

Institute of Law Research and Reform
Company Law Project

COMPANY LAW: THE SEIZURE OF SHARES

August 8, 1978

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THE SEIZURE OF SHARES

The seizure, by a creditor, of a debtor's shares in a company raises problems because of the very nature of a share. The body of this paper is aimed at providing some of the answers or, at least it is hoped, making the problems more obvious.

Historically.

At common law shares in a company "were deemed to be mere choses in action, and hence not subject to levy and sale upon execution." (1) This situation was altered, in England, by The Judgements Act, 1838, 1 & 2 Vict., ch. 110 (2) which provided, in sections 14 and 15, for a charging order against shares. However, in Canada, the common law had already been altered by 1838. In Maloof v. Labad (1912), 22 O.W.R. 99, Riddell J. states:

"The first statute in Upper Canada is that of 1831, 2 Wm. IV, ch. 6 and the original of all the subsequent legislation is in 1849, 12 Vict., ch. 23. The statute now in force, the statute of 1909, Edw. VII, ch. 47, sec. 11 (1) is the same (with mere verbal differences) as the original Act of 1849, 23 Vict., ch. 23 sec. 2 (sic)."

(1) 23 Corpus Juris 327. See also Maitland's Lectures in Equity 115, Morton v. Cowan (1894), 25 O.R. 525 and Maloof v. Labad (1912), 22 O.W.R. 99.

(2) See Page 2. Section 14 was amended by The Judgements Act, 1840, 3 & 4 Vict., ch. 82, sec. 1. See page 3.

14. And be it enacted, That if any Person against whom any Judgment shall have been entered up in any of Her Majesty's Superior Courts at *Westminster* shall have any Government Stock, Funds, or Annuities, or any Stock or Shares of or in any Public Company in *England* (whether incorporated or not), standing in his Name in his own Right, or in the Name of any Person in Trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any Judgment Creditor, to order that such Stock, Funds, Annuities, or Shares, or such of them or such Part thereof respectively as he shall think fit, shall stand charged with the Payment of the Amount for which Judgment shall have been so recovered, and Interest thereon, and such Order shall entitle the Judgment Creditor to all such Remedies as he would have been entitled to if such Charge had been made in his Favour by the Judgment Debtor; provided that no Proceedings shall be taken to have the Benefit of such Charge until after the Expiration of Six Calendar Months from the Date of such Order.

15. And in order to prevent any Person against whom Judgment shall have been obtained from transferring, receiving, or disposing of any Stock, Funds, Annuities, or Shares hereby authorised to be charged for the Benefit of the Judgment Creditor under an Order of a Judge, be it further enacted, That every Order of a Judge charging any Government Stock, Funds, or Annuities, or any Stock or Shares in any Public Company, under this Act, shall be made in the first instance *ex parte*, and without any Notice to the Judgment Debtor, and shall be an Order to show cause only; and such Order, if any Government Stock, Funds, or Annuities standing in the Name of the Judgment Debtor in his own Right, or in the Name of any Person in Trust for him, is to be affected by such Order, shall restrain the Governor and Company of the Bank of *England* from permitting a Transfer of such Stock in the meantime and until such Order shall be made absolute or discharged; and if any Stock or Shares of or in any Public Company, standing in the Name of the Judgment Debtor in his own Right, or in the Name of any Person in Trust for him, is or are to be affected by any such Order, shall in like Manner restrain such Public Company from permitting a Transfer thereof; and that if, after Notice of such Order to the Person or Persons to be restrained thereby, or in case of Corporations to any authorised Agent of such Corporation, and before the same Order shall be discharged or made absolute, such Corporation or Person or Persons shall permit any such Transfer to be made, then and in such case the Corporation or Person or Persons so permitting such Transfer shall be liable to the Judgment Creditor for the Value or Amount of the Property so charged and so transferred, or such Part thereof as may be sufficient to satisfy his Judgment; and that no Disposition of the Judgment Debtor in the meantime shall be valid or effectual as against the Judgment Creditor; and further, that unless the Judgment Debtor shall within a Time to be mentioned in such Order show to a Judge of one of the said Superior Courts sufficient Cause to the contrary, the said Order shall, after Proof of Notice thereof to the Judgment Debtor, his Attorney or Agent, be made absolute: Provided that any such Judge shall, upon the application of the Judgment Debtor, or any Person interested, have full power to discharge or vary such Order, and to award such Costs upon such Application as he may think fit.

