended to raise the amount of

the exemption to $75.00 and to provide the following formula to deal with cases where the wages owing were for less than one month's work:

> (2) Where the debt due or accruing due is wages or salary for a period of less than one month, the part thereof exempt from attachment shall be that sum which bears the same proportion to $75.00 as the period for which the wage or salary is due or accruing due bears to one month of four weeks. [75]

The 1923 amendments also included a provision that no wages, salary or other sums payable or agreed to be paid by his ordinary or former employer to any person in active military or naval service of the Crown were liable to seizure or attachment. This provision survived until the 1969 Alberta Rules of Court, when it was dropped.

The 1944 Supreme Court Rules modified the garnishment exemption provisions in three ways:

(1) The single exemption of $75.00 was replaced by two exemptions. The first exemption of $75.00 applied where the debtor was

> "a married person or a widow or widower with dependent children in his or her custody or under his or her control."

The second exemption of $40.00 applied to unmarried persons.[76]

(2) The formula for dealing with employees who had worked part of a month was modified as follows:

> (2) Where the debt due or accruing due is wages or salary for a period of less than one month, the part thereof exempt from attachment shall be that sum which bears the same proportion to $75 or $40, as the case may be, as the period for which the wages or salary is due or accruing due bears to one month of four weeks. Provided however, that if the defendant or execution debtor proves that he has been employed during part of the period in which the wages or salary are due, the defendant or execution debtor shall be entitled to the same exemptions as if he were employed during the whole of such period.[77]

(3) The exemptions from wage garnishment were declared not to apply in two cases:

> (a) where the debtor has absconded or is about to abscond from the province, leaving no wife or husband or infant children within the Province; or
>
> (b) to any garnishee summons issued upon any judgment or order for the payment of alimony or for the payment of maintenance by a husband to his wife or his former wife, as the case may be, or for the payment of maintenance for any child of the debtor. [78]

(The garnishment exemption had since 1893 been denied in cases where the debt had been contracted for board or lodging.[79])

In 1962, the Rules were further amended to provide an exemption varying according to number of children and other factors as follows:

> 565. (1) Subject to the other provisions of this Rule, a debt due or accruing due to a mechanic, workman, labourer, servant, clerk or employee for or in respect of his wages or salary is not liable to attachment, except to the extent that the debt exceeds the following sum,
>
> (a) if the debtor is a married person, the sum of one hundred and fifty dollars, or
>
> (b) if the debtor is a married person with dependent children
>
> (i) in his or her custody, or
>
> (ii) under his or her control, or
>
> (iii) in respect of whom he or she is paying maintenance, the sum of one hundred and fifty dollars plus twenty-five dollars for each such child, or
>
> (c) if the debtor is a widow, widower or unmarried mother, with dependent children in his or her custody or under his or her control, the sum of eighty-five dollars plus twenty-five dollars for each such child, or
>
> (d) if the debtor is an unmarried person, the sum of eighty-five dollars. 80

Apart from an increase in the amounts of the various exemptions,[81] no further change was made in the garnishment exemption provisions before the 1969 Alberta Rules of Court. Those Rules, together with any other current legislation relevant to exemption from garnishment, will be discussed in Section IV of this paper.

III. Policy Considerations

Before turning to the adequacy of the present Alberta exemptions from garnishment and execution, it will be useful to analyze the competing policies which the reformer must consider before trying to reconstruct the law of creditors' remedies. Much of the difficulty in making reform proposals in this area lies in striking the proper balance between debtor and creditor, while keeping in mind that the compromise reached affects not only the immediate parties but society as a whole. In this section, it is intended to discuss the policy problems in the abstract, that is to say, without considering the distorting effect of the new Bankruptcy Bill. If the Bill is adopted in its present form, provincial legislators may have to give up any attempt to create an ideal system of creditor-debtor relations in order to protect the rights of provincial residents under the federal bankruptcy legislation. The distorting effect of the Bankruptcy Bill will be discussed fully below.

The writer has already noted the antiquated and obsolescent quality of exemptions legislation in Canada. This obsolescence becomes more dramatic when viewed against the backdrop of the economic and social changes which have occurred in the country since the exemptions provisions were drafted in the late nineteenth century. It should not be necessary to document the enormous expansion in the amount of consumer credit, the ever-increasing ease in obtaining credit, and the developing acceptance of consumer credit as a legitimate way to acquire assets.[82] The steady economic inflation during this century has made monetary exemptions increasingly inadequate, and the shift of population from the farms to the cities has stripped the specific exemptions of part of their significance. Canadian creditors today are not usually local tradesmen

who know the debtors personally; instead they have become large and impersonal sellers of goods and services, who know of their debtors only as "delinquent accounts".

Associated with these economic and social changes is a more subtle change in Canadian perceptions of debtors. The Senate Committee Report on Poverty,[83] if it did nothing else, at least sought to persuade us that poverty is usually not a result of laziness, but is instead traceable to economic and social conditions far beyond the control of the poor. The same analysis applied to creditor-debtor law leads to a rejection of the "deadbeat" image as an accurate description of the majority of debtors. Herbert Jacob, in his study of delinquent consumer debtors and bankrupts in Wisconsin,[84] observed that most of them were characterized by incomes between $3,000 and $7,000,[85] rental accommodation rather than home ownership, blue-collar jobs, heavier family burdens (including a higher proportion of marriages, children, and marital breakups), heavier medical expenses, inadequate capital resources, and the use (apparently by necessity) of more expensive forms of credit. These characteristics suggest that the "deadbeat" image of the debtor is a grossly over-simplified and inaccurate statement of the facts.

A Quebec sociologist has made some useful observations about the differing uses of credit as between the poor and the non-poor.[86] Credit is generally used by the non-poor as a form of advance savings, but for the poor credit serves the very different function of providing necessities, or at least those goods perceived as necessary by the population.

> For the majority of the families (60%)the net total income was below the $4,500 necessary to fulfill their needs. To them credit appears as a means of increasing their income and of permitting the satisfaction of felt needs. This being the case, the lower the income the greater the amount of credit that had to be used. In the same way, the use of credit also increased the longer the income had been below the norm. (This was true of the rural population.) It was in this lower income group that a state of chronic indebtedness was found and that the financial condition of the family tended to deteriorate. Far from being a kind of a posteriori saving, credit was an incurable sickness leading directly to some kind of bankruptcy. A part of future income is used to satisfy immediate needs. But since future income is already too low to satisfy future needs the gap will increase - and therefore also the need for increased amounts of credit. It is a kind of vicious circle.
>
> What is very important is that we found not only that budget planning was absent in these families, but that it was psychologically impossible. It is impossible in this type of situation to determine an order of priority in the goods desired. Everything which is lacking is defined as equally pressing and equally necessary. Every need has the same priority, and it is more or less the whim of the moment which will lead to credit use and credit buying. In very low income families this may cause completely incoherent behavior. [87]

Fortin summarizes his study as follows:

> Except for a minority of middle and upper income families, modern credit is a way for the poor consumer to act as if he were not poor. It is also a way for him to become poorer.[88]

The problems of consumer credit and of creditors' remedies are inextricably intertwined with the problem of poverty, and particularly with the plight of the working poor and the near-poor.

The creditors' remedies system is thus perceived as operating unsatisfactorily by both creditors and debtors. Professor Cuming has observed about Canadian executions law that it often fails to accomplish

much more than to create hardship for low income debtors without doing much to satisfy the claims of their creditors.[89] This feeling of dissatisfaction is nowhere more evident than in discussions of exemptions.[90]

The reformer of the law governing exemptions from execution is brought face to face with the fundamental policy question of the proper balance which the law should strike between creditor and debtor. A review of exemptions legislation in North America reveals a myriad of different solutions, ranging from harsh pro-creditor remedies to lenient pro-debtor remedies to the absence of remedies (as in those American states which have abolished wage garnishment). Choosing among these various solutions is impossible without weighing the conflicting social values and reaching a social policy which involves an assessment of these values. It is therefore necessary to examine the relevant interests, values, and costs which are involved in the law governing enforcement of money judgments.

Discussions of policy in this area usually begin with the assertion, often described as self-evident, that the creditor who has gone to judgment has a clear and unchallengeable right to recover the amount of the judgment from the assets of the debtor. The Payne Committee expressed this approach at the beginning of their report:

> We start from the assumption that citizens ought to repay legally binding debts and that the community recognizes a social and moral obligation to honour obligations freely contracted. Pacta sunt servanda is not only legal doctrine; it is moral precept too. The function of law is to compel observance of the rule in those marginal cases where moral and social sanctions fail. Accordingly, the legal machinery must be efficient, capable of reaching out to all the assets of a debtor and yet sensitive both to the needs and social circumstances of debtors and to the rights of creditors.[91]

The difficulty with this kind of dogmatic assertion is that it is stated in terms of absolute truth rather than as one policy among many. A critic of the Payne Committee Report commented on the quoted passage as follows: "As applied to consumer transactions, almost every word of the dogma rests on unwarranted assumptions. Indeed, 'it has long been recognized that freedom of contract has little meaning in consumer transactions'."[92]

The problem with consumer transactions is that these contracts are frequently solicited by misleading advertising and are themselves drafted in an unfair and one-sided manner. When consumer disputes come to court, the unfairness inherent in the original transaction is compounded by the arbitrary quality of the system of adjudication in which the vast majority of money judgments are obtained by default and without any assessment of the merits of the claim.[93] While the nature of the judicial process before judgment is beyond the scope of this study, the summary character of most money judgments is relevant to any attempt to develop a fair system of creditors' remedies.

No doubt the judgment creditor has an interest in an effective system of remedies against the assets and income of his debtor. What is often forgotten is that other people besides the creditor have interests and rights to be protected. The debtor and his family have an interest in surviving as a viable economic and social unit in society, despite the collection efforts of the creditor. In addition, the debtor has interests in the protection of his privacy and his reputation against unfair assault. The debtor's employer has a strong claim to be protected against excessive demands on his time and his business as a result of wage garnishments, for example. A less obvious interest is that of the other creditors of the

debtor, particularly if they advanced credit before the execution creditor. One of the defects of the present system of creditors' remedies is that it encourages creditors to execute or garnishee precipitously in order to be sure of payment. The aggressive creditor may thus protect himself at the expense of others, because the result of this action will often be to destroy the fragile economy of the debtor and to bring on his complete economic collapse.[94]

In addition to the interests of specific participants in the debt collection process, there are larger social values and costs at stake. It is probably true to say that Canadian society places a high value on maintenance of the system of consumer credit.[95] It is by no means clear, however, that the existence or the nature of a system of creditors' remedies is crucial to the continued availability of credit. There has been much argument about whether or not a correlation exists between the creditors' remedies laws of different jurisdictions and the amount or rate of consumer credit extended in those jurisdictions.[96] The statistical arguments are inconclusive in the sense that they do not establish a clear correlation either way. Common sense would suggest that changes in the law of enforcement of money judgments are unlikely to affect credit policies in any but borderline cases, and it is arguable that credit should not be freely extended to marginal consumers in reliance on a harsh but unreliable legal system. Assuming that restriction of remedies does result in the restriction of credit in some cases, the problem probably should be perceived and dealt with as one of social welfare policy rather than as an aspect of private creditors' remedies.

Any system of enforcement of money judgments may create benefits in that debts are collected, but it also results in certain costs to

society. The judicial and administrative system used by judgment creditors is partly financed from costs paid by the creditors and the debtors, but the rest of the cost comes from the general revenues of the state. A more extensive or efficient sheriff's office might well increase the portion of the cost borne by the public.[97]

It can be argued that the public reaps substantial benefits from its expenditures on the judicial system, such as the control or elimination of extra-judicial or even illegal collection methods. There are, however, two difficulties with this argument. The first is that American studies have shown that the judicial system of creditors' remedies is used heavily by some creditors, but ignored by others who are apparently able to collect their debts without recourse to the law and without apparent illegal activities.[98] The second difficulty is more fundamental. The creditor's problem with bad debts is often a result of his own folly in extending credit without careful assessment of the credit risk. Given an efficient credit reporting system, the creditor has the power to avoid many of his losses on bad debts by exercising restraint in the initial granting of credit. From the point of view of the debtor, the credit reporting system functions as a real sanction against nonpayment. The judicial debt collection system is therefore not the only or even the most important process controlling debtor behavior.[99]

Besides the cost of the judicial system, the debt collection process occasions other social costs which are less acceptable. Some students have concluded that there is a relationship between harsh creditors' remedies and a range of social disasters, including personal bankruptcy, loss of employment (being fired or quitting), marital disruption, resort to welfare, and even suicide.[100] A study of garnishment

orders in maintenance cases conducted for the Payne Committee found that "Of the 600 cases in which the order had been discharged, and in which the reason for discharge had been ascertained, 85 per cent (507) of the orders had been discharged because the respondent to the order had left his employment."[101] This kind of personal and social disruption is clearly an undesirable cost of a harsh creditors' remedies system and one which has to be weighed against the benefits to creditors and to the commercial community.

The writer mentioned above the clear relationship between creditor-debtor law and the problem of poverty. Canadian society cannot be said to have made any real attempt to eradicate poverty, but it has created a series of measures designed to ameliorate the conditions of the poor, such as social assistance and pension legislation, minimum wage provisions, and legal aid schemes. There can be no doubt that creditors' remedies are used against the poor and near-poor;[102] it follows that they cannot be considered in isolation from other legislation and policies designed to improve the conditions of life at the bottom of our society.

In assessing the present system of creditors' remedies, another consideration is that it should operate fairly as between creditor and debtor. When one examines the present law, not simply as it appears in the books but as it operates in practice, it becomes clear that it falls substantially short of an acceptable standard of fairness.[103] The writer has already noted the one-sided quality of the standard-form contracts of sale and loan which form the basis of most money judgments. The unfair nature of the contracts is compounded by the fact that most money judgments are arrived at without any assessment of the merits of the claim and of the possible defences.

After judgment, the unfair operation of the system continues. The judgment creditor is given a discretion as to which garnishment and execution remedies be used, and as to the timing and repetition of the remedies. It is, for example, entirely open to a judgment creditor to execute against goods, to garnishee the debtor's wages, to file a writ in the Land Titles Office and to apply for an examination in aid of execution, all at the same time. The result is that the vindictive or foolish judgment creditor is given an extensive and uncontrolled discretion in the devices he chooses to collect the debt. The debtor, on the other hand, is a passive victim of the system, especially when he is incapable of payment, or is resentful because he has a real or imagined defence to the original claim.

The remedies themselves are not very efficient in terms of their stated objective, namely, to seize exigible property and income. However, the real impact of the remedies is as threats which operate as powerful inducements to the debtor to stave off execution by finding money to pay the claim. The employee whose wages are garnisheed is coerced into acquiescence to the creditor's claim because of fear of lost employment. An even clearer example is execution against land. Although the matrimonial home is not totally exempt in Alberta, the law makes it exceedingly difficult to execute successfully against such an interest. Still judgment creditors file writs under the land titles system and commence proceedings against the matrimonial home. The reason is again that the threat of selling up the home is enough to induce most debtors to settle, even though the threat is for practical purposes usually an empty one.[104]

There are two dangers in a creditors' remedies system which operates largely by way of threat. First, the debtor may be induced by this kind of pressure into foolish actions which will lead to complete financial collapse. He may pay the executing creditor by failing to pay other creditors, or he may leave his employment and try to evade his creditors. In either event, the result will be financial disaster, perhaps associated with personal upheavals. The ironic result is that the aggressive creditor who caused the collapse may find himself paid in full, while the other creditors, who may have deliberately held off execution, receive little or nothing from the wreck.

The second danger in an in terrorem system of creditors' remedies is that the debtor against whom execution has gone may be persuaded to enter into an onerous repayment agreement with the creditor which, apart from its economic consequences, may effectively bypass the defences and exemptions which the debtor has in law. American studies have established that debtors whose wages are garnisheed sometimes make agreements with their creditors without claiming wage exemptions to which they are entitled.[105] In Alberta,it is not inconceivable that judgment debtors enter into arrangements with the creditors to make monthly payments which cut into income which is exempt under rule 483 of the Alberta Rules of Court.

The unfairness of the postjudgment process is analogous to the problems which occur before judgment. The system at no stage ensures a real assessment of the merits of the claim and of the debtor's capacity to pay, judged against his total financial position. Indeed, it is precisely this lack of a hearing which was one of the bases of the recent American Supreme

Court decisions which struck down prejudgment wage garnishment[106] and replevin[107] legislation and which have led to a wholesale re-examination of remedial legislation in the United States.[108] If fairness is seen as a desirable social value, then substantial changes must occur in the Canadian law of enforcement of money judgments.

The above analysis of policies and values leads this writer to the view that the present system of creditors' remedies in Canada is excessively harsh and punitive to the debtor, while failing adequately to protect the legitimate interests of the creditor. Setting aside questions of fairness in the prejudgment process, the present law gives to the judgment creditor very wide powers to conduct a legal war, using remedies which can cause grave injury to the debtor and other people, as well as social and economic costs to society as a whole. The present structure of rules and remedies is costly in ways that are unacceptable to a society which strives towards fairness and due process. This analysis of policy underlies specific proposals regarding exemptions from garnishment and execution which form the rest of this paper.

IV. The Special Case of Wage Garnishment

For most people, the wage packet or the salary cheque is their only source of funds to purchase present necessaries as well as to pay off past obligations. Despite the essential character of wages for the survival of the debtor, Alberta law has long permitted individual creditors to garnishee part at least of the judgment debtor's income. It is therefore legitimate to discuss wage garnishment separately because it attacks not savings or accumulated wealth but present income and therefore present buying power.

Wage garnishment warrants special treatment for another reason. It was noted earlier that there is much evidence of a relationship between harsh creditors' remedies and various kinds of personal disasters such as bankruptcy and loss of employment.[109] Wage garnishment is a particularly dangerous remedy because it involves in the debt collection process a third person, the employer. There is little doubt that wage garnishment gains much of its impact from the (usually) unspoken threat that the employer who has to process the garnishee order may seek to cut his losses by firing the delinquent employee.

The purpose of this section is to explore the reasons for and against the continuation of such a harsh and dangerous remedy as wage garnishment. The writer will in subsequent sections explore the consequences of (a) a recommendation that wage garnishment be abolished and (b) an alternative recommendation that wage garnishment be retained but that the level of exemptions be raised substantially and that other reforms be enacted. The writer will then discuss the relationship between the provincial law regarding wage garnishment and the present and proposed federal bankruptcy laws.

Before addressing the question of abolition or retention of wage garnishment, it may be useful to summarize the results of the statistical study of creditors' remedies which the writer and Mr. Leigh Hillier completed during the summer of 1973 for the British Columbia Law Reform Commission.[110] The study collected statistics on the use of the attachment of debts remedy in the Vancouver Judicial District of the Supreme and County Courts for the 1972 calendar year. The writer has not made any similar study of creditors' remedies in Alberta, but it is suggested that the results would not be dissimilar.

The British Columbia study found that attachment of debts was the most popular remedy in Supreme and County Courts and that it was quite effective in collecting the debts owed. In Supreme Court, attachment of debts orders resulted in payment into court of approximately one-twelfth of the money claimed in the orders. In County Court, the rate of recovery was better; about one-sixth of the money claimed in the garnishment orders was paid into court. The attachment remedy is probably more effective than the figures indicate. Actual or threatened issuance of a garnishee order may often result in payment directly from the debtor (or occasionally the garnishee) to the creditor.

In a significant percentage of cases in both Supreme and County Court, the creditor found it useful to issue more than one garnishee order, although the court records did not enable a distinction to be made between orders issued against different garnishees and successive orders against the same garnishee. In Supreme Court, about thirty-four percent of the garnishee orders were issued against banks, credit unions, and trust companies; the comparable figure in County Court was forty-five percent. The remaining orders could not be analyzed, but it is a fair guess that

most of them were issued against employers.[111]

What the study demonstrates is that garnishment is a popular and a moderately effective remedy in British Columbia. The study also suggests that garnishment is used in a substantial number of cases against wages or salaries, either by garnishing the employer or by attaching the bank account into which the salary cheque has been paid. Even although garnishment appears to be fairly effective, the question still remains whether or not its harmful effects outweigh its usefulness as a collection device. It is necessary therefore to turn to a consideration of the arguments for and against the abolition of wage garnishment.

At the outset, it may be useful to indicate the limits of the present study. The writer is here concerned only with wage garnishment in its present form, namely, a remedy which can be invoked by an individual creditor at his discretion against his debtor. It is not intended to consider the rather different question whether wages should be available to a trustee in bankruptcy or to a state enforcement officer acting for all of the creditors. The writer wishes to restrict himself to the narrow question whether wage garnishment as an individual creditor's remedy should be retained or abolished.

Those writers who advocate retention of wage garnishment fall into two categories: those who would retain the remedy in its present form, and those (like Kerr[112] and the Payne Committee)[113] who would retain an analogous remedy only as part of a larger enforcement office proposal.[114] Taking this distinction into account, it is possible to distill the following arguments for the retention of wage garnishment:

1. The judgment creditor has a clear right to be paid and a corresponding right to call on the legal system to assist him in the collection of his debts. Wage garnishment is a relatively cheap and effective collection remedy, compared to other available methods of execution;[115] indeed, for some kinds of debts such as small loans, small debts, or credit card debts, garnishment may be the only practical means of executing on a judgment.[116] Moreover the remedy may have a general deterrent effect on would-be defaulters.

2. Wage garnishment should not be considered in isolation from the other remedies available to the creditor. If wage garnishment were abolished, creditors might well use their other remedies more vigorously and harshly, leading to abuses.[117] Execution against real and personal property, or garnishment of non-income debts such as the bank account, may have effects as harmful as garnishment of income. Other creditors will ignore the legal system and rely on extra-legal or even illegal methods of collection. The baseball bat may be as effective as the garnishee summons, and some creditors will be unscrupulous enough to substitute the one "remedy" for the other.[118]

3. The debtor's income is ultimately the source from which his debts are going to be repaid. It therefore seems fair to give to the creditor direct access to this asset, rather than restricting him to capital assets which generally cannot be sold except for a fraction of their true value.[119] The hardship involved in attaching the debtor's income is more than equalled by the hardship in seizing the debtor's land and goods, representing income savings, and selling them for much less than their original price or, more important, their replacement cost at the date of seizure.

4. The garnishment remedy need not injure the debtor unduly, provided that the exemptions are high enough and the legislation provides real procedural safeguards.[120] Prejudgment wage garnishment is today almost universally condemned because of the absence of notice or a hearing before the debtor's wages are taken.[121] Alberta law presently permits prejudgment wage garnishment, but the remedy could easily be restricted to judgment creditors. The danger to the employment of the wage earner-debtor could be dealt with by a stronger version of section 40 of the Alberta Labour Act.[122]

5. In part, businessmen extend credit in reliance on the legal system permitting enforcement of money judgments. If the most effective remedy available to the creditor were to be abolished, the result would be a restriction in the availability of consumer credit or an increase in the cost of credit and of consumer goods and services generally. One consequence might be to drive high-risk consumers into the hands of loan sharks or other unscrupulous credit grantors.[123]

This argument assumes some correlation between the harshness or leniency of creditors' remedies, and the availability of consumer credit. As was noted earlier,[124] the studies which have been made fail to establish such a correlation. One can reconstruct the argument to take account of these studies as follows: "The consequences of abolition of wage garnishment are not clear. Abolition might have a deleterious effect on the consumer credit market. Therefore the remedy should not be abolished until empirical studies have identified the likely results of such a fundamental reform."[125]

6. Abolition of wage garnishment is an arbitrary and inflexible response to a complex and varied range of situations. Debtors who had

substantial salaries but no other assets would escape scot-free, while other less fortunate debtors whose wealth was invested in exigible capital assets would be exposed to execution.[126] What is needed is a range of remedies capable of reaching any assets of the judgment debtor, subject to appropriate exemptions.