1. . . . That the aforesaid Provisions of the said Act [i.e. Judgments Act, 1838, s. 14], shall be deemed and taken to extend to the Interest of any Judgment Debtor, whether in Possession, Remainder, or Reversion, and whether vested or contingent as well in any such Stocks, Funds, Annuities, or Shares as aforesaid as also in the Dividends, Interest, or annual Produce of any such Stock, Funds, Annuities or Shares; and whenever any such Judgment Debtor shall have any Estate, Right, Title or Interest, vested or contingent, in Possession, Remainder, or Reversion, in, to, or out of any such Stocks, Funds, Annuities or Shares as aforesaid which now are or shall hereafter be standing in the name of *the Accountant-General of the Court of Chancery or the Accountant General of the Court of Exchequer*, or in, to, or out of the Dividends, Interest, or annual Produce thereof, it shall be lawful for such Judge to make any Order as to such Stock, Funds, Annuities, or Shares, or the Interest, Dividends, or annual Produce thereof, in the same Way as if the same had been standing in the Name of a Trustee of such Judgment Debtor: Provided always, that no order of any Judge as to any Stock, Funds, Annuities or Shares standing in the name of *the Accountant-General of the Court of Chancery or the Accountant-General of the Court of Exchequer*, or as to the Interest, Dividends, or annual Produce thereof, shall prevent the Governor and Company of the Bank of *England*, or any Public Company, from permitting any Transfer of such Stocks, Funds, Annuities, or Shares, or payment of the Interest, Dividends, or annual Produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater Effect than if such Debtor had charged such Stock, Funds, Annuities, or Shares, or the Interest, Dividends, or annual Produce thereof, in favour of the Judgment Creditor, with the Amount of the Sum to be mentioned in any such Order. [Emphasis added.]

The statute of 1831, 2 Wm. IV. ch. 6 provided that shares in a company were to be subject to execution. The Act followed the 1849 Act, noted by Riddell J. as being "the same (with mere verbal differences) as the statute of 1909.. ..", which was then consolidated in The Execution Act, R.S.O. 1914, ch. 80. ⁽³⁾

The Ontario Statute of 1909, 9 Edw. VII, ch. 47 (O.S. 1909, ch. 47) proved to be the basis for Alberta's first step in the area of execution in respect of shares. The Consolidated Rules of the Supreme Court (1914) pursuant to The Supreme Court Act of 1907, ch. 24 followed in Rules 610 to 613, ⁽⁴⁾ the Ontario provisions.

In 1933, The Seizures Act, S.A. 1933, ch. 16, sec. 45 repealed Rules 609 to 627 of the Rules of the Supreme Court and repealed The Extra-Judicial Seizures Act, R.S.A. 1922, Ch. 96 (which made no mention of the seizure of shares) and enacted, in its section 7, ⁽⁵⁾ the modern predecessor of the present section 7 of The Seizures Act, R.S.A. 1970, ch. 338. ⁽⁶⁾

In 1955, The Seizures Act, S.A. 1933, ch. 16 was amended by The Seizures Act, R.S.A. 1955, ch. 307 and section 7 took the form that is presently in force - with the exception of sub-sections 2 and 3 which were reorganized by section 2 of An Act to Amend The Seizures Act, S.A. 1965, ch. 87.

(3) See page 6.

(4) See page 7.

(5) See page 9 and 10.

(6) See pages 11 and 12. Note private company additions.