When one turns to the arguments for abolition of wage garnishment, it will be found that some are directed only at the individual creditor's remedy, whereas others would prevent recourse to wages by a trustee in bankruptcy or an enforcement officer as well as by a creditor alone. The writer's present concern is simply with the issue of abolition of the individual creditor's remedy. In this context, the principal arguments for abolition of wage garnishment appear to be as follows:

1. For most wage earners, the monthly wage packet or salary cheque is the principal source of the means to purchase the immediate necessities of life. "It has been estimated that in an inflationary economy the average wage earner needs from 85 to 90 percent of his salary just to meet current expenses, and suggested that any legislation exempting less than 90% of wages from garnishment might properly be characterized as 'antisocial'." [127] Where an attachment of debts statute permits, either in law or in fact, creditors to cut into that portion of salary necessary to meet current expenses, the result must inevitably be that the debtor will be forced into default on his credit obligations generally.[128] Wage garnishment is therefore socially acceptable only for a very small percentage of the monthly salary cheque.

A related point is that in any modern attachment of debts statute, there must be a salary figure below which nothing can be garnisheed. The Alberta Rules of Court fix this floor figure at $100 a month

for an unmarried person, $200 for a married person, and $40 in addition for each dependent.[129] The adequacy of these figures will be examined later, but it is relevant to note that they fall well below the rates for comparable family groups on social assistance,[130] not to speak of the Alberta minimum wage legislation.[131] If the floor figures were to be raise substantially, the wage garnishment remedy would be still further stripped of significance.

2. Raising the exemptions is not a complete answer to the dangers of wage garnishment because that remedy, like most creditors' remedies, functions largely as a threat which forces the debtor to take some kind of action. As was pointed out earlier, the danger of a creditors' remedies system which operates in terrorem is that it may force the debtor to make some precipitous and unwise response to the threat without taking legal advice first.[132] The debtor may be induced to enter into an onerous repayment agreement with the creditor which will force him to default on his other debts and which will cut into that portion of his income which is necessary for his daily survival. Alternatively the spectre of wage garnishment may persuade the debtor to leave his employment or to go on welfare in order to frustrate his creditors. Whatever action he takes is likely to harm not only himself but also his family, his other creditors and ultimately the society as a whole.[133] The real significance and potency of wage garnishment flows from its extra-judicial potential to do harm to the debtor, especially to his continued employment. (See argument number 3, below.) The level of exemptions in the Rules of Court is irrelevant to this threat which operates, as it were, outside the system. The only really effective way to prevent the deleterious consequences of wage garnishment is to abolish the remedy entirely.

The debtor's response to the threat of wage garnishment is also affected by two related facts. First, the use of wage garnishment adds substantial costs to the debt already owing.[134] Secondly, the Rules of Court permit repeated invocations of the wage garnishment process, thus raising costs and increasing the threat to the debtor's continued employment.[135]

3. Recent empirical and statistical research has established that there is a correlation between harsh wage garnishment laws and various forms of social hurt and disruption to the lives of debtors and their families. It is now clear that the rate of applications for personal bankruptcies is related directly to the degree of harshness of wage garnishment laws in a particular jurisdiction. Shuchman and Jantscher studied the impact of the enactment of a uniform federal minimum wage exemption from garnishment in the Consumer Credit Protection Act of 1968.[136] The effect of the Act was to raise wage exemptions in twenty-five states and the District of Columbia, while the exemptions in the other twenty-four states remained the same because they were already higher than the federal level. It was discovered that the effect of raising exemptions from garnishment in the twenty-five states and the District was to lower bankruptcy rates in those jurisdictions, compared to the other twenty-four states,and the writers predicted that the amount of reduction of bankruptcy rates would increase in the future. The Shuchman-Jantscher study confirmed the generally held belief that harsh garnishment laws force into bankruptcy people who would not take this extreme action in jurisdictions where the remedy had been restricted or abolished.[137] While personal bankruptcy may have certain social and economic advantages, it does involve a decision by the debtor to stop paying all of his debts. It also attracts to the

debtor the stigma of bankrupt which is bound to affect his credit rating, his employability, and perhaps his general reputation. To this extent, it is an undesirable consequence of the attachment of wages.

David Caplovitz, in an extensive study of defaulting debtors,[138] was able to establish a relationship between wage garnishment and loss of employment, thus confirming the generally accepted view that employers often fire employees whose wages are garnisheed.[139] The reason from the employer's point of view is that dealing with wage garnishment is time-consuming, costly, and involves a complex and often difficult calculation of the proper portion of the wages which should be paid into court. The writer does not know of any similar empirical study in Alberta, but it is suggested that some employers in Alberta today continue to discriminate against or dismiss employees whose wages are attached.[140]

It is true that this kind of conduct is to some extent prohibited by the Labour Act.[141] Section 40 provides as follows:

> 40. No employer shall dismiss, terminate, lay off or suspend an employee for the sole reason that garnishment proceedings are being or may be taken against the employee.

Section 18 empowers the Board or an officer to arbitrate between employer and employee where a breach of section 40 has occurred, and sections 42 to 48 permit a prosecution of the employer. The Act does not appear to empower the Board to order that an employee who has been laid off contrary to section 40 be reinstated.[142]

Section 40 of the Alberta Act is similar to provisions which exist in most Canadian jurisdictions.[143] A few provinces have no protective legislation at all,[144] while others have extended their statutes' scope to include discriminatory acts other than dismissal.[145] The

intention of these provisions is clearly to reduce or eliminate the possibility of dismissal or discrimination because of the service of a garnishee order on the employer. However the writer's conclusion is that while these sections may have persuaded some employers to change their practices, they offer little real protection to an employee who has been dismissed or discriminated against because of a wage garnishment.

A few months ago, the writer wrote all Canadian jurisdictions with legislation similar to section 40.[146] The letters advanced the view that these sections would seem to have little practical significance. The writer then asked for information as to the number of complaints and prosecutions of employers under the relevant section since January 1, 1973. The stated intention was to use these figures to measure the effectiveness of such sections, while keeping in mind that the sections might have caused employers to alter their policy voluntarily. British Columbia, Alberta, Saskatchewan and Nova Scotia reported no complaints and no prosecutions during the relevant period. Manitoba, Ontario and the Federal Government each had one complaint. The Ontario complaint was "satisfactorily resolved by our Employment Standards Officer," the Manitoba complaint was dismissed by the Manitoba Labour Board because the employee failed to appear, and the Federal Government complaint was not proceeded with because "legal proceedings were not warranted."

It should be added that a number of correspondents advised that their departments had received several inquiries about the legislation, suggesting that it was having some effect in persuading employers to change their practices without the necessity for complaints or prosecutions. For example, Mr. G. E. Gough, the chief field services officer

for the Labour Standards Branch of the Alberta Department of Labour, indicated that each of the six regional offices of the Department had received inquiries from time to time regarding the interpretation and application of the section. On the other hand, the Vice-Chairman of the Manitoba Labour Board agreed with the writer's observation that such sections have "little practical significance." The writer concluded from this correspondence that provisions like section 40 may well have some educational significance on employers' attitudes to wage garnishment, but that they are not being used to prosecute offending employers.

An examination of section 40 itself shows why it is unlikely to prove an effective weapon against a recalcitrant employer. The section requires the employee to lay a complaint and to prove that he was dismissed or suspended "for the sole reason that garnishment proceedings are being or may be taken against the employee, "an impossibly high burden. Nothing is said about an employee losing a chance for advancement, or about a prospective employee failing to get the job, because of wage garnishment. Nor does the section protect the wage-earner against an employer who pressures him into borrowing money to pay the debt. Section 40 is likely to afford little or no protection, partly because of its narrow drafting, but principally because it requires the debtor (who has just been fired or demoted) to come to the Board, accuse, and prove that his employer fired or demoted him for the reason that his wages were garnisheed. It is not surprising that the writer has found no prosecutions under section 40 since the beginning of 1973. The state cannot prevent employers from firing their workers because of wage garnishment by beefing up section 40 [147] or by creating state policing

mechanisms; the only effective solution would appear to be abolition of wage garnishment itself, a conclusion which gathers some support from the American experience.[148] In Section VI of this paper, the writer will make some proposals for strengthening section 40 if it is decided to retain wage garnishment.

Wage garnishments have been found to affect the debtors' employment in other ways.[149] Employees whose wages are garnisheed may leave their jobs, a conclusion confirmed by a study prepared for the Payne Committee.[150] Even if the employees stay on the job, their productivity, attendance and their psychological attitude are all affected. Caplovitz has established a clear correlation between wage garnishment and deterioration of health, marital discord, and financial disruption. His conclusion is that debt problems can be "extremely costly and debilitating" [151] both to the debtor and to society at large. Of all the debt problems facing the debtor, the most dangerous must be attachment of wages because of its potent effect on him, and because it involves an unwilling third person, the debtor's employer.

4. Earlier in the paper, it was argued that creditors' remedies are most commonly used against the poor and the near-poor. One of the conclusions of the Caplovitz study is that wage garnishment has a greater and more damaging effect against the poorer defaulters.[152] He found that the poor are more likely to be garnisheed but less likely to be served with the relevant documents. The poor are more likely to lose their jobs because of wage garnishment. Finally, and not surprisingly, the poor are less likely to pay all or part of their debts after garnishment. These conclusions are particularly damning as they demonstrate that the remedy

is used against precisely that class of society which is least likely to pay and least capable of protecting itself. Wage garnishment thus contributes to the nasty and unpleasant character of life at the bottom of our society.

5. American and English studies have observed that certain kinds of creditors are much more likely to use wage garnishment than others.[153] Creditors who avoid wage garnishment may do so for public relations reasons, because they are too small or badly organized to use the remedy, or because they have better remedies, such as repossession.

Creditors who do use wage garnishment extensively may do so indirectly by assigning their overdue accounts to collection agents. (Examples in the United States are doctors and hospitals.) Large retailers are often prepared to use relatively harsh remedies because they are "explicitly organized to handle credit transactions, with a credit department that is organizationally separate from the sales department."[154] The credit department can be relatively unconcerned about alienating a customer, because it is not responsible for selling. "It deals with debtors, not with customers."[155]

Finance companies use wage garnishment extensively for the rather different reason that they make many marginal loans. "... (I)ndeed, they are often the last commercial source of credit for the debtor in financial trouble."[156] The Wisconsin finance companies studied by Jacob were prepared from the beginning of the loan to use wage garnishment, and would begin collection efforts almost as soon as the debt became delinquent.

The Caplovitz study concluded that creditor-plaintiffs tended to fall into at least two strata.

> One class consists of those who use high pressure tactics to sell their goods and resort to strong measures to collect their debts. The other class consists of creditor-plaintiffs who are more ethical in their business dealings and are less prone to resort to harsh collection measures, perhaps because they are concerned with the good will of their customers and/or do not view default-debtors as a source of profit. The picture that emerges from these findings is that garnishment is more often relied on by the less ethical creditor-plaintiffs. [157]

The high-pressure less ethical creditors more frequently sell to the poor and the high-risk debtors, which confirms the view stated earlier that wage garnishment tends to be used more extensively against the lower strata of our society.

Wage garnishment can thus be seen as a remedy which many creditors do not use, but which is used extensively by marginal high-risk sellers of credit to the poor. Abolition of the remedy might result in a slight curtailment of credit to the marginal debtor, but it would also protect him against the shysters who currently rely on wage garnishment as part of their less-than-ethical business operations.

Abolition would also deter the creditor who extends credit to an already heavily-burdened debtor, sometimes on the very eve of insolvency. It is not uncommon for debtors to receive legitimate and prudent extensions of credit, and then later to borrow more money from a high-risk lender who is (one would assume) counting on strong measures to collect his money, often at the expense of the earlier creditors. If the last creditor garnishees, the result may well be a general failure to pay all debts, coupled with the personal disasters discussed earlier.[158]

6. If wage garnishment were abolished, the creditor would still have a series of remedies or defences available to him. To begin with, he could refrain from extending credit to marginal risks without reviewing carefully the would-be debtor's credit rating. If he did extend credit and default occurred, he could still rely on execution, repossession of the sold goods, bankruptcy or, perhaps, an enforcement office. Even without wage garnishment, the creditor would be adequately protected, and the threat of an adverse credit rating would be enough to keep most debtors from falling into default.

The abolition or retention of wage garnishment is clearly one of the most important issues which the Institute will have to consider in its study of exemptions from garnishment and execution. In a sense, it dramatizes the basic dilemma of creditor-debtor relations which is to find the proper balance between creditor and debtor. On the issue of wage garnishment, the present writer has come to the view that the remedy should be abolished, at least in its present form, because of its peculiar dangers and costs to the debtor, to his other creditors, and to the society as a whole.

V. Reforms Related to the Abolition of Wage Garnishment

Assuming that the Institute were to recommend the abolition of wage garnishment, certain other reform proposals would logically follow. The purpose of this section is to outline some of these related reform measures. The proposals will be stated in outline only, pending the decision of the Institute on wage garnishment.

(1) The definition of wages - how wide should the exemption be?

In section IV, the writer discussed the abolition of the garnishment of wages, as if that term described a specific and easily identified kind of asset. In reality, however, there are many kinds of income payment which are sufficiently like wages to raise the question whether they too should be exempt. It would be difficult to deny that the exemption should extend to salaries, piece-work payments, vacation and severance pay,[159] and strike pay from unions.[160] But should the law go further and exempt commissions,[161] self-earnings, or the income of such joint adventurers as fishermen?[162] If it is concluded that all income from employment should be exempt, problems of definition must inevitably arise.[163]

Underlying the difficulty of definition of income lies a difficult policy question. Assuming that employment income is to be totally exempt, the result may well be that one person earning $50,000.00 a year will be completely protected from garnishment whereas another person earning $20,000.00 a year from share dividends, rents, business profits, or returns on capital will be completely exposed.[164] The anomaly is real, and difficult to solve. One could create an exemption for non-employment income up to a certain maximum level, perhaps tied to the cost of living. The difficulty with this solution is that it admits of a fraudulent use of a mixture of employment

and non-employment income to evade one's creditors. Alternatively, one could leave the level of exemption of non-employment income to the determination of a judge on application by either debtor or creditor. However the exemption is defined, it seems difficult to escape from the conclusion that some protection of non-employment income seems fair and necessary. The exemption need not, however, be absolute, because the dangers and abuses associated with wage garnishment are not as likely to occur in the case of non-employment income. The writer will consider this problem more closely later in the paper.

There are a number of Alberta and federal statutes which authorize various kinds of assistance, insurance and pension payments. If income payments are exempt, it is obvious that the statutory payments should generally be exempt as well. At present, some of these statutes exempt benefits thereunder,[165] while others are ambiguous,[166] or contain no exemption section.[167] The cases have usually tended to protect this kind of payment from garnishment, whether the statute contained an exemption clause or not,[168] but the matter should be clarified by legislation. David Baird, in his report on exemptions to the Ontario Law Reform Commission, proposed that the Ontario Execution Act be amended by the addition of a section which would exempt monies payable under a list of specific provincial statutes.[169] The same exemption clause would thus apply to all such payments. In a subsequent report to the same Commission, John Kazanjian recommended the inclusion in the equivalent to our Exemptions Act or our Rules of Court of the section proposed by Baird with cross-references in all other relevant statutes.[170] It is recommended that the two proposals be accepted in Alberta. The writer attaches to this memorandum a detailed list

of Alberta statutes which might be included in the exempt category. (See Appendix A.) There are a number of similar federal statutes which provide for exemption payments. These statutes are not within the scope of this study, but I have attached a list of most of them in Appendix B to this report. I have also attached as Appendices C and D the relevant passages from the two reports to the Ontario Law Reform Commission.

If public pension plans are exempt, it is arguable that payments from private pensions should also be protected.[171] It may be that awards of damages in law suits commenced by the debtor for personal injury should also be exempt,[172] on analogy to the rule that such damages are not property of the bankrupt.[173] A more difficult question, the exemption of payments from private life insurance plans, will be considered later.

(2) Assets purchased with exempt wages

Up to this point, the paper has discussed wages owing but unpaid to the employee. Assuming that unpaid wages are exempt from garnishment, the next question is whether that exemption does or should survive payment of the wages to the employee or the transformation of the wages into some other form of asset.

The question has been seldom considered by English and Canadian courts, but such case law as there is suggests that once the wages are paid to the employee, they lose their exempt character as wages, although they may be protected by some other exemption provision. A fortiori, assets purchased with exempt funds are not for that reason alone exempt.[174]

The harshness of the rule can be seen when we look at the common situation of wages which are paid into the employee's bank account, either by the employee or by the employer. The bank account is not protected by

the wage exemption, except in the rare case where the bank can be treated as the agent of the employer.[175] The Exemptions Act is also clearly inapplicable.[176] The result is that the bank account is completely exposed to garnishment by the employee's creditor, despite the fact that it may well be used for nothing but the monthly wage cheque.

This writer recommends no change in the general rule that wage exemptions do not survive the purchase by the employee of assets with his wages. Whether or not assets purchased by the employee are exempt or not should not depend on the source of the funds used to buy them. However the writer urges that this general rule be modified in two cases. First, it is argued that the wage exemption should extend to wages paid to the employee and retained by him in the form of cash or a cheque. The policy is the same, namely, that the exemption should apply to wages, before or after payment to the judgment debtor, up to the time when the debtor starts to spend the money on goods and services.[177]

The second case in which the rule should be modified is where the wages are paid by the employer or the employee into a bank account. Despite the mechanical difficulties in constructing the exemption provision, the writer would propose that bank accounts should be exempt from garnishment up to the total amount of wages paid into the account during the 40 day period immediately preceding the service of the garnishee order.[178] Such a provision would effectively protect the last month's paycheque but would not protect accumulated savings. It might be necessary to provide (on analogy to Re Hallett's Estate)[179] that where the bank account contains mixed wages and non-wages, and where the employee-debtor has later withdrawn money, that he will be presumed to have withdrawn the exempt wages first, thus leaving the rest available to garnishment.

(3) The absolute character of the wage exemption

In section IV of this paper, the writer argued for the abolition of wage garnishment on the ground that the remedy was costly, coercive and destructive. The conclusion was that the remedy should not survive, at least in its present form, as an individual creditor's remedy, but should be eliminated. Given this analysis, it follows that the Institute should be very reluctant to permit exceptions to the rule.

(a) Exemption a right

Given the unequal bargaining positions of debtor and creditor, it is proposed that the legislation make clear that the wage exemption is an absolute right, not a privilege which has to be claimed by the debtor, as is the case in many American states.[180] It is further proposed that the wage exemption should in no circumstances be capable of waiver,[181] nor should wages be capable of an irrevocable wage assignment to any creditor, whether a lending institution or not.[182]

(b) All judgment creditors bound

The wage exemption should apply to all garnishing creditors, including the provincial Crown.[183]

(c) Who can claim the exemption?

Cases have occurred in which a widow or a dependent of the deceased judgment debtor has attempted to claim an exemption to which the judgment debtor would have been entitled. It might be useful to state expressly that the wage exemption can be claimed by a widow or a dependent of a deceased debtor wage earner.

(d) Exceptions from exemption

A more difficult problem is whether there should be any exceptions to the rule that wages are absolutely exempt. The Alberta Rules of Court presently provide that the normal exemptions from wage garnishment will not apply in three cases, namely: (1) where the debt was contracted for board and lodging or either of them, (2) where the debtor has absconded or is about to abscond from Alberta, leaving no wife or husband or infant children within Alberta, and (3) in claims for alimony or maintenance payable to a wife or former wife, or for a child.[184] It is assumed that a garnishee summons issued under section 5 of the Execution Creditors' Act[185] is subject to the normal exemptions.[186] In any event, if wage garnishment were to be abolished, the relevant sections of the Execution Creditors' Act would have to be repealed. In other jurisdictions, exceptions from the normal exemptions from wage garnishment have been proposed or enacted where the debtor is a corporation,[187] where the debt was contracted for "necessaries," [188]where the claimant is the state,[189] or where exempt assets are purchased to defeat creditors.[190]

Differing arguments can be advanced in support of these various exceptions. The exceptions for debts contracted for necessaries and for board and lodging may be defended on the ground that otherwise credit for these items would never be extended to debtors falling below a certain economic level.[191] The exception for matrimonial debts is defended on the ground that the wife depends for her survival on payment of the maintenance order and that failure to pay can lead to serious social and economic burdens for the state.[192]

As to the exception in the case of absconding debtors, Kazanjian recommends the enactment of such an exception in Ontario as follows:

> Although the individual who is leaving the jurisdiction is no less dependent on necessaries, there are compelling reasons to terminate his right to exemptions. An exception here would reinforce the deterrent aspects of The Absconding Debtors' Act and would assist domestic creditors who might otherwise lose the opportunity to satisfy their claim. By renouncing his binding obligations within the province, the absconding debtor should also be taken to have renounced his rights to any benefits. [193]

This writer finds it difficult to accept any of these exceptions from the wage exemption, apart from the exception of the corporate debtor. Given the serious social and economic costs and disruptions occasioned by the remedy, it is hard to see why there should be any departures from the total exemption of wages.

VI. Exemptions Reforms, Assuming the Retention of Wage Garnishment

(1) Introduction

If the Institute recommends retention of wage garnishment, it will have to consider what changes need to be made in the provisions exempting part of the judgment debtor's wages from the remedy. In this section, it is proposed to examine the present exemptions from wage garnishment, and then to suggest certain reforms. The following discussion assumes the retention of wage garnishment within the context of a system of individual creditors' remedies, rather than an enforcement office system.

(2) The present law

The principal exemption of wages from garnishment is to be found in rules 483 and 484 of the Alberta Rules of Court. The provisions are important and are set out in full:

> 483. (1) Where the debt due to an employee is for wages or salary the following portion thereof is exempt from attachment by garnishee for each month in respect of which the wages or salary is payable:
>
> (a) if the debtor is a married person, the sum of $200, or
>
> (b) if the debtor is a married person with dependent children
>
> (i) in his or her custody, or
>
> (ii) under his or her control, or
>
> (iii) in respect of whom he or she is paying maintenance,
>
> $200 plus $40 for each child, or
>
> (c) if the debtor is a widow, widower, unmarried mother or divorced person with dependent children

(i) in his or her custody, or

(ii) under his or her control, or

(iii) in respect of whom he or she is paying maintenance,

$100 plus $40 for each child, or

(d) if the debtor is an unmarried person $100.

(2) The amount of exemption applicable is increased or decreased proportionately where the period in respect of which the wages or salary is payable is greater or less than one month.

(3) If the debtor is employed during part only of a month, he is entitled to the full exemption for the month.

(4) If the amount of the exemption applicable or any portion thereof is paid into court, the clerk shall pay it out to the defendant or judgment debtor.

(5) This Rule does not apply

(a) where the debt sued for, or in respect of which judgment was recovered, was contracted for board and lodging or either of them, or

(b) where the debtor has absconded or is about to abscond from Alberta, leaving no wife or husband or infant children within Alberta, or

(c) to any garnishee summons issued upon any judgment or order for the payment of alimony or for the payment of maintenance by a husband to his wife or his former wife, as the case may be, or for the payment of maintenance for any child of the debtor.

(6) A copy of this Rule shall be attached to or endorsed on each garnishee summons purporting to attach wages or salary.

484. Where both husband and wife are in receipt of wages or salary the court may, upon application, reduce the exemption to which one or both of them would be otherwise entitled under Rule 483.

One modification of the above section must be noted. Mr. Justice Primrose has informed the writer that the Rules of Court Committee will

recommend that all the money exemptions in rule 483 should immediately be doubled in amount, but that the rule should otherwise be left as it is, pending the Institute's report on exemptions. The writer will later refer to some correspondence to and from the Rules of Court Committee regarding various aspects of rule 483.

Another point about the rule should be mentioned. In Alberta, unlike most provinces, income can be attached before as well as after judgment. While the procedure is different in the two situations,[194] the exemptions in rule 483 apply equally to both.

The Civil Service Garnishee Act[195] provides in section 2 that a person who obtains "a judgment or order for the payment or recovery of money" against an Alberta civil servant may attach the wages or salary due or accruing due to the employee. Two other sections of the Act may usefully be quoted in full:

> 3. Except as otherwise provided by this Act the provisions respecting garnishment contained in the Alberta Rules of Court apply mutatis mutandis to the attachment of wages or salary under this Act.
>
> 6. The wages or salary of an employee are exempt from attachment under this Act to the extent of
>
> (a) that portion of the wages or salary determined as being exempt from attachment under the provisions respecting garnishment contained in the Alberta Rules of Court,
>
> (b) any amounts required to be deducted by the Provincial Treasurer or the board or commission, as the case may be, by or under an Act of the Parliament of Canada or of Alberta, and
>
> (c) the amounts of any deductions made at the direction of the employee or as a consequence of an assignment made by the employee, if the deduction is included in any class of deductions designated by an order of the Provincial Treasurer as exempt deductions for the purpose of this section.

Three points need to be made about this legislation.

(i) Without the Civil Service Garnishee Act, the wages of provincial civil servants would probably not be garnishable, either because a court could not at common law make an order binding on the Crown, or because wages of Crown employees are not a debt sufficient to permit garnishment.[196] The Act overcomes these problems and makes it clear that the wages of Alberta public servants are garnishable after the creditor has obtained a "judgment or order for the payment or recovery of money."[197] The wages of federal civil servants are not garnishable because of the absence of legislation like the Civil Service Garnishee Act.[198]

(ii) In the opinion of the writer, the wages of a provincial civil servant cannot be attached before judgment unless the plaintiff has obtained an interim order which requires the defendant to pay money, such as an interim alimony order. Without such an interim order, however, the plaintiff must go to judgment before he can attach a provincial Crown servant's wages.

The point is not altogether as certain as one would like. There is a decision by Magistrate De Weerdt of the Northwest Territories Magistrate's Court holding on similar legislation that a creditor can attach the wages of a territorial public servant before judgment,[199] and there is some opinion that the same result might prevail in Alberta.[200] However it is understood that the Alberta Treasury Department and some government boards and commissions take the view that the Alberta Act does not permit garnishment of the wages of public civil servants before judgment or an order for the payment or recovery of money.[201] The writer concurs in this view, despite the anomalous distinction thus created between public servants and other debtors.[202]

(iii) As to exemptions, section 6 of the Civil Service Garnishee Act provides that the wages or salary of a civil servant are exempt to the extent provided for in rule 483 of the Alberta Rules of Court. However section 6 goes on to create two additional exemption provisions. It will be noted that these limitations create an additional anomalous distinction between provincial civil servants and other debtors.

(3) Different forms of exemption provisions

Before recommending changes in the exemptions provisions in the Alberta Rules of Court, it may be useful to examine the main types of exemptions provisions found in Canadian, English and American legislation.[203]

(a) The flat amount exemption expressed in dollars and cents

A popular and straightforward method of exemption is to establish a set dollars and cents figure which is completely free from garnishment. Some jurisdictions set out one exemption for any debtor while others set out different amounts for single debtors and debtors supporting dependents.[204] The exemption may be limited to certain classes of persons, such as "heads of family," or to certain periods of time (e.g. Alaska's exemption of $350 for services rendered within thirty days preceding a levy, or $200 if single).[205] Some jurisdictions permit the debtor to claim the flat amount exemption out of the total amount owing at the date of each garnishee order; others provide that the debtor can claim the exemption once a month (or some other time). Provision may be made for the debtor or the creditor to apply for an order increasing or decreasing the exemption.[206] It is obvious that the present Alberta exemption is of this flat amount form.

(b) The flat amount exemption, tied to an escalator clause

The difficulty with the flat amount exemption expressed in dollars and cents is that as soon as it is enacted, inflation begins to make it increasingly inadequate as a protection to the debtor. If the legislature is not prepared to review its exemptions legislation frequently, flat amount exemptions very quickly lose their intended scope. The history of the Alberta wage exemption, discussed in Part II of this paper, is a good example of the process.

One solution to the problem of inflation is to pin the flat amount exemption to a statistical formula such as the cost of living index. A complicated example of such a legislative provision is contained in section 2 of the final draft of the Uniform Exemptions Act, which has been written for the American National Conference of Commissioners on Uniform State Laws. (The relevant section with commentary is attached to this report as Appendix C.) For a Canadian example, one might refer to the Federal Government's attempt to tie income tax rates to the cost of living index.

Another more common solution is to tie the exemption to some other statutory provision such as the minimum wage[207] or social assistance rates.[208] The success of this alternative as a protection against inflation depends on the frequency of reform of the legislation used as an escalator for the wage garnishment exemption. A further difficulty is that there are strong political and economic pressures against raising the minimum wage and welfare rates which would, if successful, have the side effect of preventing garnishment exemptions from escalating with the general inflation in the economy.[209]

(c) The flat period exemption

Some American states provide that all or part of the wages or salaries earned within a certain period ranging from 30 days to 90 days before the issuance of the garnishee order shall be exempt from the garnishment process. These exemptions are often coupled with provisions that the judgment debtor must be the head of a family or a resident of the state, and that the debt was not incurred for "necessaries."[210]

(d) Percentage exemptions without limitation

Instead of setting out a flat amount or a flat period exemption, some garnishment statutes exempt without further limitation a certain percentage of the wages or salaries due or accruing due. Such percentage exemptions run from 33 1/3% to 90% in various Canadian statutes. The percentage may be lower where the judgment creditors fall within a protected class, such as wives suing for alimony or maintenance.[211]

The problem with a simple percentage exemption without the minimum limit is that, no matter how small the earnings of the debtor, the creditor may take some part of them in satisfaction of his claim. (As a practical matter, there is, of course, a floor below which the costs of garnishment would make the remedy unattractive.) On the other hand, the occasional debtor with a large salary retains a proportionately larger amount exempt. As a result, percentage exemptions do not often appear without minimum and sometimes maximum limitations.

(e) Percentage exemption with limitations

The most popular kind of exemption statute provides that a certain minimum level of income (a flat rate) is totally exempt, and that all income

above the minimum level is exempt to a certain percentage. An example is section 3(4) of the British Columbia Attachment of Debts Act. A more restrictive variation of this formula is to be found in section 1672 of the American Consumer Credit Protection Act which says that the maximum part of the weekly disposable earnings of an individual which is subject to garnishment may not exceed 25 percent of his disposable earnings for that week, or the amount by which his disposable earnings exceed thirty times the Federal minimum hourly wage, whichever is less.[212] Where the court or a registrar has power to increase or decrease the exemptions, this power may itself be subject to a percentage limitation as in section 3A(4) of the British Columbia Attachment of Debts Act.

Another kind of limitation which is sometimes found is a maximum dollars and cents figure beyond which the percentage exemption is either replaced by a smaller percentage or does not apply at all. An example is the (now repealed) Idaho exemption of 75 percent of earnings, up to $100 maximum.[213]

Both minimum and maximum flat rate limitations suffer from a proneness to become inadequate and restrictive because of inflation, unless they are tied to some form of cost of living escalator clause. A further difficulty with the maximum flat rate limitation is that if all income above the flat rate could be taken by a creditor, the debtor would lose any incentive to earn more than the maximum amount.[214]

(f) Discretionary exemption

The different forms of exemption provisions examined to this point have set out fixed formulae, whether expressed in terms of dollar floors or ceilings, periods of time, or percentages. It is not uncommon

for the legislation to provide a power in a registrar or a judge to vary the fixed exemption, as in section 3A of the British Columbia Attachment of Debts Act. Where the discretion is not invoked by creditor or debtor, the exemption remains as fixed by the legislative formula.

A few jurisdictions have taken the very different approach of providing no legislative formula, but of leaving the wage exemption in all cases to be set by a judge or an administrator. The English Attachment of Earnings Act 1971 sets out no fixed exemption but provides that the clerk of the court in every attachment order will specify the normal deduction rate ("the rate ... at which the court thinks it reasonable for the debtor's earnings to be applied to meeting his liability under the relevant adjudication") and the protected earnings rate ("the rate ... below which, having regard to the debtor's resources and needs, the court thinks it reasonable that the earnings actually paid to him should not be reduced.")[215]

The only Canadian province which has taken a similar approach is Prince Edward Island. In 1972, that jurisdiction amended its Garnishee Act to provide as follows:

> 17.(2) There shall be exempt from garnishment on wages due or accruing due to any judgment debtor for his personal labour and service, sums in such amounts and for such purposes as shall be more particularly set forth in regulations.
>
> (3) The amount of exemption hereinabove referred to in subsection (2) shall be calculated by the Prothonotary of the Supreme Court or by a clerk of the County Court, as the case may be, on the basis of an exemption for each "Item of basic need" prescribed by regulation, and in no case shall the exemptions under this section leave the judgment debtor with less income than he would receive if he were a person wholly dependent for his income on payments made under the provisions of The Welfare Assistance Act.

> (4) The calculation of exemption hereinabove referred to in subsection (3) shall be made in a manner prescribed by regulation.[216]

The regulations made pursuant to section 17 set out an exceedingly complex series of calculations which must be made by the Prothonotary of the Supreme Court or by the Clerk of the County Court in order to establish the proper exemption. (A copy of the regulations is attached as Appendix E to this Report.)

The other Canadian legislation which adopts a similar approach to exemptions is section 48 of the Bankruptcy Act which provides:

> 48.(1) Notwithstanding section 47, where a bankrupt is in receipt of, or is entitled to receive, any salary, wages or other remuneration from any person employing, or using the services of, the bankrupt, hereinafter in this section referred to as the "employer", the trustee, if directed by the inspectors or the creditors, shall apply to the court for an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine having regard to the family responsibilities and personal situation of the bankrupt. [217]

There are American jurisdictions which have adopted a similar approach.[218]

David Baird has, after some uncertainty, recommended a discretionary exemption provision to the Ontario Law Reform Commission. In his comment on the Payne Committee Report, submitted to the Commission in 1972, Baird expressed some unhappiness with the way in which the judges were exercising their discretion under the (then) section 39A of the Bankruptcy Act.

> Section 39A of The Bankruptcy Act of Canada gives the Court the power to order the debtor to pay a portion of his future earnings to the Trustee in Bankruptcy for distribution among his creditors. Under the Bankruptcy Act the Courts have considered the individual circumstances of the debtor and have not required any payments to be made unless it is established that the debtor earns more than he

> requires for the support of his family. In my practice, each Judge has a different approach and it is very difficult to determine any general standard. The Courts have tended to be very lenient. It is my opinion that more consistency is required than that shown in the Bankruptcy Courts. This could be done by giving each person a basic exemption and increasing that exemption in the event that the debtor is married and has children. [219]

However, in his report on exemptions submitted in February, 1973, Baird had changed his mind and was prepared to recommend a discretionary wage exemption provision similar to section 48 of the Bankruptcy Act.[220] In his exemptions report, Baird does not appear to answer the criticisms of an unfettered discretion which he developed in his earlier report.

The Ontario Law Reform Commission may be prepared to accept Baird's proposal. In their recent discussion paper on the Service and Enforcement Office (the S.E.O.), they tentatively recommend that their present garnishment procedure be abolished and replaced by the following scheme:

> If the judgment creditor has reasonable grounds to believe that the judgment debtor has surplus income over and above the minimum amount required to support his family, he could apply to a local Registrar of the S.E.O. for an Order requiring the judgment debtor to pay a portion of his earnings to the S.E.O. for distribution among his creditors. The S.E.O. would serve notice of a hearing on the judgment debtor and the Registrar of the S.E.O. would determine whether or not such an order should be made. An Order to attach earnings should be reviewable by a Judge of the Small Claims Court having jurisdiction where the judgment debtor resides. This procedure would ensure that the judgment debtor had sufficient earnings to support his family before being required to make any payment to his creditors. It is analogous to the present rights given to a Judge under Section 7 of The Wages Act to increase or decrease that portion of the debtor's wages which may be exempt from attachment or seizure.[221]

While the passage is ambiguous, it appears to contemplate the unfettered judicial discretion proposed earlier by Baird.

(4) The best form of exemptions provision

In this section, it is intended to examine the range of wage exemption provisions set out above in order to indicate the most desirable formula for Alberta. The writer will in a subsequent section deal with some mechanical problems in constructing an exemptions section. The discussion proceeds on the assumption that wage garnishment is to be retained as an individual creditor's remedy, and not as a remedy available only to an enforcement officer.

When we examine the different forms of exemption provisions outlined above, some can be eliminated as being clearly unsatisfactory. The flat amount exemption expressed in dollars suffers from the serious flaw that, as soon as it is enacted, inflation starts to cut down its real value. If the purpose of the exemption is to protect the minimum level of income deemed to be necessary to the wage earner debtor, the flat amount exemption will, except at the moment of enactment, be inadequate. The result is that the writer urges the Institute to recommend against the present exemption against wage garnishment in the Alberta Rules of Court because it is of the flat amount type.

The percentage exemption without a minimum limitation is equally unacceptable. Canadian social policy, as expressed in social assistance and minimum wage legislation, postulates a basic income level below which no Canadian citizen should be permitted to fall. A percentage exemption without a minimum limitation would permit the creditor to take part of the income of his debtor, no matter how small the income per month. Such a conclusion is intolerable today, despite the practical obstacles to attaching small amounts of wages.

The flat period exemption need not be discussed in detail. An exemption of all income of the debtor earned during the period of 30 days or more immediately preceding the garnishment would amount in most cases to abolition of wage garnishment, a conclusion which has been rejected for the purpose of the present discussion. If the legislative provision sets out an exemption of a percentage of the income earned during the fixed period, then it seems to limit artificially the operation of a percentage exemption.

It is more difficult to deal with those provisions which leave the amount of the exemption in each case entirely in the discretion of a judge or an administrative official, particularly if there is inadequate evidence as to the way in which these provisions operate in practice. However there do appear to be several difficulties with totally discretionary provisions which lead to the rejection of this alternative. We have already noted that Canadian social policy has recognized a basic level of income which is the right of every Canadian citizen. The completely discretionary exemption does not satisfy this social policy, because it delegates to the judges or administrators the freedom to make whatever social policy they please from case to case. The protection of a citizen's basic income is too important to leave to the whims of an individual administrator or judge.

Leaving the amount of the exemption to the discretion of an official would appear to open the door to unequal treatment of debtors. David Baird observed this kind of inconsistency in different judges' applications of section 48 of the Bankruptcy Act,[222] and other students have noted similar inconsistencies in the interpretation of the provisions of Part X of the Bankruptcy Act.[223] It may be useful to allow room for some judicial or administrative discretion, but there must be a point at which society draws the

line as an exercise of general social policy.

We have observed earlier that the legal system generally can be seen as biased in favour of the creditor and against the debtor. One way to right this (often unconscious) bias is to strip the functionaries in the system of all but a limited and marginal discretion.

Finally, a completely discretionary scheme would appear to be an administrative nightmare for the courthouse staff who have to set the exemptions, and the employers who have to abide by them. In the interests of efficiency, the discretionary exemption would appear to be undesirable.

The above analysis leads the writer to the conclusion that the most satisfactory form of wage exemption is a percentage exemption coupled with a minimum level below which income is totally exempt. This minimum one hundred percent exemption should not be expressed in dollars and cents, but should be tied to some kind of escalator clause, such as the minimum wage. The American Consumer Credit Protection Act pins the weekly exemption to thirty times the Federal minimum hourly wage.[224] The National Commission on Consumer Finance has recommended that the Federal legislation be changed by increasing the multiple of the minimum hourly wage from thirty to forty. According to the Commission:

> [a] wage earner working a full 40-hour week at the minimum hourly rate earns, by standards recognized by Congress, the minimum amount necessary to support a family at a bare subsistence level. To exempt from garnishment an amount based on a 30-hour workweek seems unreasonable. It does not afford the employees earning the minimum wage with adequate means to provide basic necessities.[225]

This proposal has been supported by Kerr,[226] and it appears to this writer to be closer to a proper exemption than the "thirty times" formula. (The form and amount of the minimum level exemption will be considered more fully

below.)

Another recommendation made by Kerr, and supported by this writer, is that the minimum level exemption should vary according to whether the judgment debtor is single or whether he supports dependents. Welfare rates, income tax exemptions and other legislative systems which attempt to distinguish the poor from the non-poor all take into account the number of dependents in the family unit. The same should be true of wage exemptions. Kerr proposes to take account of this factor as follows:

> The exemption for a person with dependants is proposed to be expressed as a multiple of the rate for a person without dependants. For a person with one dependant, an exemption of one and a half times the exemption for a person without dependants is proposed. For each additional dependant it is proposed that the multiple be increased by one quarter. 227

Some such formula would appear necessary if the minimum level is to be adequate for the judgment debtor with dependents. The idea is not foreign to Alberta; the present flat amount exemption in the Rules of Court varies according to the number of dependents of the debtor.[228]

As well as setting a minimum level below which all income is free from garnishment, it is desirable to set a percentage of income above the minimum level which is exempt as well. The practical reason for the percentage exemption is to give the judgment debtor some incentive to work. If the judgment creditor can take one hundred percent of wages above the minimum level, the judgment debtor may be well advised to order his affairs so as not to earn more than the minimum.[229] The incentive-to-work principle is an essential element of the guaranteed annual income scheme advocated, inter alia, by the Senate Committee on Poverty,[230] and it should be incorporated into any modern wage exemption provision.

The percentage exemption coupled with a 100% floor exemption appears to work well in practice, judging by the letters received by Mr. Justice Hugh John MacDonald writing for the Rules of Court Committee. Mr. Hurlburt has copies of these letters.

The final problem to be discussed in this section is whether a discretionary power should be given to a judge or an administrator to vary up or down the minimum level exemption or the percentage exemption. The writer's view is that a state official should be given the power to increase exemptions but not to decrease them. (What official exercises this power may be left to be determined at a later stage of this study.)

We have argued that the wage exemption protects that minimum amount of wages necessary for the survival at an acceptable standard of living of the judgment debtor and his family. If this is the case, then it would be wrong to permit any exceptions to the exemption. If power were given to the creditor to apply to reduce the wage exemption, the creditor could use the threat of such an application to coerce the debtor into a potentially dangerous repayment agreement. Such a discretionary power would open the door to a consideration by the state official of factors irrelevant to the central issue, namely, what is the minimum amount which the debtor needs to live.

The strongest case which can be put for a judicial or administrative power to reduce exemptions is that a case may arise in which the debtor is receiving a large salary, most of which is exempt. However, well-paid judgment debtors are rare, and are open to other remedies such as execution or bankruptcy. The real danger of admitting any exception to the wage exemption is the opportunity for harassment and coercion thus afforded to the creditor. No official should be empowered in a system of

individual creditors' remedies to reduce the wage exemption. The answer might conceivably be different, given an enforcement office or a bankruptcy system, although even there, as Baird has pointed out,[231] dangers still exist. The same argument can be advanced against the imposition of any maximum limit on the percentage exemption, whether the maximum limit is expressed in dollars or is tied to a cost of living escalator.

A judge or an administrator should, however, be given the discretion to raise the minimum wage exemption. Circumstances may well arise in which the minimum exemption is dangerously inadequate, and it should be possible for the exemption to be adjusted to meet such a situation. The difficulty with such a recommendation is to make it effective.

Section 3A of the British Columbia Attachment of Debts Act[232] now provides that a judge may increase the wage exemption, but very few orders have been sought, much less granted, under this section.[233] The reason is simple. Judgment debtors whose wages have been garnisheed are highly unlikely for psychological and economic reasons to launch a court application to vary their wage exemption. (The only successful applications under section 3A known to this writer have been brought on with the assistance of law students from legal advice clinics.)

The same pattern has developed in Manitoba. Mr. Grey Richardson, Master and Referee of the Court of Queen's Bench, described the system as follows:

> Section 9(2) [of the Garnishment Act[234]] provides a method for varying exemptions. In the 3 1/2 years I have been Referee of the Queen's Bench there has been no application to our Court in the Eastern Judicial District by either a debtor or creditor for the variation of an exemption. The County Court Clerks inform me that they cannot recall any application for

> such a variation ever being made in the County Court of Winnipeg. Section 10(1) provides for an application by a judgment debtor for "Release of Garnishment on Terms." No applications under this section have been made to Court of Queen's Bench. The County Court of Winnipeg receives about six such applications in a year. They are heard by a Court Clerk and no decision of his has ever been appealed to a County Court Judge. To put the matter into perspective the Court of Queen's Bench for the Eastern Judicial District issued 977 Garnishing Orders in 1975. In that same year the County Court of Winnipeg, which covers a somewhat smaller area and population than the Eastern Judicial District, issued 2360 Garnishing Orders. Separate statistics are not kept as to whether the Garnishing Orders are for wages, regular Garnishing Orders or say Bank Accounts or continuing Garnishing Orders under Section 14 for alimony or maintenance. I would estimate that probably about 60% of the Garnishing Orders in the Court of Queen's Bench are on employers for wages. In the County Court, particularly those arising from Small Claims Court Judgments the percentage would be considerably higher. I do not know why Sections 9 and 10 of the Garnishment Act are not used more. I would speculate that it is because the judgment debtors do not know of their existence and do not seek legal advice. I believe they should be used more, and now with legal aid readily available, I would expect more applications to be made. 235

The only criticism that one might make of this passage is to query the Master's rather optimistic reliance on legal aid as a realistic solution to the problem. However the Master's view that the right of variance is little used is supported by research in other jurisdictions.[236]

What is needed is some sort of simplified procedure which would make it relatively easy for the judgment debtor to apply for an order raising the wage exemption. The solution might be to adapt to wage garnishment the procedural system developed in Alberta to control execution against goods and chattels.

The new legislation might require the garnishing creditor to give the garnishing debtor a notice which, when signed and returned to the clerk of the court, would constitute an application to consider the adequacy of the wage exemption. The details of such a scheme need not be explored further here, but it is important that the principle be recognized. In the area of creditor-debtor relations, the adversary system does not operate equally or fairly. Procedural protection is needed to ensure that the judgment debtor's case is heard and determined, despite his weak economic and social position.

(5) Technical aspects of the wage exemption

Having decided on the best form of exemption provision, it may be useful to consider several technical problems in drafting such an exemption clause.

(a) The definition of wages

In the discussion of reforms related to the abolition of wage garnishment, we noted some difficulties in defining "wages." Those same difficulties must be faced when our intention is to retain wage garnishment but to reform the present wage exemption provisions. It is not necessary to repeat this discussion,[237] but one new problem should be noted.

Under most, if not all, contracts of employment today, the employee is not paid the whole of his gross earnings for the pay period; instead he receives those earnings less various deductions. The question which must be answered is whether the employer who receives a garnishee summons against wages must pay into court the gross earnings for the pay period less exemptions, or the gross pay less (compulsory deductions plus exemptions). The

problem is of common occurrence but is by no means clearly settled in Alberta law, largely because the Alberta Rules of Court do not define "wages" or "salary" for the purpose of the garnishment sections.

In the absence of some legislative assistance, the lawyer must fall back on the general rule that a creditor can attach only debts due or accruing due to the debtor-employee.[238] Arguably the wage-debt due from the employer to the employee at the end of the month does not include sums of money which the employer is required to deduct because of federal or provincial statute or perhaps because of contractual term (e.g. a compulsory pension plan).[239] The reason is that the portion of the gross earnings which the employer must deduct is not a debt due or accruing due to the employee, even though he may obtain some benefit from the disposition of these moneys. If this analysis is right, then the employer in receipt of a garnishee summons should subtract all compulsory deductions from the employee's gross pay and then deduct the exemptions in rule 483 to determine the sum payable into court. A lawyer might well be uncertain as to what deductions are sufficiently compulsory to fall outside the "debts due" formula.

The present law is obviously in need of clarification, but the problem becomes more acute if the reform urged in the last section is adopted. The issue which would then arise is whether the percentage exemption should be calculated on gross or take home pay. Some legislative guidance is needed here.