AN ACT to provide for making Stock held in Companies having a Joint Transferable Stock, liable to the satisfaction of Debts.

[Passed 23th January, 1832.]

WHEREAS it is just and expedient, that the Stock held by individuals, either in Banking Institutions or in other Companies lawfully created ^{Prescribed.} within this Province, and having a joint transferable Stock, should be subject to be taken and sold in satisfaction of debts, in the same manner as other personal property.—*Be it therefore enacted* by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, entitled 'An Act for making more effectual provision for the Government of the Province of Quebec, in North America,' and to make farther provision for the Government of the said Province," and by the authority of the same, That the Stock held by any person in any Bank, or in any Corporation or Company in this Province having a joint transferable Stock, shall be liable to be taken and sold in Execution, in the same manner as other personal property of the Debtor.

II. *And be it further enacted by the authority aforesaid,* That it shall and may be lawful for the Cashier of any such Bank, or for the proper Officer of any other such Corporation or Company, upon the production of a Certificate under the Hand and Seal of Office of the Sheriff acting upon any Execution, declaring to whom any Stock taken upon such Execution shall have been sold by him, to transfer such Stock from the name of the original Stockholder to the name of the person or persons who may be named in such Certificate as the purchaser or purchasers under such Execution; and that such purchaser or purchasers shall from thenceforth be entitled to receive all dividends and profits arising from such Stock, and shall in all other respects be considered in the place and stead of the former Stockholder.

Shares and dividends and equitable interests therein.

12. Shares and dividends, and any equitable or other right, property, interest or equity of redemption in or in respect of shares or dividends in an incorporated bank or an incorporated company having transferable shares shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property. 9 Edw. VII. c. 47, s. 10.

13.—(1) The Sheriff on being informed on behalf of the execution creditor that the execution debtor has such shares, and on being required to seize the same, shall forthwith serve a copy of the execution on the bank or company with a notice that all the shares of the execution debtor are seized thereunder; and from the time of service the seizure shall be deemed to be made and no transfer of the shares by the execution debtor shall be valid unless and until the seizure has been discharged; and every seizure and sale made under the execution shall include all dividends, premiums, bonuses or other pecuniary profits upon the shares seized, and the same shall not, after notice as aforesaid, be paid by the bank or company to any one except the person to whom the shares have been sold.

Notice of seizure.

Duty of bank or company.

(2) Such seizure may be made and notice given by the Sheriff where the bank or company has within his bailiwick a place at which service of process may be made. 9 Edw. VII. c. 47, s. 11.

How seizure made.

14. If the bank or company has more than one place where service of process may be made, and there is some place where transfers of shares may be notified to and entered by the bank or company, so as to be valid as regards the bank or company, or where dividends or profits as aforesaid on stock may be paid other than the place where service of such notice has been made, the notice shall not affect any transfer or payment of dividends or profits duly made and entered at any such other place, so as to subject the bank or company to pay twice, or so as to affect the rights of any bona fide purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of service by post from the place where it has been made to such other place, which notice it shall be the duty of the bank or company to so transmit. 9 Edw. VII. c. 47, s. 12.

Provisions for the case of more than one place of service.

15. Where any such share is sold the Sheriff shall within ten days after the sale serve upon the bank or company at some place where service of process may be made a copy of the execution, with his certificate endorsed thereon certifying the sale and the name of the purchaser who shall have the same rights and be under the same obligations as if he had purchased the share from the execution debtor at the time of the service of notice under section 13. 9 Edw. VII. c. 47, s. 13.

Mode of proceeding after sale.

16. Nothing in this Act shall affect any remedy which the execution creditor might, without this Act, have had against any such share or the dividends, premiums, bonuses or other pecuniary profits in respect thereof; and the provisions of the next preceding four sections shall apply to such remedy in so far as they can be applied thereto. 9 Edw. VII. c. 47, s. 14.

Saving of all other remedies.