One solution which has found favour in Canada and in the United States is to define "wages" as gross pay less certain deductions. For example, the British Columbia Attachment of Debts Act presently defines

"wages" as follows:

> "wages" includes salary, commissions, and fees, and any other money payable by an employer to an employee in respect of work or services performed in the course of employment of the employee; but it does not include deductions therefrom made by an employer under an Act of the Legislature of any province or the Parliament of Canada. [240]

The American Consumer Credit Protection Act similarly defines "disposable earnings" as compensation paid or payable for personal services less any amounts required to be withheld by law.[241] While in British Columbia, the writer recommended to the Law Reform Commission that the present definition of wages was satisfactory. On reflection, however, the advice was wrong.

The reason why this kind of definition of wages is bad policy is set out in the series of reports on wage garnishment by the California Law Revision Commission. Their trenchant criticism of the definition of "disposable earnings" in the American Consumer Credit Protection Act deserves to be quoted at length:

> Basic Exemption
>
> The wage garnishment provisions of federal law determine the maximum amount that may be withheld from an employee's wages pursuant to a garnishment in California. Under federal law, the debtor with a large family -- and, consequently, greater needs -- has more earnings withheld than a single debtor with the same gross earnings but with more limited needs. For example, if the employee whose wages are garnished has gross weekly earnings of $100, approximately $6.25 is withheld if he is single, $15.79 if he is married and has two children, and $20.69 if he is married and has six children. The employee's take-home pay after garnishment will be $69 for the week, whether he is single or is married with two or with six children. This strange result occurs because garnishment under federal law is calculated on disposable earnings, and disposable earnings increase as the number of income tax exemptions for dependents increases.

> An additional deficiency in the federal law is that it provides inadequate protection for low income debtors. In fact, at low income levels, a California debtor with dependents whose earnings are garnished may have significantly less spendable income than he would have if his family were on welfare.
>
> The Commission recommends that the amount withheld pursuant to a garnishment be based on the judgment debtor's gross earnings, regardless of the number of his dependents. This will leave the debtor having dependents (who has less deducted for state and federal income taxes) with more take-home pay than a debtor with the same amount of gross earnings but fewer dependents.
>
> . . . . . .
>
> In the following table, amounts that would be withheld pursuant to a garnishment under the recommended legislation are compared to amounts that would be withheld under existing law.

COMPARISON OF AMOUNTS WITHHELD UNDER A WAGE GARNISHMENT

(Note. These examples are based on the $2.30 federal minimum wage effective January 1, 1976.)

GROSS EARNINGS (weekly/ annual)	*AMOUNT WITHHELD UNDER A WAGE GARNISHMENT*			
	PROPOSED STATUTE (all persons)	*EXISTING LAW*		
		Single person having 0 tax exemptions	*Married and 2 children (4 tax exemptions)*	*Married and 6 children (8 tax exemptions)*
$100/$5,200	–	$6.25	$15.79	$20.69
106/ 5,512	$5.00	10.64	20.28	23.75
120/ 6,240	10.00	19.98	24.81	26.83
150/ 7,800	20.00	27.21	30.12	32.42
250/13,000	37.00	43.07	47.01	49.78

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The writer wishes to make substantially the same recommendation to the Institute. "Wages" should be defined as gross earnings, including compulsory deductions. A variant of this kind of definition is the following, taken from the Canadian draft Bankruptcy Bill:

> "wages" means salaries, fees, commissions and other compensation for services including any amount withheld by an employer as severance pay, vacation pay, pension and other health and welfare plan contributions.(243)

Two points need to be made regarding this proposal. First, the Bankruptcy Bill definition is different from the California recommendation in that the Bill does not equate "wages" to gross earnings. Indeed, it leaves out income tax, which is the deduction which causes the California Commission its greatest concern. If the California recommendation were to be adopted in Alberta, "wages" would have to be defined as including those compulsory deductions which vary according to family size and perhaps other factors. One would have to look at each deduction in turn to decide whether it should be included in or excluded from the sum available to garnishment.

The second point is that the writer has already recommended that the floor level exemption should vary according to whether the debtor is single or whether he supports dependents. The result is that the debtor-wage earner supporting a family is doubly protected against wage garnishment, not an undesirable goal.

(b) The minimum level

The writer has already suggested that the minimum weekly level below which all wages are exempt should be forty times the Alberta minimum hourly wage. It is now necessary to comment briefly on this recommendation.

The first problem is to decide what is the minimum amount of income which is essential to the debtor's survival at an acceptable standard of living. We have already noted the development of the Canadian social policy that no citizen shall be permitted to fall below a basic level of income. This policy underlies our welfare system, our minimum wage legislation, and the numerous proposals to create guaranteed annual income systems.[244] Wage garnishment legislation should be drafted in accord with this policy, particularly in its wage exemption provisions.

If this policy position is accepted, the Institute must still decide what form the minimum level provision should take. The section should contain an escalator clause, but should it be tied to a cost of living index (as in the American Uniform Exemptions Act[245]) or should it be related to other legislation, like the minimum wage regulations?

The advantage of tying the floor exemption to minimum wage legislation is that it gives real support to the anti-poverty policy discussed above without creating a complicated escalator clause based on some economic formula such as the cost of living.[246] Tying the wage exemption to social assistance rates might actually decrease wage exemption; moreover, the relationship between the two is not as obvious as the relationship between wage exemptions and the minimum wage. The minimum wage formula has the added advantage that it has already been adopted in some form by a number of legislatures.[247]

The disadvantage of using the minimum wage as an escalator is the political pressure against raises in the minimum wage, discussed in the previous section of this paper. The Uniform Exemptions Act clause is complicated, but it does demonstrate that such a provision can be drafted.

The writer has not been able to choose between the two possible escalator provisions, and there may be other possible formulae. What is clear is that an escalator clause in some form must be included, or the minimum level will quickly lose its significance because of inflation.

(c) The percentage exemption

We have already recommended a percentage exemption to be applied to all wages earned over the minimum level. It is now necessary to consider what that percentage should be.

The present exemption in several provinces, including British Columbia, is seventy percent, subject to certain exceptions. The writer would propose that the percentage exemption in Alberta should be either eighty-five percent or ninety percent. American research suggests that in an inflationary economy the average wage-earner needs from eighty-five to ninety percent of his salary just to meet current expenses.[248] Allan Harris, a third year law student, has done some research which seems to confirm this result for Canada.[249] Some support for this proposed percentage figure can be drawn from the letters written by Ms. Catherine Wolhowe and Mr. Grey Richardson to Mr. Justice Hugh John MacDonald. For reasons advanced above,[250] it seems unacceptable to permit creditors to garnishee anything more than ten or fifteen percent of their debtors' monthly wages.

(d) Reforms proposed in Part V of this paper

Part V of this paper contained a series of proposed reforms related to the abolition of wage garnishment. Those recommendations dealt with (a) the definition of wages, (b) the problem of assets purchased with exempt wages, and (c) the absolute character of the wage exemption. The writer has now reviewed Part V and is prepared to make the same recommendations as necessary adjuncts to the changes in the wage exemption provision outlined in Part VI.

Since completing Part V, the writer has read the American draft Uniform Exemptions Act, which includes a number of proposals similar to those made in Part V. The Institute might want to look at sections 6 (property exempt which is necessary for support), 8 (flat cash exemption), 9 (tracing exempt property through transformation in form, e.g. wages paid into bank account), 10 (exceptions from exemptions) and 12 (waiver).[251]

If wage garnishment were to be retained, a couple of points made in Part V would have to be reconsidered. As to payments from pensions or under statute, the Institute might want to go through the statutes listed in Appendix A to Part V and the related recommendations [252] in order to decide which payments should be totally exempt and which should be subject to the exemptions which apply to wages. As to wage assignments, the present Alberta legislation invalidates only wage assignments which are made to a lending institution, defined as "a person who lends money in the ordinary course of his business or his operations." [253] All other wage assignments are probably valid and enforceable. [254] As long as the Wage Assignments Act remains in its present form, it would seem sensible that the exemptions applicable to wage garnishment should apply as well to all wage assignments.[255]

(6) Related Reforms

If wage garnishment is to be retained, there are a number of reforms unrelated to exemptions which would lessen the devastating impact of the remedy on the debtor, and make its operation fairer and more efficient. These proposals will simply be noted in outline, but they are of the greatest importance if wage garnishment is to become a civilized and fair element of our system of creditors' remedies.

(a) Prejudgment wage garnishment

The Alberta Rules of Court presently permit a creditor to attach the wages of his debtor before judgment if he obtains an order from the Court.[256] (Where the debtor is a civil servant, the creditor must go to judgment before garnishment.[257]) In this respect, Alberta law differs from the law in most Canadian provinces, the Uniform Consumer Credit Code,[258] as well

as the policy which underlies Sniadach v. Family Finance Corporation of Bay View,[259] the earliest of the American Supreme Court cases applying ideas of due process to creditors' remedies. The writer's view is that the policy prohibiting prejudgment garnishment of wages is sound and should become Alberta law. Garnishment of wages puts excessive pressure on the debtor to consent to judgment or to a coercive repayment scheme without a real opportunity to defend the action. Even if wage garnishment after judgment is retained, the remedy should not be available before judgment.

(b) Continuing garnishment order against income

The writer earlier proposed to the British Columbia Law Reform Commission that the British Columbia Attachment of Debts Act be amended to permit a continuing garnishment order against all debts.[260] A fortiori a continuing garnishment order against income seems an essential reform. The writer has already referred to the cost of the present practice, required by the "debts due or accruing due" formula, of garnishing every month. In addition to the cost to the creditor, there is the cost and disruption to the employer which is likely to lead to the firing of the employee-judgment debtor. The obvious solution would appear to be to create for all judgment creditors the right which now exists in a limited form for wives claiming maintenance under the family relations legislation of many provinces, namely, the right to a continuing garnishment order.[261]

The advantage of a continuing order from the point of view of the employer is that he would know from month to month exactly how much he had to pay into court and how much he had to pay to his employee. One of the great problems of the present system is that the employer can never be sure when a garnishment order is coming in, which is important for calculating

the amount which has to be paid into court. The result hopefully would be to lessen substantially the harassment of employees because their wages have been garnisheed.

(c) The prohibition against firing employees because of garnishment

Section 40 of the Alberta Labour Act[262] provides that no employer shall dismiss, terminate, lay off or suspend an employee for the sole reason that garnishment proceedings are being or may be taken against the employee. The writer has suggested earlier that the section is probably unenforceable because of the word "solely" and because of the difficulties of proof. Section 40 would be more effective if the following changes were made:

(i) The word "solely" is too restrictive. It should be an offence to dismiss or demote an employee where a "principal cause" or a "substantial cause" is that garnishment proceedings are being or may be taken against the employee.

(ii) The burden of proof that section 40 has not been contravened should lie on the employer, once a prosecution has been brought under that section.

(iii) The Board of Industrial Relations should take over the policing of section 40 and should make it an effective sanction.

(iv) The Board should be empowered to reinstate an employee who is dismissed or demoted because of wage garnishment.

The above proposals seem harsh against the employer. On the other hand, it must be borne in mind that, if the policing of section 40 is left to the individual employee without some assistance from a government

agency, the section will continue to be a dead letter, no matter how strong it appears. There are precedents for reversing the onus in this kind of section. (See for example section 8(7) of the Labour Code of British Columbia.[263]) The analogy between unfair labour practice prosecutions and prosecutions under section 40 of the Alberta Labour Act is very close. In both cases, the facts are uniquely in the possession of the employer, and successful prosecutions will therefore be very difficult. This is particularly so because, under section 40 of the Alberta Labour Act, it is unlikely that a union will be fighting the prosecution. The alternative to beefing up section 40 is to leave the firing of employees whose wages are attached as the real sanction underlying the threat or the fact of wage garnishment in Alberta.

(d) Simplifying the employer's duties

Thought should be given to ways in which the employer's duties on receipt of a garnishee order might be simplified. Much of the difficulty experienced by employers flows from the complexity of the calculations which they must make in order to decide what portion of the employee's wages must be paid into court. The California Law Revision Commission has recommended a series of reforms to ease this burden on the employer, including the publication by the government of a series of tables which would spell out exactly what the employer must pay into court.[264] It might be useful to develop similar recommendations in Alberta in order to lessen the burden on employers and, as a result, lessen the temptation to fire or demote the debtor-employees.

(e) Miscellaneous reforms

The writer cannot discuss the many proposals which have been developed to modify the harsh effects of wage garnishment.[265] The Institute is urged to review the general law of wage garnishment and to consider the broad range of reform proposals that have been made concerning this useful and yet dangerous remedy.

(7) Statute or Rules of Court?

In 1975, the Institute made public a report which suggested that many of the present Alberta Rules of Court, including the garnishee provisions, may be invalid because they deal with substantive rights rather than practice and procedure.[266] The Institute recommended that the Judicature Act be amended to validate the present Rules and permit future amendments, even if the present or proposed Rules affect substantive rights. Since that report, it has been suggested that, rather than simply validating the present Rules, the better course would be to take potentially invalid provisions out of the Rules and enact them as separate statutes. Mr. Hurlburt has asked me to consider this proposal as it relates to the garnishee rules.

In many Canadian provinces, the attachment of debts provisions are in statute form,[267] but there are significant exceptions.[268] In Alberta, the process of execution is established by statute,[269] but the garnishee and the absconding debtor provisions are contained in the Rules.[270] Exemptions from execution are contained in the Exemptions Act,[271] while exemptions from garnishment are found in Rules 483 and 484. An exception is the garnishment of the wages of civil servants which is dealt with by statute.[272] It does not seem profitable to try to discover some rational explanation for the present distribution of provisions between the statutes and the Rules. Instead

the writer proposes to look at the question in principle and to ask whether the garnishee provision should be left in the Rules (validated as proposed by the Institute) or whether the provisions should be moved into a separate Attachment of Debts Act.

There are some strong arguments for leaving the garnishee provisions where they are. The history of garnishment legislation (and creditors' remedies law generally) in North America has generally been one of neglect. Nowhere is this more apparent than on the question of exemptions. Legislatures have maintained exemptions legislation on the books long after it has been stripped of significance by inflation or by other economic and social changes. One reason is that legislatures have limited time to debate new legislation and that time has been taken up with more important or at least more pressing political questions. A cynical explanation may be that there has been until recently no lobby for change of creditors' remedies legislation. The debtors have little political clout, and the creditors and lawyers have tended to be either complacent or apathetic about the state of the law. The result has been that creditors' remedies legislation, once passed, has tended to stay in roughly its original form, despite the clear need for change.

The argument therefore is that the legislature will be slow to reform garnishment legislation. Does it follow that judges or rules committees will be more flexible and more efficient in reforming the relevant rules? The history of the garnishment rules, discussed above,[273] suggests that the answer is no. There appears to have been little radical re-thinking of the garnishment process in Alberta since 1905, and the exemption provisions have clearly lost much of their significance because of inflation, despite the

occasional increase in the amounts. It is difficult to say with certainty that those jurisdictions with garnishment acts have done better or worse than rules of court jurisdictions in keeping their legislation up to date.

The other argument for leaving the garnishee provisions in the Rules is that it does not make any real or important difference where they are, as long as they are well drafted, frequently reviewed and, of course, intra vires. Even if the Rules are drafted by an appointed committee, they must be reviewed and approved by the Lieutenant-Governor in Council, and published as an order in council. Stripped of technicalities, much the same process will go on, whether the provisions ultimately issue as regulations or as a statute. Bearing in mind the limited time available for debate in the Alberta legislature, it is therefore preferable to leave the garnishment rules where they are.

The above argument depends on the assumption that there is no real difference between the two methods of legislating a garnishment of debts system. Assuming that the provisions are thought out carefully and reviewed often, the results will be much the same, whether the provisions are expressed in the Rules or in statute. In the view of the writer, the assumption is false. There is an important difference between the two forms of expression which should lead the Institute to recommend that the provisions be expressed in statute form.

Creditors' remedies legislation is not just technical apparatus; it involves difficult and controversial political issues. In a society which is heavily dependent upon consumer credit, the question of the proper legal balance between debtor and creditor is of the utmost importance. Should wage garnishment be retained be retained or abolished? Should wage garnishment exemptions be doubled or quadrupled? Should provincial civil servants

be treated differently from other debtors? Should the Federal government using the bankruptcy power determine in part exemptions for the provinces? It is hard to imagine questions which are more controversial and more political in character.

The political sensitivity of creditors' remedies and related legislation can be illustrated by reciting a few examples. The recent Canadian draft bankruptcy bill and the two American bankruptcy bills presently before Congress have been the subject of intense and vigorous debate.[274] In both Canada and the United States, the exemptions issue has been singled out for particular consideration. The Payne Committee Report [275] in England touched on considerable argument, as did the Anderson Committee Report [276] in Northern Ireland. One might multiply examples, but the point is clear. Creditors' remedies law raises difficult and important issues of policy on which differing points of view are bound to be expressed.

In a democratic society, political issues are not, or should not be, decided by rules committees, departmental committees or other appointed bodies. The basic principles at least should be debated by elected representatives in the Legislative Assembly. If the garnishment system is left in the Rules, the danger exists of a strong-willed member of the Rules Committee who can force his views on the Committee and therefore on the people of Alberta, despite the fact that he is neither elected by nor accountable to the people for whom he legislates. The threat of ad hoc piecemeal legislation may be increased when there is no real opportunity for debate in the Legislative Assembly. For all of these reasons, it seems to this writer that the garnishment system is too important to be left in the Rules; it should be expressed in statute form and thus exposed to debate in the political arena.

There is another argument which supports the conclusion that the garnishment system should be contained in a statute rather than in the Rules. The garnishment provisions are of interest to many people other than lawyers. Employers and creditors may well want to look up the law themselves in order to work out their rights and responsibilities. Out of province lawyers and laymen may want to do the same. Placing the provisions in a statute would make them accessible to non-lawyers, a fact which might encourage interested persons to seek out and to obey the law.

One of the arguments (advanced earlier) for leaving the garnishment provisions in the Rules was that they are potentially more flexible and easier to reform than is a statute. The writer doubts whether the history of law reform in this area supports this view. Even if we concede that rules are in fact more easily amended than statutes, the use of escalator clauses in the relevant legislation would take much of the impact from this criticism. The principal need for law reform in the area of exemptions is to keep them from being stripped of significance because of inflation. Escalator clauses can effect this result without losing the other advantages of expressing garnishment legislation in statute form.

VII. Exemptions of Real and Personal Assets and of Non-income Debts from Execution and Garnishment

(1) Introduction

In previous sections of this paper, the writer has discussed the history of exemptions legislation, policy problems, and the special question of exemptions from wage garnishment. The rest of the paper will consider exemptions of real and personal property from execution, and of non-income debts from garnishment. Exemptions from execution and garnishment are treated together because they raise essentially the same question, namely, how much of the debtor's non-income wealth should be free from the claims of his creditors.

The writer had intended to examine in detail the law governing exemptions from execution and non-income garnishment in Alberta, comparing it with exemptions provisions in other Canadian and American jurisdictions. The plan was that, before writing this part of the paper, the writer would complete his chapter on exemptions for the book being written for the Carswell Company Limited, and then use that research in the present report. Because of the pressure of time, it has proven impossible to carry out this plan.

It is therefore proposed to complete the research in a different form. This part of the report will refer briefly to the Alberta law of exemptions from execution. It will then compare the present Alberta statute to exemptions statutes in other jurisdictions, and conclude with a series of proposals to reform substantive and procedural aspects of the present law.

The writer will also submit to the Institute his chapter on

exemptions as it is written. (The section on exemptions of personalty from execution is almost complete.) As the rest of the chapter is written, it will be submitted to the Institute, together with any additional reform proposals which flow from that research.

It is unfortunate that a combination of time pressures on the Institute and on the writer have forced us to this imperfect realization of the original research plan. As it turns out, the proposals for reform by the writer can be substantially argued without the case-by-case research necessary for the book and which was intended to be included in this report. However that research should be completed within the month.

One final note. The writer will not deal in this report with exemptions from distress.

(2) Present Alberta Exemptions

In an earlier section of this paper, the writer traced the development of English and Alberta exemptions of personal and real property from execution. The principal statute is the Exemptions Act,[277] and it may be useful to set out section 2 which is the basic "shopping list" of exemptions against execution today.

> 2. The following real and personal property of an execution debtor is exempt from seizure under any writ of execution:
>
> (a) the necessary and ordinary clothing of the execution debtor and his family;
>
> (b) furniture and household furnishings and household appliances to the value of $2,000;
>
> (c) cattle, sheep, pigs, domestic fowl, grain, flour, vegetables, meat, dairy or agricultural produce, whether or not prepared for use, or such of them as will be sufficient either themselves or when converted into cash to provide

(i) food and other necessaries of life required by the execution debtor and his family for the next 12 months,

(ii) payment of any sums necessarily borrowed or debts necessarily incurred by the execution debtor

(A) in growing and harvesting his current crop, or

(B) during the preceding period of six months, for the purpose of feeding and preparing his livestock for market,

(iii) payment of current taxes and one year's arrears of taxes or in case taxes have been consolidated, one year's instalment of the consolidated arrears, and

(iv) the necessary cash outlays for the ordinary farming operations of the execution debtor during the next 12 months and the repair and replacement of necessary agricultural implements and machinery during the same period;

(d) horses or animals and farm machinery, dairy utensils and farm equipment reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next 12 months;

(e) one tractor, if it is required by the execution debtor for agricultural purposes or in his trade or calling;

(f) either

(i) one automobile valued at a sum not exceeding $2,000, or

(ii) one motor truck,

required by the execution debtor for agricultural purposes or in his trade or calling;

(g) seed grain sufficient to seed the execution debtor's land under cultivation;

(h) the books of a professional man required in his profession;

(i) the necessary tools and necessary implements and equipment to the value of $5,000 used by the execution debtor in the practice of his trade or profession;

(j) the homestead of an execution debtor actually occupied by him, provided it is not more than 160 acres, but if it is more, the surplus may be sold subject to any lien or encumbrance thereon;

(k) the house actually occupied by the execution debtor and buildings used in connection therewith, and the lot or lots on which the house and buildings are situated according to the registered plan thereof, if the value of the house, building and the lot or lots does not exceed $8,000, but if the value does exceed $8,000, the house, building and lot or lots may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds $8,000 the property shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and shall until then be exempt from seizure under any legal process, but no such sale shall be carried out or possession given to any person thereunder until the execution debtor has received $8,000;

(l) the mobile home actually occupied by the execution debtor if the value of the mobile home does not exceed $3,000, but if the value does exceed $3,000, the mobile home may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds $3,000 the mobile home shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and shall until then be exempt from seizure under any legal process, but no such sale shall be carried out or possession given to any person until the execution debtor has received $3,000.

Exemptions provisions appear in a number of Alberta statutes other than the Exemptions Act. The most important of these may be section 253 of the Alberta Insurance Act,[278] which provides as follows:

> 253.(1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the insurance money and the rights and interests of the insured therein and in the contract are exempt from execution or seizure.

The implications of the section will be discussed later.

There are several other Alberta statutes which set up special exemptions from execution,[279] or extend the Exemptions Act provisions to situations to which the Act might otherwise not apply.[280] An interesting variation on this pattern is section 8(4) of the Masters and Servants Act[281] which provides that where a seizure is made under that section for unpaid wages, the debtor-employer is entitled only to the exemptions allowed under section 3 (not section 2) of the Exemptions Act. Section 3 provides a narrower list of exemptions in cases of distress by a landlord for rent.

The above discussion deals with exemptions from execution. As to garnishment, the position is simpler. Unless the debt is for wages or salary, or unless it falls within one of the special statutes listed in Appendix A to section V of this paper, there is no exemption provision at all. Non-income debts are exposed to garnishment without any protection or exemption.[282]

(3) Different Models of Personal Property Exemptions Provisions

In the discussion of provisions for exempting wages from garnishment, the writer noted a variety of models from which to choose reform proposals. The same diversity is evident when one looks at Canadian and American personal property exemptions, as is illustrated by the comparative table of Canadian legislation attached to this paper as Appendix A. It is possible to distinguish five different types of exemptions provisions, all of which suffer from certain obvious defects.[283]

(i) Specific property exemptions

The oldest form of exemption provision encountered in common

The implications of the section will be discussed later.

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(i) Specific property exemptions

The oldest form of exemption provision encountered in common

law legislation exempts a list of specific and narrowly defined chattels from execution. Almost all Canadian jurisdictions except British Columbia have enacted some specific exemptions. It is common to exempt specifically beds and bedding, cooking and eating utensils (often listed separately), cooking stoves and other domestic articles. Other common types of specific exemptions are designed for farmers, and attest to the antiquated quality of much exemptions legislation. Thus Manitoba specifically exempts "Four horses, mules, or oxen, six cows, one bull, ten sheep, ten pigs, one hundred fowl, besides the animals the judgment debtor may have chosen to keep for food purposes, and food for them during eleven months."[284] This exemption is (theoretically) available to any person, but if the Manitoba debtor is a farmer, he may also keep "one tractor, one combine, and one motor vehicle that has been used by the judgment debtor for not less than one year."[285]

The items specifically exempted vary from province to province, reflecting historical and cultural differences as much as logical distinctions. Thus Newfoundland exempts a fishing skiff or punt,[286] while Saskatchewan protects grain, flour, vegetables and meat sufficient if sold to provide food and fuel for the debtor until the next harvest.[287] Seed grain is exempted in four provinces[288] and religious books and furniture in two.[289] Quebec, for reasons not altogether clear to the writer, exempts family papers, portraits, medals and other decorations.[290]

The specific property exemption has certain advantages. It will not be devalued by the inflationary spiral, assuming that the exempted items increase in value at the same pace as the economy generally. The specific exemption is usually certain and easy to understand by creditor and debtor although, as we shall see below, the seeming certainty of specific exemptions should not be overstated. An important advantage of the

specific exemption is that it leaves the Sheriff's officer relatively little discretion, particularly where the exemption is seen as a right and not a privilege of the debtor.

However, the specific exemption has substantial disadvantages which militate against its general use. A study of the history of exemptions legislation in Canada and the United States makes it clear that legislatures have failed to keep exemptions provisions up to date. The result is that specific exemptions designed for a rural society cease to have much, if any, significance to an increasingly urban and industrial world. Manitoba's exemption of four horses, mules or oxen was probably an attempt to protect a farmer's team. It has little or no significance today either to the urban debtor, or to the farmer who now uses tractors and other farm machinery and drives an automobile.

The American courts, faced with excessively specific exemptions, have had to perform feats of verbal magic to make them relevant to changed circumstances. Thus the courts have held that exemptions of "wagons", "buggies" or "carriages" covered automobiles and trucks,[291] but they have resisted classifying television sets as "furniture" or "musical instruments".[292] It is desirable to avoid the necessity for this kind of judicial sleight-of-hand, even if one were confident that the Canadian courts would or could perform it.

It is sometimes urged that specific exemptions are undesirable because the crafty and experienced debtor will put his wealth into exempted goods and chattels. A more likely problem is that specific exemptions can operate unfairly as between different classes of people. The debtor who has maintained a higher standard of life (probably at the expense of his

creditors) will likely retain more valuable articles under the specific item exemption. (A Silver Cloud is the same as a Datsun, given an exemption of "one automobile.") Even where specific exemptions are restricted by standards such as "necessary for sustaining life" or "necessary comforts", the courts have indicated that what is necessary for the well-to-do is not necessary for the poor. "Thus, a debtor, 'ensconced in a luxuriously furnished home ... relying upon exemption laws in resisting the efforts of his creditors to collect their debts', was allowed exempt furniture, statues, and paintings worth over $20,000.00."[293]

There is a procedural problem which has to be dealt with expressly if exempt property exemptions are to be used. If the law exempts "one automobile" and the debtor owns a Datsun and a Porsche, who chooses the vehicle which is exempt? If the choice is given to the debtor and he refuses or fails to exercise it, it would seem fair that the Sheriff should be free to seize one of the vehicles, leaving the other one to the debtor. This proposal would preserve the debtor's right to an exemption, but would overcome the problem of choosing among two or more chattels which fall into the exempt category.

One specific property exemption which deserves to be dealt with in more detail is the motor vehicle. North American exemptions legislation is ambivalent on the subject, perhaps reflecting a deeper confusion about the advantages and disadvantages of the automobile. Some jurisdictions, recognizing that the automobile may be the only asset of value owned by most debtors, specifically provide that motor vehicles are not exempt.[294] Other jurisdictions, recognizing the practical necessity for a car today, have created or considered the opposite solution, namely, an absolute

exemption of one motor vehicle available to any debtor.[295] The third solution has been to exempt the automobile only where it is necessary to the debtor's employment. Express provisions to this effect have been provided for farmers' motor vehicles in Alberta,[296] Saskatchewan,[297] and Manitoba.[298] Alberta[299] and Saskatchewan[300] also provide for the exemption of one motor vehicle "necessary for the proper and efficient conduct of the execution debtor's trade, calling or profession," although the farmer-debtor cannot rely on this provision where he has already received an exemption for a farm vehicle. Even without a specific provision, automobiles have been held to be exempt under general clauses protecting tools and chattels necessary to the debtor's trade or calling but, as shall be seen later, the case law on the subject is inconsistent and confusing.

(ii) Selective Property Exemptions

The distinction between selective property exemptions and the specific property exemptions discussed above is more a question of degree than of kind. The selective property exemption indicates a broad class or type of personal property which is free from execution, either absolutely or up to a certain limit, whether expressed in cash or otherwise. The following are examples of selective property exemptions drawn from Canadian statutes:

(a) "the necessary and ordinary clothing of the execution debtor and his family." [301]

(b) "furniture and household furnishings and household appliances to the value of $2000.00." [302]

(c) "the books of a professional man." [303]

(d) "In the case of a debtor other than a person engaged solely in the tillage of the soil or

> farming, tools and instruments and other chattels ordinarily used by the debtor in his business, profession or calling not exceeding $2000.00 in value." [304]

The distinguishing characteristic of the selective property exemption is that it designates a broad class of chattels which are either exempted absolutely or, more commonly, are exempted up to a cash value or some non-cash limitation such as the requirement that they be "necessary". In the latter case, the choice of assets to be retained is usually left to the debtor, although the process of selection is sometimes unclear.

The selective property exemption has many of the advantages and relatively few of the disadvantages which attach to the specific property exemption. It will not be stripped of significance by inflation unless it is specifically limited by a cash ceiling. The selective exemption is more likely to survive technological and social change because of its broader, less specific wording. The exemption of "tools of the trade" has proved easier for the courts to bring up to date than specific exemptions of "wagons" or "teams of horses". Another advantage is that the broader exemption enables the draftsman to simplify the exemptions legislation and to underline the basic classes of chattels which are seen by the society to be necessary for survival.

The very broadness and lack of specificity of the selective exemption gives rise to its chief weakness, namely, that it leaves much room for disagreement as to its interpretation. At the level of the Sheriff's office, this leads to a greater range of choice available to the officer who actually has to make the seizure. The result may be inequality in treatment, either because officers hold different views as to the correct law, or because officers apply the law strictly or liberally

according to their sense of the merits of the individual debtors. Where a debtor and creditor are represented by counsel, or where the execution process is supervised by the court, the result of the broadness of the selective exemption may be prolonged and repeated litigation to seek to give content to the legislative formulae.

The ambiguity of selective exemption provisions may be illustrated by reviewing briefly the case law which has grown up around the typical exemption of "tools or implements necessary for a trade or calling." The Canadian case law interpreting this provision has explored a number of difficult issues:

(i) Should exemption provisions be interpreted strictly (because they derogate from common law rights)[305] or liberally (because they are designed to protect the poor and unfortunate)?[306]

(ii) What is a "trade or calling"? (A wholesale jeweller is neither a "trade" nor a "profession" in Alberta,[307] and a telephone line repairman may not be engaged in a "trade" in Saskatchewan.)[308]

(iii) What is a "tool or implement"? (The Ontario courts have interpreted the somewhat broader formula of "tools and implements and other chattels" to include pool and snooker tables used in a pool hall,[309] but to exclude office furniture used in a merchant's office.)[310]

(iv) When is the chattel "necessary" to the debtor's trade? (The courts have had trouble deciding whether automobiles

> are necessary to the debtor's business. Cars are necessary for real estate salesmen,[311] travelling "pedlars",[312] taxicab drivers,[313] musicians,[314] and fishermen who use the vehicle to haul their catch.[315] But cars are not necessary to managers of companies,[316] and salesmen, even where the latter uses his car to carry his stock-in-trade, namely, devices weighing close to fifty pounds.)[317]

Some of these problems might have been prevented by more careful drafting of the exemptions statute, but interpretation problems are inevitable where broad, all-inclusive language is used to cover a range of different situations.[318]

Where the selective property exemption is limited by a cash ceiling, another interpretation problem has arisen which is easier to avoid. Suppose that the exemption is for "tools and implements to the value of $1000.00" and the debtor has one chattel which falls within the protected class but is worth more than $1000.00. What must the sheriff do? The Supreme Court of Nova Scotia,[319] following English authority,[320] has held that such a chattel is absolutely exempt, even where it is worth substantially more than the cash limit. However, where the exemption read "tools and implements to the extent of $1000.00", the Ontario Court of Appeal[321] concluded that the one chattel could be seized and sold, so long as $1000.00 of the proceeds was returned to the judgment debtor. The Ontario result would appear more sensible, and any selective property exemption should be drafted so as to lead to that interpretation. The reform should also replace the peculiar Alberta rule that an automobile worth less than $2000 and required by the debtor in his trade or calling is completely exempt while the same kind of automobile worth more than $2000 is completely

exposed to execution, the debtor salvaging nothing![322]

Another common problem with selective property exemptions, particularly those which have not been amended recently, is that they draw specific distinctions which are explicable on historical and cultural grounds only. For example, the exemption of the tools or implements necessary to the debtor's trade would, if drafted broadly enough, appear to cover all occupations. Yet many Canadian and American statutes create specific exemptions for the goods of a farmer or the books and equipment of a professional man.[323] If, as Baird says, there are basically two areas of exempt assets: "The necessaries of life and the means to earn a living",[324] it would appear desirable in the interests of equal treatment to reduce our selective property exemptions as close as possible to these two basic categories. In doing so, however, one runs the risk of the kind of interpretation problems discussed above.

In addition to the disadvantages of the selective property exemption already discussed, the device shares some of the disadvantages of the specific exemption, namely, the dangers of abuse and potential unfairness as between debtors. It is not necessary to repeat the discussion of these problems. The selective exemption with a cash ceiling has special disadvantages resulting from inflation but these will be discussed more fully below.

(iii) Lump Sum Exemptions

The third kind of personal property exemption, the one adopted by British Columbia, is very different from the specific and selective property exemptions discussed above. Instead of listing kinds of exempt property, British Columbia and some American states[325] simply provide that the debtor may choose goods to the value of x dollars which goods will be exempt.

What chattels are retained is entirely up to the debtor.

The advantages of the lump sum exemption are obvious and, at first glance, compelling. The lump sum exemption is simple and relatively certain, the only problem being the mechanism of choice and the question of valuation. The legislation need not set out lists of assets which then become the subject of extensive litigation. The exemption is fair and equal to all debtors, whatever their status or assets, and it gives the debtor freedom to retain what he wants rather than what the state thinks he should have. There can be no problem of abuse as all assets and all debtors are treated equally.

The one obvious problem with the lump sum exemption is that, given an inflationary economy, the exemption will become increasingly inadequate until, as in British Columbia before the 1974 amendments, the exemption is simply ludicrous as any real protection for a judgment debtor. In the writer's earlier discussion of exemptions from wage garnishment, it was proposed that the exemption be tied to the minimum wage legislation, the reason being that minimum wages are not likely to be neglected to the same extent that exemptions provisions have been. It would seem feasible to draft a similar kind of personal property exemption, tying it to some legislative creation such as the minimum wage, or perhaps using an escalator clause tied to the cost of living index or some other economic formula.[326] Whatever method is used, it is clear that the lump sum exemption must be so constructed that it will automatically rise and fall with the province's economy. Otherwise, history tells us that exemptions provisions are likely to be neglected by busy legislatures and to become increasingly worthless as any real protection for the debtor or as an accurate statement of the legislature's intention when the exemption

was first enacted.

In the discussion of exemptions from wage garnishment, a proposal was made for an increased exemption when the debtor supports dependents. The same kind of increased exemption based on numbers of dependents should be considered if the Institute opts for a lump sum personal property exemption.

Even if the problems of inflation and number of dependents can be overcome, the lump sum provision still has inherent weaknesses which have led this writer to doubt its usefulness, at least as it exists in British Columbia today. A lump sum provision cannot take account of certain basic differences between debtors which are recognized by other kinds of exemptions provisions. For example, a lump sum exemption of $5000.00 might be too generous for a labourer owning no tools of his own but too limited for a welder or a farmer who has to have expensive equipment. The lump sum provision does not take into account the considerable differences in the cost of living in various parts of Alberta. Selective property exemptions are more flexible in that they may pin the exemption to what is "necessary", a formula which takes into account differences in cost of living, cost of equipment and so on.

The other problem with the lump sum exemption is that it makes no social judgment about the kinds of assets which the state wants to encourage debtors to retain. The "tools of the trade" exemption involves an implicit legislative judgment that the debtor should be encouraged to rehabilitate himself and to earn his own livelihood by the use of the protected tools and implements. The prairie exemptions legislation clearly prefers the farm population to the urban community. Many American exemption

provisions are available only to heads of families. The particular social judgments made in these various provisions may not be acceptable today, but there may be other preferences which can only be advanced by an exemptions system more sophisticated than the lump sum exemption.

A variant of the stark lump sum exemption as it exists in British Columbia has been proposed by Professor D. H. Bonham in a report prepared several years ago for the Ontario Law Reform Commission.[327] Professor Bonham proposed that the specific and selective property exemptions in the Ontario Act should be retained but that there should be an alternative general exemption. The proposal was described as follows:

> It is recommended that consideration be given to establishing a general exemption that could be claimed by any debtor at his option in lieu of <u>all</u> other exemptions. For instance, to provide a very simple illustration, suppose that the modified exemptions for a single person without dependants were somewhat as follows:
>
> | Category | Maximum Dollar Exemption |
> |---|---|
> | (a) Household furniture and personal effects including wearing apparel. | $2,000.00 |
> | (b) Books, tools, and implements necessary to and actually in use by the debtor in his business, calling or profession: | |
> | Farmer | $10,000.00 |
> | Non-farmer | $ 5,000.00 |
>
> In order to incorporate more flexibility and equity into the exemption provisions, it might be beneficial if the debtor could elect to take advantage of a general exemption of say $3,000 worth of property, regardless of the categories to which the property belongs. Thus a debtor, subject to the above provisions, could waive his usual exemptions and protect any of his property up to a value of $3,000. In such a case the debtor would not be required to show that his property falls within either category (a) or (b).

> Also the debtor would be relieved of the need to prove that any of the exempt property was 'necessary' to his business or profession as he would otherwise have to do with respect to property in category (b). It is submitted that such an optional general exemption would go a long way toward adapting a standard pattern of exemption to special cases and that it would accomplish this objective without any unfairness to creditors. [328]

The Institute might want to consider the Bonham proposal although it would appear at first glance to suffer from many of the disadvantages of the "pure" lump sum exemption. A further difficulty is that it in effect permits a judgment debtor to waive certain proprietary exemptions, and it forces the debtor to make a difficult choice based on the value of his assets and the state of the law interpreting property exemptions. The writer will propose below that personal property exemptions should be rights which cannot be waived or bargained away by the judgment debtor and which need not be claimed by the debtor. If this policy is accepted, it would appear to involve a rejection of the Bonham proposal.

(iv) Combinations of Specific and Selective Property Exemptions With a Dollar Ceiling

A common variation of the property exemptions is to limit them by imposing a cash ceiling. An example, drawn from the Alberta Exemptions Act, is as follows: "Furniture and household furnishings and household appliances to the value of $2,000."[329] The cash ceiling has the effect of preventing abuse of particular exemptions, such as the debtor who furnishes his house with Chippendale chairs and Reynolds paintings. But the cash limit on property exemptions suffers from the same problems as the lump sum exemption, especially the difficulty created by inflation. It might be possible to tie the cash ceilings to a cost of living

escalator, but the simpler solution might be to limit selective property exemptions by formulae such as "necessary goods" or "goods reasonably essential to or needed by an average and reasonable person".[330] The writer will discuss this problem more extensively in his detailed recommendations for reform below.

(v) Discretionary Exemptions

The writer discussed above and rejected the idea of exemptions from wage garnishment to be set by a judge or an administrator. For substantially the same reasons, the writer would reject a discretionary exemption of personal property. Minimum exemptions necessary to a person's survival should be set by the legislature, not by a judge or official according to his feelings about the individual case. Apart from the objection on principle, a completely discretionary system would be administratively unworkable, and would make the Sheriff's job even more of a nightmare than it is at the present.

For the same reasons, the writer would reject any proposal to give a judge or an administrator discretion to lower personal property exemptions, although there is an argument that a debtor should be able to apply to a judge for an increased exemption in special cases. Suppose the debtor is an invalid who needs for his survival a piece of medical equipment which falls outside the normal exemptions. There should be provisions for the court to extend the exempt categories of assets in such unusual cases.

4. The Exemption of Life Insurance

Section 139 of the Alberta Insurance Act provides as follows:

> 253.(1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the insurance money and the rights and interests of the insured therein and in the contract are exempt from execution or seizure. [331]

Exemption clauses like section 139 exist in insurance acts throughout Canada and the United States and have caused considerable trouble for creditors, for courts [332] and for students of exemptions law.[333] The writer had intended to examine in depth the exemptions of life insurance contracts and payments from execution or garnishment by creditors of either the insured or beneficiary. Pressure of time has prevented the completion of this study. However the writer recommends strongly that the problem of the life insurance exemption should be canvassed by the Institute staff before the publication of the Working Paper. There is a need for a careful analysis of the policy underlying section 253, and a consideration of various reform proposals which have been advanced elsewhere. [334]

5. The Homestead Exemption

Of all the exemptions which the writer has examined in this paper, the homesteads exemption bears most clearly the marks of its historical development. The exemption was created by American federal and state legislatures, partly as a device to encourage people to leave the Eastern states and to settle the Western territories. The policy was to encourage

settlement "by offering land at nominal prices and by providing that the land was exempt from debts contracted prior to the official grant of the land."[335] Homestead exemptions in the United States and Canada were also a product of the economic depressions of the nineteenth and twentieth centuries which had particularly disastrous effects on the farm community. To some extent the laws reflected a hostility to the "Eastern creditors", a feeling which was a part of much of the agrarian radicalism of the American and Canadian West.[336]

As a result, homesteads exemptions originated and found their most extensive expression in the American western and southern states, although similar provisions are today to be found in all but a handful of jurisdictions. [337] The Canadian development was somewhat different. Homesteads exemptions are to be found today only in the four western provinces and in the two territories,[338] although the idea has been recommended (unsuccessfully) in Ontario and New Brunswick.[339]

There is a wide divergency in modern Canadian and American homesteads exemptions as to their cash value and as to other limitations. Some Canadian [340] and American [341] limitations are so parsimonious as to be virtually worthless whereas others are excessively generous.[342] The writer will examine these differences further in his analysis of the arguments for and against retention of the homestead exemption.

The writer will provide the Institute later with a detailed account of the way in which the homestead exemption has operated in Alberta and elsewhere (as part of his chapter written for the Carswell Company Ltd.) At this point, however, it may be useful to canvass the arguments for and against the retention of an exemption against real property.

The issue of retention or abolition of the homesteads exemption is not an easy one, and the policies which led to the original enactment of homesteads legislation in the United States and Canada are no longer convincing. Alberta has been settled and has become an urban industrialized society, although farming remains a significant industry. The problem is to consider the modern arguments for and against the homesteads exemption in order to decide whether it should be retained.[343]

The chief arguments for retaining the homesteads exemption can be summarized as follows:

(i) The farm exemption can be justified as an extension of the "tools of the trade" personalty exemption. If the farmer is going to be encouraged to rehabilitate himself and work his way out of his financial problems, he must be permitted to retain the means to do so.

(ii) As to the home exemption (and the argument applies to the farm home as well), shelter is a necessity which every citizen must have and which should be saved from the financial wreck of the debtor. Shelter is necessary to the survival of the debtor and his family, and it would be wrong to strip them of this necessary asset which is the result of saving and investment.

(iii) The retention by the debtor of his home is likely to give him the sense that he still has a stake in the society and a reason to keep working and to seek to rehabilitate himself. The debtor may thus be encouraged to pay his debts and to keep off welfare. At the very least, the debtor is encouraged to stay in his community, rather than throwing up his responsibilities and absconding.[344]

(iv) A forced sale of a home would result in substantially deflated prices, thus injuring seriously the debtor without a corresponding benefit to the creditor.

(v) Many of the proponents of the homestead exemption proceed on an assumption that home ownership is a desirable social characteristic and should be encouraged.

(vi) In addition to these specific arguments, the writer would refer the Institute to the more general arguments, advanced above, in support of exemptions generally and abolition of wage garnishment, some of which have an obvious relevance to the homesteads question.

The case against the homesteads exemption has been put in a compelling form in a number of recent studies.[345] The arguments can be summarized as follows:

(i) The exemption is an anachronism, appropriate only to a rural frontier society. The historical and cultural assumptions supporting the exemption have disappeared and, with them, the justification for the exemption.[346]

(ii) The home ownership exemption is unfair to renters of property, unless one extends to them an exemption of personalty (perhaps reduced in amount) in lieu of the realty exemption.[347]

(iii) The argument that the shelter exemption is a "necessity" is overstated. Shelter can be rented, and debtors probably should be renting rather than tying up substantial amounts of capital in real estate. What the homesteads exemption protects is the ownership of property, a luxury which the debtor (and the society as a whole) cannot afford. (This argument

says nothing about the defence of the farm exemption as a "tool of the trade".) If the debtor has substantial exemptions of income and personalty, he will have enough to rent shelter, and he does not need to own his home.

(iv) The debtor who owns or is purchasing his home may want to keep it rather than his personal property. His freedom of choice can be preserved by creating an exemption of "x" dollars worth of personal or real property at the debtor's discretion.[348] This exemption, plus a "tools of the trade" exemption, is ample protection for the debtor. Permitting him a real property exemption as well would be unfair to the creditor.

(v) The homesteads exemption is unlikely to accomplish the result. William Vukowich puts the argument as follows:

> The homestead exemption is undesirable as a matter of policy since it removes substantial assets from creditors without commensurate benefits to society from home ownership by debtors. In many jurisdictions the value limitation placed on the debtor's equity in his homestead is so low that the exemption does not permit him and his family to maintain their home. Since the debtor's equity in the home exceeds the value of the exemption, creditors may force the sale of the home; the debtor is paid in cash the dollar amount of the exemption, and the creditor is paid the remainder, not to exceed the amount of the debt owed. The money paid the debtor usually is exempt for six months or a year. The purpose of granting an exemption of the cash in the debtor's hands is to allow him to reinvest in a new homestead. However, the amount of cash is usually so small that no new homestead can be purchased. Consequently, during the six months or one year that the debtor holds the cash, his creditors cannot reach the cash, and the debtor cannot purchase a home. The debtor might spend the money during the time, and his creditors might be denied this asset for collection. Whether or not the debtor has the money at the end of the six months or year, the policies of the state are frustrated: the debtor has no home and the creditors' rights to collect are delayed for a significant time or lost altogether.