The Consolidated Rules of the Supreme Court (1914)

Seizure of
shares

610. Shares in any corporation having transferable shares may be seized under execution and sold thereunder in the manner hereinafter provided. [O. Statutes, 1909, c. 47, s. 10.]

611. The sheriff on being informed on behalf of the execution creditor that the execution debtor has such shares and on being required to seize the same shall forthwith serve a copy of the execution, together with a notice that all the shares of the execution debtor are seized thereunder upon the corporation at its place of business within the province where transfers of shares may be notified and entered by the corporation so as to be valid as regards the corporation; and from the time of service the seizure shall be deemed to be made and no transfer of the shares by the execution debtor shall be valid unless and until the seizure has been discharged; and every seizure and sale made under the execution shall include all dividends, premiums, bonuses or other pecuniary profits upon the shares seized, and the same shall not, after notice as aforesaid, be paid by the bank or company to anyone except the person to whom the shares have been sold. [O.S. 1909, c. 47, s. 11.]

612. Where any such share is sold the sheriff shall, within ten days after the sale, serve upon the corporation at the same place as in the next preceding Rule mentioned a copy of the execution with his certificate endorsed thereon certifying the sale and the name of the purchaser who shall have the same rights and be under the same obligations as if he had purchased the shares from the execution debtor at the time of the service of notice of the writ of execution. [ib. s. 13.]

613. Nothing in these Rules shall affect any remedy which the execution creditor might, without these Rules, have had against any such shares or the dividends, premiums, bonuses or other pecuniary profits in respect thereof; and the provisions of the next preceding Rules shall apply to such remedy in so far as they can be applied thereto. [ib. s. 14.]

614. The sheriff may seize and sell any equitable or other right, property, interest or equity of redemption in or in respect of any goods or other personal property, including leasehold interests in land, of the execution debtor, and the sale shall convey whatever equitable or other right, property, interest or equity of redemption the execution debtor had or was entitled to in or in respect of the goods or other personal property at the time of the delivery of the execution to the sheriff for execution. [358; O.S. ib. s. 17.]

What amounts to Seizure?

As at common law shares were not exigible at all, to determine what amounts to a seizure of a share one must look at the Act that makes it exigible. Subsection 7 (1) of The Seizures Act, R.S.A. 1970, ch. 338 provides that shares "shall be deemed to be personal property. Found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property." Subsection 7 (2) provides that the sheriff, on being required to seize shares of the debtor, "shall (a) seize the share certificates or other documents evidencing the ownership of the shares, and (b) either before or within five days after the seizure, serve a copy of the writ of execution on the bank or company" Subsection 2, from a plain reading, contemplates a distinction between the seizing of shares and the filing of a notice with the company to prevent further transfers (requiring both). This would, with subsection 1's "seized ... in like manner as other personal property", I submit, eliminate the possibility in Alberta of a "constructive" seizure of shares whereby a service of a copy of a writ of execution on the company preventing further transfers of the shares would be a "seizure".

In this regard, our Act must be compared with the Execution Act of British Columbia. In Royal Bank of Canada v. Canadian National Fire Insurance Company, [1920] 3 W.W.R. 517, Murphy J. comments:

"This Act provides a method of execution against shares held by a judgment debtor by constructive as distinguished from actual seizure."

7.—(1) Shares and dividends, and any equitable or other right, property, interest or equity of redemption in or in respect of shares of dividends in an incorporated bank or an incorporated company having transferable shares shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property.

Shares and dividends

(2) The sheriff on being informed on behalf of the execution creditor that the debtor has such shares as aforesaid and on being required to seize the same, shall forthwith seize the share certificates or other documents evidencing the ownership of the said shares and thereupon shall serve a copy of the execution on the bank or company with

Procedure by sheriff

a notice that all the shares of the debtor are seized thereunder; and from the time of service the seizure shall be deemed to be made and no transfer of the shares by the debtor shall be valid unless and until the seizure has been discharged; and every seizure and sale made under the execution shall include all dividends, premiums, bonuses or other pecuniary profits upon the shares seized, and the same shall not, after notice as aforesaid, be paid by the bank or company to anyone except the person to whom the shares have been sold.