> Setting the values of homestead exemptions at realistic levels unfairly compromises the rights of creditors. To remove $10,000 to $40,000 from the reach of judgment creditors when debtors and their families easily can establish homes in rental units defers too greatly to the interests of debtors. Nor is home ownership essential to family protection or debtor rehabilitation. Even the $5,000 exemption recently recommended by both the National Commission on Consumer Finance and the Commission on the Bankruptcy Laws is undesirable, since the amount thus denied creditors is great.[349]

The arguments advanced for and against the homesteads exemption bring the writer to the problem of choosing among the available forms of exemptions provision the one which would best fit the Alberta situation. In the next sections, the writer will advance a proposal for a new system of exemptions for Alberta, and will discuss some technical and procedural issues which should be dealt with in any new legislation.

6. Recommendations for the Basic Non-income Exemption Provisions

Before setting out the writer's proposals for a new structure of non-income exemptions in Alberta, it is necessary to make two preliminary comments. First, the following proposals assume that all real and personal property is available to execution and all non-income debts to garnishment. On that basis, it is intended to set up a system of exemptions which will apply to all real and personal property of the judgment debtor, and all debts owing to him except those which can be classified as income.[350]

The second preliminary point which needs to be made concerns the ideas on exemptions contained in the 1970 Report of the Federal Study Committee on Bankruptcy and Insolvency Legislation,[351] and the incorporation of those ideas into the short-lived Bill C-60.[352] The Study Committee recommended massive changes in the Bankruptcy Act and related acts, many

of which changes would have become law if Bill C-60 had passed. However, some of the proposed reforms attracted considerable criticism from the business community and from academics, culminating in a very negative report by the Banking, Trade & Commerce Committee of the Sentate.[353] As a result, the Bill was withdrawn in 1976. The rumor is that the staff of the Consumer and Corporate Affairs Department are reviewing the Bill with a view to incorporating some of its ideas into the present Bankruptcy Act, but no such redrafted act has yet seen the light of day.

The Study Committee dealt briefly with the problem of exemptions in a passage which has been xeroxed and is attached to this report (in Appendix B). After noting critically that the Act presently incorporates by reference the relevant provincial exemptions,[354] the Study Committee recommended that a new Bankruptcy Act should contain its own list of exempt property which might be more narrow than some of the provincial exemptions provisions. The Committee then proposed that the debtor should be given a choice between relying on his rights under the more liberal provincial provisions or settling for the more stringent federal provisions. If he insisted on relying on the provincial exemptions, the result should be that he would not obtain a release from his debts on discharge. These proposals were incorporated into Bill C-60 in a somewhat modified form. Section 145 provided that the bankrupt could retain his provincial exemptions, if he wishes, but section 150 made it clear that if the bankrupt elected to retain exempt property with a value in excess of $3000 (or such greater amount as might be prescribed by regulation), he would not be released from his debts. These sections were sharply criticized by the Senate Banking Committee[355] and others,[356] and may not emerge again in the redrafted

Bankruptcy Act.

The current thinking of the Department of Consumer and Corporate Affairs is not known to the writer, but it is suggested that the Institute can answer the question of provincial exemptions law without waiting to see the federal proposals. The provincial exemptions will be significant in the case of a great many debtors who do not become bankrupt. If the federal provisions were much more stringent than the provincial exemptions, the result might be that a few creditors would want to put some debtors into bankruptcy, a result not entirely without merit where the debtors have some assets. In most cases, however, the divergence of exemptions provisions will not induce creditors to petition debtors into bankruptcy, and the debtors are unlikely to assign into bankruptcy voluntarily. It is therefore assumed that the unknown provisions of any redrafted Bankruptcy Act can be ignored for the subsequent discussion.

Against this background, the writer advances the following proposals for the basic structure of exemptions provisions in Alberta:

(i) The real property exemptions[357] should be repealed and the new exemptions provisions should not contain an exemption for the debtor's home. To this writer, the arguments against the homestead exemption advanced above are overwhelming. If the debtor has substantial exemptions for income, personalty and for "tools of the trade", he does not need and should not be given an <u>additional</u> exemption for a home.[358] (The writer will later recommend that the debtor should have an exemption of "x" dollars worth of personal <u>or</u> real property at the debtor's discretion.)

The consequences of this recommendation are clear as to the debtor's home, but the case of the farm that serves as home and means of

livelihood is more complex. Insofar as the farm homestead exemption is justified as providing shelter for the debtor, it is unacceptable. However the farm is also a means of livelihood and, on that basis, the exemption makes more sense. The farmer thus creates a special problem which must be dealt with further below.

(ii) The present personal property exemptions[359] should be repealed, and replaced by the following exemption provisions:

> I. personal or real property or debts due or accruing due to the judgment debtor to the extent of "x" dollars, subject to a cost of living escalator clause, and
>
> II. either (a) (for non-farmer debtors) tools, books, instruments, equipment and machines which are necessary to the debtor in the course of his occupation. ("Necessary" might be defined to mean "reasonably essential to or needed by an average and reasonable person, including any special needs by reason of health or physical infirmity".)[360]
>
> or (b) (for farmer-debtors) a series of specific and selective property exemptions.

A number of comments need to be made about the above proposals. The writer was anxious to avoid constructing an exemptions provision which would soon be out of date because of inflation. As a result, it was necessary either to impose no cash ceiling or to tie the cash ceiling to a cost of living escalator. The writer also wanted to avoid excessively specific exemptions because they would quickly become obsolete because of social, technological and economic changes. Bearing in mind Baird's

dictum that personal property exemptions protect two main classes of assets: "the necessaries of life and the means to earn a living"[361], the writer reduced his exemptions proposals to two headings: the "tools of the trade" exemption, and the more general personalty - realty - debts exemption with a cash ceiling. It is now intended to comment on each exemption in turn and then to comment on the exceptional treatment of the farmer.

The "tools of the trade" exemption is reasonably resistent to inflation and cultural and technological change, if drafted broadly enough. It is similarly resistent to inflation when it is not limited by a cash ceiling. Moreover, the "tools of the trade" exemption has the compelling advantage that it is flexible as between different trades and occupations. It contracts to a small cash value where the debtor's trade requires no equipment, but it expands to cover the tradesman or professional who needs expensive equipment, books, tools, and so on. It thus provides the needed flexibility in the exemptions system which cannot be achieved by a lump sum exemption even when tied to a cost of living escalator. Finally, it rests on the social judgment that debtors should be encouraged to rehabilitate themselves through their work, a not unwelcome echo of the old-fashioned work ethic. This policy is supported by advancing an additional exemption for tools of the trade, apart from any other asset which the debtor might be entitled to retain.

The writer has not proposed a cash ceiling for the "tools of the trade" exemption.[362] Instead the exemption is limited by the word "necessary" as defined. The dangers of this kind of ambiguous formula are real and have been discussed above. It does give the sheriff room for

discretion, although that discretion can be controlled by a system of judicial supervision. There is plenty of room for argument, as the case law reveals. On the other hand, the advantage of the "necessary" limitation is that it avoids a fixed dollar limitation and gives to the judge some room to adapt the exemption to the circumstances of the individual case. The problem of the debtor who seeks to abuse the exemption by getting lavish and excessively expensive equipment may be cured by the proposed definition of "necessary".

In addition to the "tools of the trade" exemption, the writer would propose an exemption for personalty, realty, and debts due or accruing due to the (non-farmer) debtor, to the value of "x"dollars. (The quantum will be discussed below.) This exemption would be a substitute for specific exemptions for household furnishings, automobiles and other personalty, and for the homesteads exemption for realty. It would also extend to debts owing to the debtor. The proposed exemption would thus eliminate many specific exemptions which have been productive of much dispute, and would create a general non-income exemption, subject to a cash ceiling.

Unlike the "tools of the trade" exemption, the proposed lump sum exemption gives to the debtor freedom to choose personalty, realty or book debts up to the cash ceiling. It might be argued that the lump sum exemption should also be controlled by formulae such as "necessary" or "essential". The writer takes the view that, apart from "tools of the trade", the state should leave the debtor the freedom to choose what he wants to keep from his creditors. If the debtor owns a boat, a Chippendale dining room suite, and a Rolls Royce, why should the society impose its value judgment as to which assets the judgment debtor should keep? In

most cases, the debtor will be required by circumstances to retain what most people would classify as "necessaries", and it hardly seems advisable to force on him the judgment of the sheriff or the judge.[363]

The writer hesitated long over whether to apply the freedom of choice principle to the automobile. It has been argued that the car should be exigible except where essential to the debtor's livelihood, and the writer earlier called for a specific legislative pronouncement on the motor vehicle. On further reflection, the writer has concluded that if society wishes to exempt a certain amount of personalty on the theory that it is necessary, giving the choice of items to the debtor, it is inconsistent to except the automobile from the exemption. Indeed, there is a strong case for the proposition that our society has effectively decided that the car is a necessity by its policy of highways, urban planning and so on, and it is capricious and punitive to deprive the debtor of his automobile, unless he chooses other assets to fill the exempt category.

Because the lump sum exemption has a cash ceiling, it raises a number of problems which did not have to be faced in the case of the "tools of the trade" exemption. The inflation problem can be avoided by tying the cash ceiling to a cost of living escalator.[364] Where the debtor has dependants, there is a case for providing an additional exemption (calculated as a fraction of the cash ceiling) for each dependant.[365] Finally, the cash ceiling creates a problem of valuation of the debtor's assets. In the first instance, the sheriff no doubt should perform the activity of valuing the assets but if there is disagreement with his valuation either from the debtor or the creditor, there should be a right to apply to a judge to review the valuation. The Alberta removal and sale system provides a vehicle for the discontented debtor to complain about

valuation; the creditor should have an analogous right.

Where a cash ceiling is imposed on a category of assets, there is the problem of the debtor choosing an asset which falls within the category but which exceeds the cash ceiling. As the writer indicated above, the result in such a case should be that the chosen asset may be sold and the amount of the exemption should be paid to the debtor, the surplus going to the creditor. It is hoped that the proposed formula "to the extent of 'x' dollars" will accomplish the desired result.

(iii) Under the proposed system of exemptions, the farmer-debtor would enjoy the lump sum exemption of "x" dollars plus a series of specific and selective property exemptions in lieu of the "tools of the trade" exemption. The reason for providing for the farmer separately is that his trade involves expensive and special assets which have been dealt with separately in most exemptions legislation in North America. Even if the homesteads exemption is abolished, there is a case for preserving the exemption of a certain number of acres as well as necessary equipment and livestock. The writer has not developed a detailed list of farm exemptions, but it is recommended that Institute staff give careful consideration to those real and personal assets which are necessary to a farmer pursuing his trade.

(iv) The writer's final recommendation is that the court should be empowered to vary the above exemptions upwards but not downwards on application by the debtor (and perhaps interested parties such as the sheriff or the Debtor Assistance Board). The reasoning behind this proposal has been advanced earlier.[366] For such a discretion to be meaningful, it would be necessary to create some kind of simple procedure for the debtor

to get before the court (such as the Alberta removal and sale procedure) or for the debtor to seek the advice and assistance of an agency like the Debtor Assistance Board.

7. Ancillary Reform Proposals

In this section, it is intended to set out several technical problems which will arise in the drafting of the exemptions clauses proposed in the preceding section. Some of these problems involve difficult questions of law and policy and the writer has not had the time to explore them as fully as they deserve. The intention therefore is to raise the problems and to suggest solutions, subject to the caveat that further research needs to be done.

(i) Quantum of the Lump Sum Personalty - REalty - Debts Exemption

In the preceding section, the writer proposed an exemption of personalty, realty, and book debts of the judgment debtor up to a cash ceiling and tied to an escalator clause, but the question of an appropriate cash ceiling was deferred. It is not the intention of the writer to settle now on a specific cash figure, but rather to indicate some of the factors which should be considered in arriving at a cash ceiling.

The lump sum exemption is intended to replace the homestead exemption and all personalty exemptions except those for the "tools of the trade". As such, the exemption must be sufficiently liberal to provide the debtor with the means for survival at an acceptable standard of living. The writer has earlier discussed this issue in the context of wage garnishment, but it should be noted that the discussion there was simpler because direct

comparisons could be drawn between wage exemptions and welfare rates, minimum wage provisions, and poverty levels established by such bodies as the Senate Committee on Poverty.[367] Delmar Karlen has dealt with the problem as follows:

> With respect to the amount of income to be exempted, there is fairly widespread agreement that $3,000 a year is about what is necessary to keep a family from poverty. If somewhat more than that amount -- say $3,600 per year or $300 per month -- were to be exempted it would seem to strike a fair balance between the rights of judgment creditors and humane considerations for judgment debtors. With respect to property, there is no equivalent yardstick, but it seems not unreasonable to suggest that the property exemption could appropriately and conveniently be fixed at the equivalent of a full year's exempt income -- namely $3,600. Whatever figures are chosen, they should be flexible, adjusting automatically to fluctuations in the cost of living, possibly by reference to cost of living statistics or to some such standard as the amount of salary upon which Social Security taxes are based. As is amply demonstrated by the history of exemption provisions, fixed dollar amounts very quickly get out of date, but once having been put in the statutes are likely to remain there indefinitely.
>
> The amounts suggested are far less than are exempted in some states for homestead property alone, but more than are allowed in others for all types of property combined. $3,600, therefore, is somewhere in the middle range of what is now allowed judgment debtors, depending upon the fortuitous circumstance of the kinds of property and income they happen to have.[368]

The writer is inclined to agree with Karlen's approach to the problem, but the figure of $3,600 seems low when compared to existing exemptions legislation, welfare regulations, other reform proposals,[369] or the poverty levels proposed by the Senate Committee.[370] The writer would be inclined to favour a figure in the neighbourhood of $2,000 to $3,000 for the lump sum exemption alone, not including the additional "tools of the trade" exemption. But the important point is not so much the figure

chosen as the information to be considered in making the choice.[371] (The writer would also remind the Institute of his earlier proposals that (i) the ceiling figure should increase according to the number of dependants, and (ii) it should increase automatically by virtue of a cost of living escalator clause built into the exemptions statute.)

(ii) All Property Covered

The writer repeats here his earlier recommendation that the lump sum exemption should be so broadly drafted that it catches any property interest of the judgment debtor in personalty (except for "tools of the trade"), realty, and non-income debts due to the debtor. It has been held in Alberta[372] and British Columbia[373] that where a debtor is purchasing an asset pursuant to a conditional sales contract, his interest in the asset is not exempt, even though the asset would be exempt if wholly owned by the debtor. This line of reasoning does not apply where the asset is subject to a chattel mortgage.[374] The distinction seems to this writer to be bad policy, if not bad law; it should be reversed by statute.

(iii) Exemptions an Absolute Right

The writer has already argued that exemptions should not be a mere privilege which have to be claimed by the debtor.[375] Instead they should be an absolute right to be protected by the sheriff, in turn supervised by a judge operating under the present removal and sale procedure. Where it is necessary to choose which assets will enjoy exempt status, the choice should be made by the debtor, or, if the debtor refuses or neglects to do so, by the sheriff. However the choice must be made by someone; the exemption should never be lost by inaction.

If the exemptions are to be the absolute right of the debtor, it follows that they should not be capable of waiver[376] or abandonment by him. Nor should the courts (or the legislature) develop any theory that the exemptions can be lost by the debtor's laches, or even by his fraudulent conduct towards his creditors.[377] The reason, often stated in this paper, is that the exemptions establish a level of income and assets below which no citizen should be permitted to fall. The policy underlying welfare, minimum wage legislation and anti-poverty programmes must be recognized in the field of debtor-creditor law as well.

(iv) All Debtors Protected, Except Companies

The exemptions should be available to all debtors sued in Alberta (setting aside questions of the conflicts problems). Some American jurisdictions require residency as a prerequisite to claiming the exemptions,[378] but this requirement would appear to be inconsistent with the policy underlying exemptions legislation. The reasoning would also lead the writer to reject another common limitation found in American jurisdictions, namely, that exemptions should be available only to "heads of families".[379]

The one exception to this general rule which the writer would advance is that the exemptions should not be available to limited liability companies. The policy advocated in this paper is intended to preserve assets and income sufficient to keep individual human beings at an acceptable standard of living. It is addressed to human considerations, not to the maintenance of incorporated entities.[380]

(v) All Creditors Bound, Including the Crown

There is no reason why any creditor should, as a matter of status, be free of exemptions intended to apply to the creditor process generally.[381]

(vi) Cause of Action Irrelevant

The nature of the cause of action leading to the judgment being enforced should not affect the application of the exemptions provision. The writer has already argued[382] and now repeats that there should be no exceptions for landlord and tenant action, for alimony and maintenance claims, for wage claims, or for other "special" cases.

(vii) Exempt Goods Subject to Chattel Security or Land Subject to Mortgage

Most jurisdictions recognize expressly or as a matter of common law that where personalty or realty which would normally enjoy an exemption is the subject of a security agreement, the mortgagee of the asset can exercise his rights and repossess the chattel or foreclose against the land, without regard to the exemptions statute.[383] The writer does not intend to explore this complex subject, particularly in the light of a separate personal property security study. However it is perhaps appropriate to observe that the practice of obtaining blanket chattel security agreements may necessitate a re-examination of the position of the secured creditor where the security agreement substantially erases the debtor's rights under the exemptions legislation. Professor Cuming has a useful discussion of the problem in his essay in the Saskatchewan Law Review.[384]

(ix) Goods for which Debt Contracted

A related problem is raised by the common provision that where the article sought to be seized is the subject matter of the transaction which has led to the judgment and seizure, then the article is not exempt.[385] The common justification for this exception to the normal exemption rule is that people would never sell exempt articles on credit unless they could be assured of a remedy. The writer's tentative view is that the argument is weak, and that the exception should be abolished except in the case where the vendor has taken chattel security on the goods in question. If the creditor is not sufficiently concerned to protect himself with some form of chattel security, the writer sees no reason for creating a further breach in the exemptions provisions.[386]

(x) Survival of Exemption Following Sale, Transfer, or Destruction of Asset

There is a large body of American law on the question whether the exemption of an asset survives the sale or transfer of that asset and attaches to the proceeds of the sale in the hands of the debtor.[387] A variation of the problem occurs when the exempt asset is destroyed and the insurance on the asset pays or is about to pay money to the debtor. Time prevents the writer from exploring the problem which is by no means clear in Canadian law.[388] However it would be useful for any new legislation to lay down some clear rules on the matter.

Footnotes

* Professor, Faculty of Law, University of Alberta, The writer wishes to express his gratitude to Ms. Valerie Graziano and to Ms. Susan Ayala for their assistance in the preparation of this paper. Portions of the paper are based on an earlier study on the same subject prepared for the Law Reform Commission of British Columbia.

1 Dunlop, "Some Aspects of the Charging Order as a Remedy for Unsecured Creditors" (1967) 3 U.B.C.L. Rev. 83; Dunlop, "Execution Against Personal Property in England and British Columbia" (1972) 7 U.B.C.L. Rev. 171; Dunlop, "Execution Against Real Property in British Columbia" (1973) 8 U.B.C.L. Rev. 246. The studies concentrate on the law of British Columbia but the same kinds of problems exist in Alberta law.

2 Dunlop, "Execution Against Personal Property in England and British Columbia, " supra, note 1, at p. 211.

3 Fraudulent Preferences Act, R.S.A. 1970, c. 148.

4 Bankruptcy Act, R.S.C. 1970, c. B-3,ss. 47-48.

5 Bankruptcy Bill (Bill C-60), tabled in Parliament on May 5, 1975. See also Bankruptcy and Insolvency: Report of the Study Committe on Bankruptcy and Insolvency Legislation (Ottawa: June, 1970) pp. 109-111.

6 The Report of the Committee on the Enforcement of Judgment Debts (February, 1969) Cmnd. No. 3909.

7 Kerr, "Legal Remedies of the Unsecured Creditor After Judgment" (undated); unpublished paper prepared for the Consumer Protection Project of the Law Reform Division, Department of Justice, Fredericton, New Brunswick.

8 Judgments (Enforcement) Act (Northern Ireland) 1969, c.30. The Act was based on the Anderson Committee Report. (Report of the Joint Working Party on the Enforcement of Judgments, Orders, & Decrees of the Courts in Northern Ireland, Belfast, 1965.)See also Trimble, "Note on Judgments (Enforcement) Act (N.I.) 1969" (1970) 21 N. Ireland L.Q. 359; Baird, "Comment on the Payne and Anderson Reports on the Enforcement of Judgments" (undated); unpublished paper prepared for the Ontario Law Reform Commission.

Footnotes

[9] Chitty, 1 Archbold's Practice of the Court of Queen's Bench (9th ed. 1855) 599, citing Hardistey v. Barney (1697) Comb. 356, 90 E.R. 525 (K.B.); Sunbolf v. Alford (1838) 3 M. and W. 248, 150 E.R. 1135 (Ex).

[10] Hardistey v. Barney, supra, note 9.

[11] Quoted in Millar, Civil Procedure of the Trial Court in Historical Perspective (1952) 436.

[12] Small Debts Act, 8 and 9 Vict., c. 127, s. 8. As to bankruptcy, see Execution Act, 7 and 8 Vict., c. 116, s. 9 (1844). The maximum pound limit has been raised in subsequent legislation.

[13] Dunlop, "Execution Against Personal Property in England and British Columbia," supra, note 1.

[14] 17 and 18 Vict., c. 125, ss. 60-67.

[15] Wages Attachment Abolition Act, 33 and 34 Vict., c. 30 (1870).

[16] Report of the Committee on the Enforcement of Judgment Debts, supra, note 6, at pp. 150-151; Freedland, Attachment of Earnings (1971) vii-ix.

[17] Loc. cit.

[18] Maintenance Orders Act 1958, 6 and 7 Eliz. 2, c. 39.

[19] Administration of Justice Act 1970, 18 and 19 Eliz. 2, c. 31. See now the Attachment of Earnings Act 1971, 19 and 20 Eliz. 2, c. 32.

[20] Report, supra, note 6, at pp. 149 - 167.

[21] An Act for the Relief of Insolvent Debtors, S.P.E.I., 26 Geo. 3, c. 2, s. 1 (1786). See also An Act for the Further Relief of Debtors, S.N.B., 47 Geo. 3, c. 2, s. 4 (1807);Bail Amendment Act, S.N.S., 57 Geo. 3, c. 25, s. 1 (1817); An Act for the Relief of Indigent Debtors, S. Upper Canada, 2 Geo. 4, c. 4, s. 1 (1830).

[22] See for example, Faris, "Exemption of Insurance and Other Property in the Virginias and Carolinas" (1960) 17 Wash. and Lee L. Rev. 19.

[23] Conn. Gen. Stats. (1949) #52-352, quoted in Moore and Phillips, Debtors' and Creditors' Rights: Cases and Materials (1966) 2.66-2.67.

[24] One must admire the panache of the Fifth Circuit Court of Appeals which held that where a four-man partnership in bankruptcy owned four truck-trailers, one truck-trailer was exempt to each partner under an exemption statute allowing "every family" two horses and a wagon. See Phillips v. C. Palomo and Sons (1959) 270 F. 2d. 791. See Moore and Phillips, supra, note 12, at pp. 2.66-2.67.

[25] R.S.B.C. 1960, c. 175.

[26] Homestead Exemption Act, S.B.C. 1867, c. 77.

[27] Common Law Procedure Act 1856, 19 and 20 Vict., c. 43, ss. 193-200.

[28] See Levy, "Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience" (1972-1973) 5 Conn. L.R. 399; Drake on Attachment (7th ed., 1891) 1-8; Millar, supra, note 11, at pp. 481-497.

[29] The earliest Canadian legislation is the Ontario Attachment of Wages Act, 37 and 38 Vict., c. 13, s.1.

[30] Florida, Pennsylvania and Texas. For references, see Brunn, Wage Garnishment in California: A Study and Recommendations," (1965) 53 Calif. L.R. 1214, 1250-1251.

[31] New Brunswick, New Zealand and South Australia. As to New Brunswick, see Garnishee Act Amendment Act, S.N.B. 1971, c. 36. As to New Zealand, see the Wages Protection Act 1964, S.N.Z., c. 58; see also Wily, Wily's Magistrates' Courts Practice (6th ed., 1968) 152. As to South Australia, see Draft Thirtieth Report of the Law Reform Committee of South Australia (undated) 16-17; Victoria, Australia, Report . . . regarding the Procedure for Execution in Petty Sessions (1966) 5.