Place of seizure

(3) Such seizure may be made and notice given by the sheriff of the judicial district or subjudicial district within which the bank or company has a place at which service of process may be made, or where a share register is kept.

Limitation of effect of notice by sheriff

(4) If the bank or company has more than one place where service of process may be made, and there is some place where transfers of shares may be notified to and entered by the bank or company, so as to be valid as regards the bank or company, or where dividends or profits as aforesaid on stock may be paid other than the place where service of such notice has been made, the notice shall not affect any transfer or payment of dividends or profits duly made and entered at any such other place, so as to subject the bank or company to pay twice, or so as to affect the rights of any bona fide purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of service by post from the place where it has been made to such other place, which notice it shall be the duty of the bank or company to so transmit.

Service of copy of execution

(5) Where any such share is sold the sheriff shall within ten days after sale serve upon the bank or company at some place where service of process may be made a copy of the execution with his certificate endorsed thereon, certifying the sale and the name of the purchaser who shall have the same rights and be under the same obligations as if he had purchased the share from the debtor at the time of the service of notice under subsection (2) of this section.

Remedies saved

(6) Nothing in this Act shall affect any remedy which the creditor might, without this Act, have had against any such share or the dividends, premiums, bonuses or other pecuniary profits in respect thereof; and the provisions of the next preceding four subsections shall apply to such remedy in so far as they can be applied thereto.

Shares of
private
companies

(7) If a sheriff seizes the shares of a debtor in a private company he shall first offer them for sale to the other shareholders or any one of them in such private company, and send by mail to the company at its registered office and to at least three other shareholders of the company if there be so many, and if not to the other shareholders, notice of the seizure, and shall sell the shares seized or any part of them to any shareholder who within thirty days of the date of the mailing of the notice makes an offer for the purchase

thereof at a price which appears to the sheriff to be reasonable and within the same period pays the purchase price to the sheriff, and any shares remaining unsold at the expiration of the said period shall be sold by the sheriff in the same manner as any other personal property.

Exigibility of Shares and Dividends

Seizure of
shares and
dividends

7. (1) Shares and dividends, and any equitable or other right, property or interest or equity of redemption in or in respect of shares or dividends, in an incorporated bank or an incorporated company having transferable shares shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property.

(2) The sheriff, on being informed by or on behalf of the judgment creditor that the debtor has such shares as are referred to in subsection (1) and on being required to seize them, shall

(a) seize the share certificates or other documents evidencing the ownership of the shares, and

(b) either before or within five days after the seizure, serve a copy of the writ of execution on the bank or company and a notice that all the shares of the debtor are seized thereunder.

(3) When the notice referred to in subsection (2), clause (b) is served, no transfer of the shares by the debtor is valid unless the sheriff notifies the bank or company that the seizure has been withdrawn.

(4) Every seizure and sale made under the execution shall include all dividends, premiums, bonuses or other pecuniary profits upon the shares seized, and the same shall not, after notice has been given in accordance with subsection (2), be paid by the bank or company to anyone except the person to whom the shares have been sold.

(5) The seizure may be made and notice given by the sheriff of the judicial district within which the bank or company has a place at which service of process may be made, or where a share register is kept.

(6) Where the bank or company has more than one place where service of process may be made, and there is some place where transfers of shares may be effected and entered by the bank or company so as to be valid as regards the bank or company, or where dividends or profits as aforesaid on stock may be paid, other than the place where service of the notice has been made, the notice does not affect any transfer or payment of dividends or profits duly made and entered at any place, other than the place where service of the process was made, so as to subject the bank or company to pay twice, or so as to affect the rights of any *bona fide* purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of service by post from the place where it has been made to such other place, which notice the bank or company shall transmit.