[32] See Bruun, supra, note 30; Jablonski, "Wage Garnishment as a Collection Device" [1967] Wisc. L.R. 759; Grosse and Lean, "Wage Garnishment in Washington -- An Empirical Study" (1966) 43 Wash. L.R. 743; Segal, "Wage Garnishment in New Mexico" (1971) 1 New Mexico L.R. 388; Kerr, supra, note 7, at pp. 206-207; Lee, "An Analysis of Kentucky's New Exemption Law" (1967) 55 Ky. L.J. 618; Quesada, "Florida Wage Garnishment: An Anachronistic Remedy" (1971) 23 U. Fla. L.R. 681; Boddington, "Garnishment of Wages in Pennsylvania: Its History and Rationale" (1955-6) 70 Dick. L.R. 199; Sweeney, "Abolition of Wage Garnishment" (1969) 38 Fordham L.R. 197; Harring, "Wage Garnishment: Remedy or Revenge?" (1974) 5 Loyola U. of Chicago L.R. 140; Ison, Credit Marketing and Consumer Protection (undated); unpublished book, c. 10, pp. 9-29; California Law Revision Commission, Recommendation relating to Wage Garnishment and Related Matters (October, 1972); Kelly, The Enforcement of Debts (December, 1974) unpublished draft paper

prepared for the Australian Government's Commission of Enquiry into Poverty, c. 5. Compare Thompson, "Wage Garnishment" (1968) 40 Miss. L.J. 151; Jacob, Debtors in Court; The Consumption of Government Services (1969) 48-72.

[33] Cuming, "Protection of Consumer - Borrowers - Limitations on the Remedies of Consumer Lenders" (1968) 33 Sask. L.R. 58, 76-79.

[34] Abrahams and Feldman, "The Exemption of Wages from Garnishment: Some Comparisons and Comments", (1954) 3 De Paul L.R. 153; Sweeney, supra, note 32; Morganstern, Legal Protection in Garnishment and Attachment (1971); Curran, Trends in Consumer Credit Legislation (1965) 338-341.

[35] 15 U.S.C. ss. 1671-1677 (Supp. IV, 1969). On the Act, see Sweeney, supra, note 32; Segal, supra, note 32.

[36] Alberta Rules of Court, r. 470 (1).

[37] For example, see Attachment of Debts Act, R.S.B.C. 1960, c. 20, s.3(3).

[38] See for example, the Alberta Rules of Court, r. 483 (5).

[39] Supra, note 6.

[40] Kerr, supra, note 7, at pp. 174-185, 227-242.

[41] See Baird, "Report and Recommendations on Assets Exempt from Seizure" (February, 1973); unpublished paper prepared for the Ontario Law Reform Commission.

[42] (1969) 395 U.S. 337.

[43] (1972) 407 U.S. 67. The Supreme Court may be retreating from the strong position taken in Fuentes v. Shevin. See Mitchell v. W. T. Grant Company (1974) 94 S. Ct. 1820. But cf. North Georgia Finishing, Inc. v. Di-Chem, Inc. (1975) 95 S. Ct. 719. There have been many lower court decisions and periodical articles discussing the effect of these cases. The writer and William F. Sirett have prepared a brief analysis of all but the North Georgia Finishing case for the Law Reform Commission of British Columbia.

[44] See articles cited supra, note 32.

[45] R.S.A. 1970, c. 129.

Footnotes

[46] O.N.W.T. 1879, c. 8.

[47] Exemptions Ordinance, O.N.W.T. 1884, c. 28.

[48] Exemptions Ordinance, O.N.W.T. 1885, c. 8.

[49] Vukowich, "Debtors' Exemption Rights" (1974) 62 Georgetown L.J. 779, 783.

[50] O.N.W.T. 1897, c. 38, s. 16.

[51] O.N.W.T. 1898, c. 14, s. 3.

[52] O.N.W.T. 1901, c. 16, s. 1.

[53] G.O.N.W.T. 1905, c. 27, s. 2.

[54] 4 and 5 Edw. 7, c. 3, s. 16.

[55] Statute Law Amendment Act, S.A. 1922, c. 4, s. 15.

[56] Exemptions Act, R.S.A. 1922, c. 95.

[57] S.A. 1935, c. 24, s. 3.

[58] See now Exemptions Act, R.S.A. 1970, c. 129, s. 4.

[59] Exemptions Act, S.A. 1941, c. 48. Reference to a series of minor amending statutes between 1922 and 1941 has been omitted.

[60] Supra, note 59, s. 3(2).

[61] Supra, note 59, s. 9.

[62] Supra, note 59, s. 8.

[63] Exemptions Act, R.S.A. 1970, c. 129, ss. 4(2), 11, and 12. The hospital exception section (now s. 11) has been somewhat modified.

[64] Distress Act Amendment Act, S.A. 1935, c. 12.

[65] Exemptions Act, R.S.A. 1942, c. 123, s.3.

Footnotes

66 S.A. 1966, c. 95, s. 3 (a).

67 S.A. 1966, c. 95, s. 3 (b).

68 Cf. Hudsons Bay Company v. Hazlett (1895) 4 B.C.R. 450.

69 O.N.W.T. 1878, c. 4, ss. 57-59.

70 O.N.W.T. 1884, c.3, ss. 74-79.

71 37 and 38 Vict., c. 13, s.1.

72 Judicature Ordinance, O.N.W.T. 1893, c. 6, ss. 378-379.

73 By virtue of the Alberta Act, supra, note 54.

74 As rule 661.

75 Order in Council 601-23 (1923).

76 Alberta Supreme Court Rules (1944) r. 565 (1). The amounts were raised by O.C. 182-52 (1952).

77 Supra, note 76, r. 565 (2).

78 Supra, note 76, r. 565 (6).

79 Supra, note 72.

80 Alta. Reg. 473 / 62 (1962).

81 Alta. Reg. 316 / 66 (1966).

82 See Cuming, supra, note 33; Kerr, supra, note 7.

83 Poverty in Canada: Report of the Special Senate Committee on Poverty (Ottawa: 1971).

84 Supra, note 32, at pp. 48-72.

85 8% of the delinquent debtors studied had incomes over $10,000 a year, compared to 31% of ordinary credit users.

[86] Fortin, "The Social Meaning and Implications of Consumer Credit," in Ziegel and Olley, eds., Consumer Credit in Canada (1966).

[87] Fortin, supra, note 86, at p. 32.

[88] Fortin, supra, note 86, at p. 33.

[89] Cuming, supra, note 33, at pp. 90-91.

[90] But compare Kerr's view that there is no substantial political pressure towards reform of creditors' remedies. See Kerr, supra, note 7, at pp. 203-210.

[91] Supra, note 6, at p. 12.

[92] Ison, supra, note 32, c. 10, at p. 29.

[93] See Ison, supra, note 32; see also Ison, "Small Claims" (1972) 35 M.L.R. 18.

[94] Ison, supra, note 32, c. 10, pp. 23-24.

[95] Although cf. Ison, supra, note 32, c. 10, passim.

[96] George Brunn concluded that there was no correlation. See Brunn, supra, note 30, at pp. 1239-1243; Jablonski, supra, note 32. But Brunn's analysis of the statistics was criticized. See Grosse and Lean, supra, note 32, at pp. 771-773; Segal, supra, note 32, at p. 398; Kerr, supra, note 7, at pp. 206-207.

[97] Kerr, supra, note 7, at pp. 212-215.

[98] Jablonski, supra, note 32, at pp. 770-771; Grosse and Lean, supra, note 32, at pp. 749-754; Krahmer, Clifford and Lasley, "Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study" (1972-3) 4 Texas Tech. L.R. 23, 54-62; Jacob, supra, note 32, at pp. 73-77.

[99] See articles cited supra, note 98. See also Ison, supra, note 32, c. 10, pp. 29-42.

[100] See articles and books cited supra, note 32.

[101] Supra, note 6, at p. 158. Despite this finding, the Payne Committee recommended the introduction to England of wage garnishment, a recommendation which will be considered below.

[102] See Fortin, supra, note 86. Jacob disagrees, but his definition of poverty seems unacceptably narrow. See Jacob, supra, note 32, at pp. 49, 53. Compare Poverty in Canada, supra, note 83, at pp. 5-9; Adams, Cameron, Hill and Penz, The Real Poverty Report (1971), 8-23; Economic Council of Canada, Fifth Annual Review (1968) 103-121; Economic Council of Canada, Sixth Annual Review (1969) 107-115; Will and Vatter, Poverty in Affluence (1970) 11-27.

[103] On the general question of the unfairness of the legal system to the poor, see Carlin, Howard and Messinger, Civil Justice and the Poor (1967).

[104] The conclusions regarding the remedy of execution against land are based on an empirical study done by the writer and Mr. Leigh Hillier for the British Columbia Law Reform Commission and on correspondence between the writer and David Baird, a Toronto lawyer who has done a research project for the Ontario Law Reform Commission similar to the present project. It is surmised that the conclusions hold true for Alberta.

[105] See essays listed supra, note 32. Jacob confirms this conclusion. See Jacob, supra, note 32, at pp. 97-101.

[106] Supra, note 42.

[107] Supra, note 43.

[108] For example, see Randone v. Appellate Department (1971) 488 P. 2d. 13 (Calif.); Santiago v. McElroy et al. (1970) 319 F. Supp. 204 (Pa.). There are numerous comments and articles on these decisions. See for example Bates, "The Demise of Summary Prejudgment Remedies in California" (1971-2) 23 Hastings L.J. 489; Neth, "Repossession of Consumer Goods" (1972) 24 Case Western Reserve L.R. 7; Clark and Landers, "Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution" (1973) 59 Va. L. R. 355; Muhl, "Attachment in California" (1973) 20 U.C.L.A. L.R. 1015. See also the study by the writer and Mr. Sirett cited supra, note 43.

[109] Supra, notes 100-102 and accompanying text.

[110] Dunlop and Hillier, "Judicial Statistics on the Enforcement of Judgments in British Columbia" (1973). Unpublished study.

[111] Of course, some of the garnishee orders issued against banks may have been attaching wages of bank employees.

[112] Kerr, supra, note 7, at pp. 227-239.

[113] Supra, note 6, at pp. 149-167.

[114] Wages are also seen as an asset which should be available to a trustee in bankruptcy. See Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation, supra, note 5, at pp. 109-111; Report of the Commission on the Bankruptcy Laws of the United States (1973) 29 Business Lawyer 75, at 92-93.

[115] Dunlop and Hillier, supra, note 110; David Caplovitz, Debtors in Default (New York 1971) v. 2, pp. 12.46-12.70; Jacob, supra, note 32, at pp. 84-85.

[116] Grosse and Lean, supra, note 32, at p. 784.

[117] R. F. T. Dugan, "Creditors' Post-Judgment Remedies: Part I" (1972) 25 Alabama L.R. 175 at 186.

[118] Cayne and Trebilcock, "Market Considerations in the Formulation of Consumer Protection Policy" (1973) 23 U. of T. L.J. 396, 418-419; Wallace, "The Logic of Consumer Credit Reform" (1973) 82 Yale L.J. 461.

[119] Kerr, supra, note 7 at p. 228.

[120] The Payne Committee pushes this argument rather far when they suggest that the debtor may actually "welcome" and "prefer" the remedy. See supra, note 6, at pp. 154-155, but cf. pp. 157-158. The Payne Committee Report failed to deal with the substantial body of American research critical of wage garnishment.

[121] See articles cited supra, notes 30, 32 and 108.

[122] (1973) S.A. 33.

[123] See articles cited supra, note 118.

[124] Supra, notes 95 and 96 and accompanying text.

[125] The British Columbia Law Reform Commission has already used this approach. See Law Reform Commission of British Columbia, Report on Debtor Creditor Relationships: Part 2: Mechanics' Lien Act: Improvements on Land (Vancouver: 1972) at pp. 20-26. See also Grosse and Lean, supra, note 32, at p. 784.

[126] This inequity has been noted in Florida, which exempts completely the wages of a family head. See "Note: Florida Procedures in Satisfying or Avoiding a Money Judgment" (1964-5) 17 U. Fla. L.R. 269. See also Kerr, supra, note 7 at p. 234.

[127] Segal, supra, note 32, at p. 397. See also Brunn, supra, note 30, at p. 1248; Jablonski, supra, note 32, at p. 762; Sweeney, supra, note 32, at p. 203; Cuming, supra, note 33, at pp. 78-79.

[128] Cf. Perrett and Van Ochten, A Study of Orderly Payment of Debts in British Columbia (Vancouver: 1973) p. 39 (directed research project prepared for the writer and for the Vancouver Community Legal Assistance Society). The study contains a useful profile of the kinds of people who use Part X of the Bankruptcy Act. See also Gallins, "The Operation of Part X of the Bankruptcy Act in British Columbia" (1971) 6 U.B.C.L. Rev. 419.

[129] R. 483(1).

[130] Where the welfare recipient is receiving the basic rate plus rental cost. (Based on information obtained by the writer from the Alberta Health and Social Development Department.)

[131] Alberta, Board of Industrial Relations Order #1 (1974) Governing Minimum Wages, Alta. Reg. 268/74 (1974).

[132] Caplovitz, supra, note 115, v. 2, at p. 12.17.

[133] Supra, notes 103 to 108 and accompanying text. See also Segal, supra, note 32, at pp. 395, 397-8; Sweeney, supra, note 32, at pp. 205-206, 209-212; Jablonski, supra, note 32, at pp. 765-770; Jacob, supra, note 32, at pp. 98-101; Grosse and Lean, supra, note 32, at pp. 735-741, 752-753; Caplovitz, supra, note 115, v. 2, at pp. 12.40-12.48, 12.58-12.68.

[134] See Cuming, supra, note 33, at p. 79. As Kerr points out, the cost of repeated garnishments can be cut down by providing that a garnishment order, once served, will bind present and future wages until the judgment debt is paid. See Kerr, supra, note 7, at p. 235.

[135] Brunn, supra, note 30, at pp. 1220-1222.

[136] Shuchman and Jantscher, "Effects of the Federal Minimum Exemptions from Wage Garnishment in Nonbusiness Bankruptcy Rates" (1972) 77 Comm. L.J. 360.

Footnotes

137 See articles cited supra, notes 30 and 32; Harrison, "The Consumer Credit System and the Low-Income Consumer" (1973-74) 13 J. Family Law 1, 9. But compare Jacob, supra, note 32, at pp. 57, 101; Caplovitz, supra, note 115, v. 2, at pp. 14.4-14.6.

138 Caplovitz, supra, note 115, v. 2, at pp. 12.26-12.41.

139 See articles cited supra, notes 30 and 32; Cuming, supra, note 33; at pp. 79-80; Ison, supra, note 32, c. 11, pp. 19-23; Jacob, supra, note 32, at pp. 104-115.

140 A student study of wage garnishment in Vancouver provided some evidence to confirm this conclusion for that jurisdiction. See Reiman, A Pilot Study on the Parties and Practice of Wage Garnishment in the Provincial Court of British Columbia, Small Claims Division (Vancouver, 1971) 17-25 (directed research prepared for the writer). The Reiman paper was intended to be a very small pilot study, intended to demonstrate how to set up a larger empirical study in the future. The paper itself is not of great statistical significance, but it does suggest problem areas. A number of the employers interviewed by Reiman said that they would still take wage garnishments into account in promotion and hiring decisions.

141 1973 S.A., c. 33.

142 Cf. s. 158 which empowers the Board to order reinstatement of an employee whose dismissal constitutes an unfair labour practice prohibited by s. 153.

143 Attachment of Debts Act, R.S.B.C. 1960, c. 20, s. 24; Labour Standards Act, S.S. 1969, c. 24, s. 68C; Employment Standards Act, R.S.M. 1970, c.E 110, s. 37; Employment Standards Act, S.O. 1974, c. 112, s. 9; Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.3.

144 E.g., Northwest Territories, Yukon Territory and Prince Edward Island. New Brunswick has no wage garnishment.

145 Labour Standards Code, S.N.S. 1972, c. 10, s. 27; Nova Scotia Civil Procedure Rules, r. 53.05 (e); Newfoundland Human Rights Code, R.S.Nfld. 1970, c.262, s. 9A.

146 Copies of all correspondence can be made available to the Institute.

147 As suggested by Kerr, supra, note 7, at p. 236, but cf. p. 182.

148 See citations supra, notes 30, 32 and 115.

149 Caplovitz, supra, note 115, v. 2, at pp. 14.6-14.38; cf. Jacob, supra, note 32, at pp. 98-115.

Footnotes

150 Report, supra, note 6, at pp. 156-159, 161.

151 Caplovitz, supra, note 115, v. 2, at p. 14.38.

152 Caplovitz, supra, note 115, v. 2, at pp. 12.1-12.70. See also Segal, supra, note 32, at pp. 396-397; Sweeney, supra, note 32, at pp. 204-205, 209; Harrison, supra, note 137, at pp. 8-9.

153 See Jacob, supra, note 32, at pp. 75-84; Harrison, supra, note 137, at pp. 8-9; Sweeney, supra, note 32, at pp. 217-224.

154 Jacob, supra, note 32, at p. 81.

155 Loc. cit.

156 Jacob, supra, note 32, at p. 80. Cf. Gallins, supra, note 128, at p. 427.

157 Caplovitz, supra, note 115, v. 2, at p. 12.23.

158 Ison, supra, note 32, c. 10, pp. 16-26; Jacob, supra, note 32, at p. 57.

Footnotes

159 But cf. Northland Fisheries Ltd. v. W. A. Scott and Sons Ltd. [1975] 5 W.W.R. 183 (Man. Q.B.).

160 Cf. Baird, supra, note 41, at pp. 10-11, 41-42; Kerr, supra, note 7, at p. 181. See also Todd v. De Paola (1932) 46 B. C. R. 278.

161 Kerr tentatively recommends their inclusion. See Kerr, loc. cit.

162 See Swinehammer v. Sawler (1895) 27 N.S.R. 448 (C.A.).

163 For an effort at a comprehensive definition, see the definition of wages in the Bankruptcy Bill (Bill C-60), s. 2, cf. s. 147(3). For discussions of the problem, see McDonnell, Reiter and Trebilcock, Cases and Materials Relating to Debtor and Creditor (1976) 219; Kazanjian, "Assets Subject to Seizure" (1975), unpublished paper prepared for the Ontario Law Reform Commission, at pp. 58-60.

164 Cf. Patten Package Co. v. Houser (1931) 136 So. 353 (Fla.); Jones and Peterson, "Florida Procedures in Satisfying or Avoiding a Money Judgment" (1964) 17 U. Fla. L.R. 269.

165 For example, see Public Service Pension Act, R.S.A. 1970, c. 299, s. 31 (a).

166 See Senior Citizens Benefits Act, S.A. 1973, c. 84, s. 8; Pre-Arranged Funeral Services Act, R.S.A. 1970, c. 281, s. 14.

167 Social Development Act, R.S.A. 1970, c. 345; Livestock and Livestock Products Act, R.S.A. 1970, c. 215.

168 See Slemin v. Slemin (1903) 70 O.L.R. 67; Bell v. Bell (1918) 15 O.W.N. 24; Bonus Finance Ltd. v. Smith [1971] 3 O.R. 732; 21 D.L.R. (3d) 544. But see Beneficial Finance Co. v. Classen (1963) 42 W.W.R. 593 (Sask. C.A.); Hershfield v. Amos (1971) 21 D.L.R. (3d) 597 (Man. C.A.).

169 Baird, supra, note 41, at pp. 5-6, 12-13, 30-38.

170 See Kazanjian, supra, note 163, at pp. 13, 44-48.

171 Cf. Kazanjian, supra, note 163, at p. 14; California Law Revision Commission, Recommendation Relating to Wage Garnishment and Related Matters (October, 1972) 126-127.

172 Cf. Kazanjian, supra, note 163, at pp. 14-15.

Footnotes

[173] For example, see Ritenburg v. Royal Trust Co. (1961) 33 D.L.R. (2d) 498 (Alta. T.D.); Re Brodie [1969] 1 O.R. 285 (Ont. S.C.). As to the exemption of alimony and maintenance payments from garnishment, see Cairns v. St. Amour (1913) 5 W.W.R. 115 (Sask. D.C.).

[174] Holy Spirit Parish Credit Union Society Ltd. v. Kwiatkowski (1969) 68 W.W.R. 684 (Man. Q.B.); Ex parte Vine (1878) 8 Ch. D. 364; but see Osler v. Muter (1892) 19 O.A.R. 94. The American courts have been much more ready to trace wage and other exemptions into purchased assets. See Dyer, "Creditors' Rights: Exemptions from Process in Oklahoma" (1955) 8 Okla. L.R. 84, 90; Gill, "Note: Exemptions from Execution" (1934-35) 23 Calif. L.R. 414; Kennedy and Brooks, "Ten Years of Creditors' Rights in Iowa" (1952-3) 38 Iowa L.R. 410, 411-413; Loiseaux, Cases on Creditors' Rights (1966) 173.

[175] Holy Spirit Parish etc. v. Kwiatkowski, supra, note 174.

[176] See Hudson's Bay Company v. Hazlett (1895) 4 B.C.R. 450.

[177] Cf. California Law Revision Commission, Recommendation Relating to Wage Garnishment and Related Matters (October, 1972) 125-126; Recommendation etc. (December, 1974) 910, note 4.

[178] Cf. Baird, supra, note 41, at pp. 37-38.

[179] (1880) 13 Ch. D. 696 (C.A.). See Nathan and Marshall, A Casebook on Trusts (5th ed., 1967) 319-325.

[180] See articles cited supra, notes 30 and 32.

[181] A recommendation made by Baird, supra, note 41, at pp. 27-28, and by Kazanjian, supra, note 163, at pp. 61-62.

[182] See Institute of Law Research and Reform, Report no. 8: Assignment of Wages (Edmonton: October, 1971) but compare Wage Assignments Act, S.A. 1974, c.61. See also California Law Revision Commission, Recommendations Relating to Wage Garnishment and Related Matters (Stanford: October, 1972) 127; compare Baird, supra, note 41, at pp. 38-42; Kerr, supra, note 7, at pp. 325-326; Bates, "The Wage Assignment" (1966) 24 U. of T. Fac. of Law Rev. 123; Morganstern, Legal Protection in Garnishment and Attachment (1971) 32-39.

[183] Cf. Baird, supra, note 41, at p. 28.

[184] Alberta Rules of Court, r. 483(5).

[185] R.S.A. 1970, c. 128.

Footnotes

186 Execution Creditors Act, s. 47.

187 Baird, supra, note 41, at pp. 22-23. For a more thorough analysis, see Kazanjian, supra, note 163, at pp. 27-29.

188 Kerr, supra, note 7, at p. 184.

189 Morganstern, supra, note 182, at pp. 38-39; cf. California Law Revision Commission, Recommendation Relating to Wage Garnishment Procedure (April, 1975) 626-628.

190 Kazanjian, supra, note 163, at pp. 26-27.

191 Kerr, supra, note 7, at p. 184.

192 Ison, supra, note 32, c. 10, pp. 28-29; Kazanjian, supra, note 163, at p. 26.

193 Kazanjian, supra, note 163, at p. 61.

Footnotes

194 Compare subsections (1) and (2) of rule 470 of the Alberta Rules of Court.

195 R.S.C. 1970, c. 49.

196 See McDonnell, Reiter and Trebilcock, supra, note 163, at p. 229.

197 I will not discuss the remote possibility that some Crown servants may have a defence of public policy against garnishment of their wages, even after the passage of the Civil Service Garnishee Act. See Royal Bank of Canada v. Scott [1971] 4 W.W.R. 491 (N.W.T. Terr. Ct.); Torry, "Case Comment" (1971-72) 36 Sask. L.R. 469.

198 McDonnell, Reiter and Trebilcock, supra, note 163, at pp. 229-238.

199 [1972] 6 W.W.R. 99.

200 See an exchange of letters between the writer and Ms. Joanne Veit of the Attorney-General's Department (attached to this report as Appendix A).

201 See the letters referred to supra, note 200.

202 See the passage from the writer's book being written for the Carswell Co. Ltd. (attached to this report as Appendix B).

203 Much of the following classification is drawn from Abrahams and Feldman, "The Exemption of Wages from Garnishment: Some Comparisons and Comments" (1954) 3 De Paul L.R. 153.

204 An example of the latter is the Attachment of Wages Act, S. Nfld. 1966-67, c. 46.

205 Cited in Cuming, supra, note 33, at pp. 76-77.

206 As in section 3a of the British Columbia Attachment of Debts Act, R.S.B.C. 1960, c. 20.

207 Consumer Credit Protection Act, 15 U.S.C., ss. 1671-77 (Supp. IV, 1969).

208 The Garnishee Act, R.S.P.E.I. 1951, c. 68, s. 17.

209 See for example the article from the Edmonton Journal of January 2, 1976, attached as Appendix D to this report.

210 See Abrahams and Feldman, supra, note 203, at pp. 158-160.

Footnotes

211 As in s. 3(6) of the British Columbia Attachment of Debts Act, R.S.B.C. 1960, c. 20.

212 Supra, note 207, s. 1672.

213 Cited in Abrahams and Feldman, supra, note 203, at p. 163.

214 See Kerr, supra, note 7, at pp. 238-239. Cf. Joslin, "Debtors' Exemption Laws: Time for Modernization" (1959) 34 Indiana L.J. 355, 362-364.

215 Attachment of Earnings Act 1971, 19 and 20 Eliz. 2, c. 32, s. 6. See also Freedland, supra, note 16. Similar legislation exists in some Australian states. See Kelly, Debt Recovery in Australia (1975) c. 5, pp. 1-7 (unpublished paper written for the Australian Poverty Commission).

216 Garnishee Act Amendment Act,S.P.E.I. 1972, c. 18, s. 1.

217 Bankruptcy Act, R.S.C. 1970, c. B-3, s. 48.

218 For example, New Jersey. See Rombauer, "Debtors' Exemption Statutes - Revision Ideas" (1961) 36 Wash. L.R. 484, 496-7.

219 Baird, "Comment on the Payne and Anderson Reports on the Enforcement of Judgments" (1972); unpublished paper prepared for the Ontario Law Reform Commission, at pp. 15-16.

220 Baird, supra, note 41, at pp. 38-42. Cf. Cuming, supra, note 33, at pp. 81-87.

221 Ontario Law Reform Commission, Enforcement of Judgment Debts Project (1975) 9-10. (Unpublished discussion paper forwarded to the writer on a confidential basis.)

222 Baird, supra, note 219.

223 Gallins, supra, note 128, at pp. 428-9.

224 Supra, note 207.

225 Quoted in Vukowich, "Debtors' Exemption Rights" (1974) 62 Georgetown L.J. 779, 818.

226 Kerr, supra, note 7, at pp. 237-241.

227 Kerr, supra, note 7, at p. 238.

228 Rule 483(1).

229 Cf. Kerr, supra, note 7, at pp. 238-239.

230 Supra, note 83, at pp. 179-187.

231 Baird, supra, note 219.

232 R.S.B.C. 1960, c. 20.

233 Letter from Mr. Justice H. E. Hutcheon to Mr. Justice Hugh John MacDonald, dated March 2, 1976.

234 R.S.M. 1970, c. G 20.

235 Letter from Mr. Grey Richardson, Master and Referee, to Mr. Justice Hugh John MacDonald, dated February 6, 1976.

236 See Kelly, supra, note 215, ch. 1, pp. 33-39, ch. 5, pp. 5-9; California Law Revision Commission, Recommendation Relating to Wage Garnishment Exemptions (December, 1974) 917-919.

237 See above, pp. 47-49.

238 Alberta Rules of Court, rr. 470-471.

239 See for example Gray's Ltd. v. Mountview Construction Ltd. (1967) 59 W.W.R. 58 (Alta. D.C.).

240 R.S.B.C. 1960, c. 20, s. 2(1).

241 Supra, note 207.

242 California Law Revision Commission, Recommendation Relating to Wage Garnishment Procedure (April, 1975). 621-622.

243 Bill C-60, s. 2.

244 Poverty in Canada, supra, note 83, at pp. vii-xiii, 169-192.

245 See Appendix C.

246 The choice of the minimum level is bound to be arbitrary. For a discussion of the difficulties involved in defining poverty and in determining the level of public assistance, see Byran Gibson, "Determining the Level

of Public Assistance" (1972) 1 Bull. of Can. Welfare Law, no. 2, pp. 27-30; Poverty in Canada, supra, note 83 at pp. 1-23; references cited supra, note 102.

247 Connecticut, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Utah, Virginia, Washington, Wisconsin, and the Federal Government. For a summary of the state provisions, see Morganstern, supra, note 182, at pp. 19-26. For the Federal statute, see supra, note 157. For a critical view of minimum wage legislation, see Neale Adams, "Raise Wages and Kill Jobs" Vancouver Sun, Jan. 24, 1974, p. 6. Cf. New South Wales where the floor level is set at $8.00 per week below the Sydney basic wage. See Kelly, supra, note 215, ch. 5, p. 5. Kelly is critical of fixed dollar formulae and would prefer more judicial discretion. See ch. 1, pp. 37-39, ch. 5, pp. 18-20.

248 See citations supra, notes 127 and 128.

249 A copy of the study is attached to this paper at Appendix F.

250 Supra, pages 37-38.

251 The writer has a copy of the Act.

252 Supra, pages 48-49.

253 Wage Assignments Act, S.A. 1974, c. 61, s. 1(a).

254 Holy Rosary Parish (Thorold) Credit Union Ltd. v. Premier Trust Co. [1965] S.C.R. 503.

255 Supra, note 182.

256 Rule 470(1).

257 Supra, notes 194 to 202, and accompanying text.

258 Uniform Consumer Credit Code, s. 5. 104 (Official Text: West edition).

259 (1969) 395 U.S. 337.

260 The Commission has recently put forward the idea for public discussion. See Law Reform Commission of British Columbia, Working Paper No. 18: The Enforcement of Judgments: The Attachment of Debts Act (1976).

261 The idea of a continuing garnishment order for all judgment creditors is not original. See Nova Scotia Civil Procedure Rules, rr. 53.02-53.05; Attachment of Earnings Act 1971, C 32 (U.K.); Kelly, supra, note 215, c. 1,

pp. 33-34 (New South Wales).

262 S.A. 1973, c. 33.

263 S.B.C. 1973, c. 122.

264 Supra, note 242, at pp. 611-624. Cf. Kelly, supra, note 215, ch. 1, pp. 35-36, ch. 5, pp. 10-16, 20.

265 See Kelly, supra, note 215, ch. 1, pp. 33-39, ch. 5, pp. 16-17; McDonnnell, Reiter and Trebilcock, supra, note 163, ch. 16.

266 Report No. 15: Validity of the Alberta Rules of Court (December, 1974).

267 For example, see Attachment of Debts Act, R.S.B.C. 1960, c. 20; Attachment of Debts Act, R.S.S. 1965, c. 101.

268 E.g., Manitoba and Ontario.

269 Seizures Act, R.S.A. 1970, c. 338, Land Titles Act, R.S.A. 1970, c. 198.

270 Rr. 470-484 (garnishment), 485-493 (absconding debtors).

271 R.S.A. 1970, c. 129.

272 Civil Service Garnishee Act, R.S.A. 1970, c. 49.

273 At pp. 16-20.

274 The debate will be discussed more fully in section 8 of this paper.

275 Supra, note 6.

276 Supra, note 8.

Footnotes - Part VII

277 R.S.A. 1970, c. 129.

278 R.S.A. 1970, c. 187.

279 For example, see Builders' Lien Act, R.S.A. 1970, c. 35, s.14(2)(b); Cemetaries Act, R.S.A. 1970, c.39, s. 14; Crop Payments Act, R.S.A. 1970, c. 77, s.3(3)(4); Metis Betterment Act, R.S.A. 1970, c. 233, s. 18(4)(5); Municipal Government Act, R.S.A. 1970, c. 246, s. 307; Proceedings Against the Crown Act, R.S.A. 1970, c. 285, s. 25; Warehouse Receipts Act, R.S.A. 1970, c. 385, s. 16. Compare the list of statutes creating special exemptions from garnishment in Appendix A to Part V of this paper.

280 Condominium Property Act, R.S.A. 1970, c. 62, s. 44; Income Tax Act, R.S.A. 1970, c. 182, s. 35 (5).

281 R.S.A. 1970, c. 228.

282 See supra, p. 16.

283 Much of the following analysis is derived from work done for me by two research assistants: Douglas Morley and Mary Ellen Boyd.

284 Executions Act, R.S. Man. 1970, c. E160, s. 30(1)(e).

285 Ibid., s. 30(1)(f).

286 Judicature Act, R.S. Nfld. 1970, c. 187, s. 99.

287 Exemptions Act, R.S.S. 1965, c. 96, s. 2(1)(3).

288 Alberta, Manitoba, New Brunswick and Ontario.

289 Manitoba and Quebec.

290 Code of Civil Procedure, c. 80, ss. 552-553.

291 Foster v. Foster (1936) 144 Kan. 528, 61 P. 2d 1350; Phillips v. C. Palomo and Sons (1959) 270 F. 2d. 791 (C.A. 5th); supra, note 13.

292 In re Michaelson (1953) 113 F. Supp. 929 (D. Minn.).

293 Vukowich, "Debtors' Exemption Rights" (1974) 62 Geo. L.J. 779, 847, citing Independence Bank v. Heller (1969) 275 Cal. App. 2d 84; cf. Karlen, "Exemptions from Execution" (1967) 22 Bus. Law 1167.

Footnotes

294 E.g., Oklahoma. See Dyer, "Creditors' Rights: Exemptions from Process in Oklahoma" (1955) 8 Okla. L.R. 84, 89-90. In Alberta, automobiles are given a narrower exemption than furniture and tools. See Exemptions Act, R.S.A. 1970, c. 129. Compare s. 2(f) "one automobile valued at a sum not exceeding $2000," and s.2(b) "Furniture ... to the value of $2,000." See also s. 2(i).

295 The exemption exists in California and, with limitations, in Hawaii. See citations in Rombauer, "Debtors' Exemption Statutes - Revision Ideas" (1961) 36 Wash. L.R. 484, 491. A limited exemption has recently been passed in Kentucky. See Lee, "An Analysis of Kentucky's New Exemption Law" (1967) 55 Ky. L.J. 618. See also Howe, "Modernization of Debtors' Protection Laws in the Commonwealth of Massachusetts" (1969) 4 New England L.R. 189; "Note: Personal Property Exemptions in Iowa" (1950) 36 Iowa L.R. 76.

296 Exemptions Act, R.S.A. 1970, c. 129, s. 2(f).

297 Exemptions Act, R.S.S. 1965, c. 96, s. 2(1)(4).

298 Executions Act, R.S.M. 1970, c.E160, s. 30(1)(f).

299 Supra, note 296.

300 Exemptions Act, R.S.S. 1965, c. 96, s. 2(1)(5).

301 Exemptions Act, R.S.A. 1970, c. 129, s. 2(a).

302 Exemptions Act, R.S.A. 1970, c. 129, s. 2(b).

303 Exemptions Act, R.S.S. 1965, c. 96, s. 2(1)(6).

304 Execution Act, R.S.O. 1970, c. 152, s. 2(3).

305 As in London and Can. Loan and Agency Co. v. Connell (1896) 11 Man. R. 115.

306 As in Banque Can. Nat. v. Houde [1935] 1 W.W.R. 421; 2 D.L.R. 808 (Man.). Cf. Burrows v. Johnston [1928] 3 W.W.R. 337; 4 D.L.R. 865 (Sask. C.A.).

307 Re Seizures Act; Re Seizure of Rodi (1959) 30 W.W.R. 229 (Alta. D.C.).

308 McLeod v. Girvin Central Telephone Assn. [1926] 1 W.W.R. 38; 1 D.L.R. 216 (Sask.). As to the meaning of "calling", compare Hayos v. Patrick (1961) 30 D.L.R. (2d) 742 (Sask. C.A.); and Bank of Nova Scotia v. Jordison (1963) 40 D.L.R. (2d) 790 (Alta. D.C.).

Footnotes

309 Re Kreutzweiser [1967] 2 O.R. 108; 62 D.L.R. (2d) 455.

310 Re Statham (1939) 20 C.B.R. 196 (Ont.).

311 Armstrong v. Terry [1967] 1 O.R. 588; 61 D.L.R. (2d) 570.

312 Re Bell [1938] 2 D.L.R. 754 (Ont.).

313 Metro Cab Co. Ltd. v. Munro [1965] 1 O.R. 555; 48 D.L.R. (2d) 701 (C.A.).

314 York v. Flatekval (Dayle) [1971] 3 W.W.R. 289 (Alta.).

315 Zelinisky v. Isfield [1925] 2 W.W.R. 45 (Man.).

316 Goldsmith v. Harris [1928] 3 D.L.R. 478 (Man.).

317 Langdon v. Traders Finance Corp. Ltd. [1966] 1 O.R. 655; 55 D.L.R. (2d) 12(C.A.).

318 For a discussion of the kinds of interpretation problems which are created by selective property exemptions, see Hess, "Homestead, Personal Property, and Wage Exemptions in Missouri and in Other States" (1947) 12 Mo. L.R. 21; Joslin, "Debtors' Exemption Laws; Time for Modernization" (1959) 34 Indiana L.R. 355.

319 Re Lyons [1934] 1 D.L.R. 432 (N.S.).

320 Lavell v. Richings [1906] 1 K.B. 480; 75 L.J.K.B. 287.

321 Robinson v. Robinson (1964) 48 D.L.R. (2d) 42 (Ont. C.A.).

322 Re General Steel Wares Ltd. v. Clarke (1956) 20 W.W.R. 215 (Alta. D.C.). For a more extensive discussion, see the writer's draft chapter on exceptions.

323 See Rombauer, supra, note 295, at pp. 494-495.

324 Baird, "Report and Recommendations on Assets Exempt from Seizure" (February, 1973). Unpublished report to the Ontario Law Reform Commission, p. 12.

325 See Rombauer, supra, note 295, at p. 493; Hess, supra, note 318, at pp. 26-27.

326 For a suggested formula, see Karlen, supra, note 293.

327 Bonham, "Statutory Exemptions from Seizure and Attachment" (July, 1966); unpublished report prepared for the Ontario Law Reform Commission.

328 Bonham, supra, note 327, Part C, pp. 5-6.

329 Supra, note 302.

330 A formula developed by Vukowich. See supra, note 293, at p. 872.

331 Insurance Act, R.S.A. 1970, c. 187, s. 253.

332 In cases cited in 20 Canadian Abridgement (2nd ed.), #2888-2901.

333 There is a wealth of literature on the life insurance in the United States. See Frey, "Note: Creditors' Rights - Creditor versus Widow on Life Insurance Proceeds" [1946] Wisc. L.R. 329; "Note: Rights of Creditors in Insurance Policies subject to Iowa Statutes" (1947-1948) 33 Iowa L.R. 710; Worthington, "Exemption of the Debtor's Life Insurance in Virginia" (1956) 42 Va. L.R. 239; Riesenfeld, "Life Insurance and Creditors' Remedies in the United States" (1956-57) 4 U.C.L.A. L.R. 583; Joslin, supra, note 318, at pp. 368-372; Faris, "Exemption of Insurance and Other Property in the Virginias and Carolinas" (1960) 17 Wash. & Lee L.R. 19; Reed, "The Pennsylvania Life Insurance Exemption Statute" (1961) 22 U. Pitts. L.R. 757; "Note: California Creditor Beneficiary's Insurance Proceeds are Exempt from Execution" (1962) 14 Stan. L.R. 599; Demichelis, "The Rights of Creditors in Life Insurance Policies" [1964] U. Ill. Law Forum 592; Vukowich, supra, note 293, at pp. 807-813. See also the relevant American casebooks on creditors' rights, all of which include some material on the life insurance exemption.

334 See Baird, "Report and Recommendations on Assets Exempt from Seizure", supra, note 324, at pp. 4, 10, 29-30.

335 Vukowich, supra, note 293, at p. 783.

336 Vukowich, supra, note 293, at 782-3; "Note: State Homestead Exemption Laws" (1937) 46 Yale L.J. 1023.

337 Vukowich, supra, note 293, at 782-3; Hanna and MacLachlan, Creditors' Rights - Cases and Materials (1957) 102.

338 Homestead Act, R.S.B.C. 1960, c. 175, s. 5; Exemptions Act, R.S.A. 1970, c. 129, s. 2 (j, k, l); Exemptions Act, R.S.S. 1965, c. 96, s. 2 (10-12); Judgments Act, R.S.M. 1970, c. J10, s. 13; Exemptions Ordinance, R.O.N.W.T. 1974, c. E-5, s.3(e); Exemptions Ordinance, R.O.Y.T. 1971, c. E-7, s. 3(1)(e). Temporary exemption is provided in Quebec to a settler of public lands. See Settlers Protection Act, R.S.Q. 1964, c. 106, s. 1.

Footnotes

339 Bonham, supra, note 327, Part B, pp. 7-8, Part C, p. 30. For a modified homestead recommendation, see Kerr, supra, note 7, at p. 177. For an express recommendation against a homesteads exemption, see Baird, supra, note 324, at pp. 18-19.

340 The British Columbia exemption, for example, is little comfort today.

341 Indiana's exemption is limited to $700. See Ind. Code #34-2-28-1 (1973).

342 North Dakota exempts a homestead to the value of $40,000 (N.D. Cent. Code #47-18-01: Supp. 1973), while some states place no value limitation on the exemption. See Iowa Code Ann. #561.2 (1950) (one-half acre within city; 40 acres outside city).

343 Much of the following analysis is drawn from Vukowich, supra, note 293, at pp. 782-788, 797-807. See also Hess, supra, note 318, at pp. 21-26; Davis, "Homestead Exemption Law in Mississippi as it Affects the Claims of Creditors" (1964) 36 Miss. L.J. 69; "Note: State Homestead Exemption Laws", supra, note 264; Woodward, "The Homestead Exemption: A Continuing Need for Constitutional Revison" (1957) 35 Texas L.R. 1047.

344 See Burrows v. Johnston [1928] 3 W.W.R. 337; [1928] 4 D.L.R. 865 (Sask. C.A.).

345 See especially Vukowich, supra, note 293, at pp. 805-807.

346 See Baird, supra, note 324, at pp. 18-19, but cf. pp. 8 and 15 in which Baird recommends an exemption for a mobile home.

347 As in Virginia. See Va. Code Ann. #34-4 (1950), quoted in Joslin, supra, note 318, at p. 365.

348 As recommended by Kerr, supra, note 7, at p. 177. This formula has found favour in some American states. See Morganstern, supra, note 182, at pp. 104-105; Hess, supra, note 318, at pp. 21-26.

349 Vukowich, supra, note 293, at pp. 806-807.

350 As to income debts, see supra, sections IV to VI.

351 Supra, note 5.

352 Supra, note 5.

Footnotes

353 See Senate Proceedings, Thursday, December 11, 1975, at pp. 1596 ff.

354 Bankruptcy Act, R.S.C. 1970, c. B-3, s. 47(b).

355 Supra, note 353.

356 For a critical discussion of a similar American proposal, see Shanker, "The Abuse and Use of Federal Bankruptcy Power" (1976) 26 Case Western Reserve L.R. 3. For the writer's criticism of these and other sections of the Bill, see the two letters to Prabhu in Appendix C to this paper.

357 Exemptions Act, R.S.A. 1970, c. 129, s. 2(j,k.). The mobile home exemption (s.2(e)) should be repealed for the same reasons.

358 Cf. the opposite recommendation in the American Draft Uniform Exemptions Act (May 1, 1976) s.4.

359 Exemptions Act, R.S.A. 1970, c. 129, s. 2(a-i).

360 See Vukowich, supra, note 225, at pp. 872-873.

361 Baird, supra, note 324, at p. 12.

362 Contrary to the opinion of most writers. See for example, Joslin, supra, note 214, at pp. 365-368; Vukowich, supra, note 225, at pp. 828-829, 872-873.

363 Cf. Karlen, "Exemptions from Execution" (1967) 22 Bus. Law 1167.

364 See supra, pp. 76-77.

365 Several American states vary the exemptions available according to the number of dependants the debtor supports. E.g., Utah's homestead exemption is $4000 for the head of a family, a further sum of $1500 for the spouse and $600 for each other member of the family; Utah Code Ann. ss.28-1-1(1963). Other states grant greater exemptions if the debtor is the head of a family rather than a single person. E.g., in South Dakota, the head of a family is entitled to a choice between a personal property exemption of $1500 or a long list of itemized specifics; the single debtor is allowed only $600 personal property exemption; see S.D. Code, ss. 43-45.

366 Supra, pp. 69-72.

367 Supra, note 83.

368 Karlen, supra, note 363.

369 Compare for example Vukowich's proposed statute, supra, note 225, at pp. 871-876.

370 Supra, note 83, at pp. 5-9, 169-192. See also citations supra, note 102.

371 For an assessment of the difficulties in making this kind of decision, see Gibson, supra, note 246.

372 Re General Steel Wares Ltd. v. Clarke (1956) 20 W.W.R. 215 (Alta. D.C.). But compare Armbruster Lumber Ltd. v. Fishburne (1966) 55 W.W.R. 223 (Alta. D.C.).

373 Ruscheinsky v. Spencer [1948] 2 W.W.R. 58 (B.C.S.C.).

374 Findlay v. Menzies [1928] 1 W.W.R. 457 (Man. K.B.); Re Bell (1938) 19 C.B.R. 203 (Ont. S.C.).

375 Supra, p. 51.

376 Baird agrees; supra, note 324, at p. 27. Cf. the Draft Uniform Exemptions Act (May 1, 1976) ss.11-12.

377 But see Execution Act, R.S.O. 1970, c. 152, s. 7(3).

378 For example, see Vukowich, supra, note 225, at p. 856; Joslin, supra, note 214, at pp. 373-374.

379 Vuckowich, supra, note 225, at pp. 841-845.

380 See also Baird, supra, note 324, at p. 22.

381 See Baird, supra, note 324, at p. 28. Douglas Morley, in a paper prepared for the writer, has argued that where a homestead exemption exists, it should not apply as against a municipality seeking to collect land taxes. The theory is that the municipality has for practical purposes only one asset to pursue, namely, the land being taxed. Given the recommendations in this paper to (1) reject the homestead exemption but (2) permit the debtor to claim realty as exempt under the lump sum exemption, the Institute might want to accept the Morley exception to the principle stated in the text.

382 Supra, p. 52. But cf. Baird, supra, note 324, at p. 22; Vukowich, supra, note 225, at pp. 853-855.

Footnotes

383 See the Exemptions Act, R.S.A. 1970, c. 129, ss. 4-5.

384 Cuming, "Protection of Consumer - Borrowers" (1968) 33 Sask. L.R. 58, 112-115. The question will be discussed further in the chapter on exemptions, to be written immediately following the completion of this paper.

385 Supra, note 383.

386 But see Baird, supra, note 324, at pp. 20-21; Vukowich, supra, note 225, at pp. 854-855.

387 Gill, "Note" (1934-5) 23 Calif. L.R. 414; Moore and Phillips, supra, note 23, at p. 2-68; Loiseaux, Cases on Creditors' Rights (1966) 166; Vukowich, supra, note 225, at pp. 832-837.

388 See Osler v. Muter (1892) 19 O.A.R. 94; Baird, supra, note 324, at pp. 24-27. Manitoba has expressly dealt with the matter. See the Executions Act, R.S.M. 1970, c. E160, s. 32.