(7) Where any share is sold the sheriff shall within ten days after sale serve upon the bank or company at some place where service of process may be made a copy of the execution with his certificate endorsed thereon, certifying the sale and the name of the purchaser.

12.

(8) The purchaser has the same rights and is under the same obligations as if he had purchased the share from the debtor at the time of the service of notice under subsection (2).

(9) Nothing in this Act affects any remedy that the creditor might, without this Act, have had against any share or the dividends, premiums, bonuses or other pecuniary profits in respect thereof, and subsections (2) to (8) apply to such remedy in so far as they can be applied thereto.

(10) If a sheriff seizes the shares of a debtor in a private company he shall first offer them for sale to the other shareholders or any one of them in the private company, and send by mail to the company at its registered office and to at least three other shareholders of the company if there are so many, and if not to the other shareholders, notice of the seizure, and sell the shares seized or any part of them to any shareholder who within 30 days of the date of the mailing of the notice

(a) makes an offer for the purchase thereof at a price that appears to the sheriff to be reasonable, and

(b) pays the purchase price to the sheriff.

(11) Any shares in a private company remaining unsold at the expiration of the period of 30 days shall be sold by the sheriff in the same manner as any other personal property. [R.S.A. 1955, c. 307, s. 7; 1965, c. 87, s. 2]

Murphy J. was referring to the Execution Act, R.S.B.C. 1911, ch. 79 (which is nearly identical to the Execution Act, R.S.B.C. 1960, ch. 135 - the Act presently in force). Section 20 provides:

"The Sheriff..... on being required to seize the same, shall forthwith serve a copy of the writ of execution on the company with a notice that all the stock or shares which the defendant has in the capital stock of the company are seized accordingly, and from the time of service no transfer of the stock or shares by the defendant shall be valid, unless and until the seizure has been discharged."

I would submit that the two pieces of legislation are plainly distinguishable and the Alberta legislation does not provide for the "constructive" seizure allowed by the B.C. counterpart. This necessity of physically seizing the shares will be returned to later in this paper.

The Seizure of Interests in Shares and The Judgements Act.

At the beginning of this paper it was indicated that the common law regarding a debtor's shares was, in England, first changed by The Judgements Act, 1838, 1 & 2 Vict. ch. 110 which provided for charging orders. Two questions arise at this point: What is the position of The Judgements Act today in Alberta and what is its relation to The Seizures Act?

Shares in Incorporated Companies.

18. All corporations established for the purpose of trade or profit, or for the construction of any work, or for the acquisition of gain, shall be deemed incorporated companies for the purpose of the next six succeeding sections of this Act, although they are not called companies in the Act or charter incorporating them, or in their memorandum or articles of association. R. S. 1897, c. 72, s. 17.

What shall be deemed incorporated companies.

19. All stock, shares, and dividends of shareholders in any incorporated company in the Province, having transferable joint stock or shares, shall be held to be personal property, and shall be liable to bona-fide creditors for debts, and may be attached, seized, and sold under writs of execution in like manner as other personal property. R. S. 1897, c. 72, s. 18.

Shares and dividends made liable to seizure.

20. The Sheriff to whom a writ of execution is addressed, on being informed on behalf of the plaintiff that the defendant has such stock or shares, and on being required to seize the same, shall forthwith serve a copy of the writ of execution on the company with a notice that all the stock or shares which the defendant has in the capital stock of the company are seized accordingly; and from the time of service no transfer of the stock or shares by the defendant shall be valid, unless and until the seizure has been discharged; and every seizure and sale made under the same shall include all dividends, premiums, bonuses, or other pecuniary profits upon the stock or shares seized, and the same shall not, after notice as aforesaid, be paid by the company to any one except the person to whom the stock or shares have been sold by the Sheriff, unless and until the seizure is discharged, on pain of paying the same twice. R. S. 1897, c. 72, s. 19.

Sheriff to serve a copy of the writ the company with notice of seizure.

Shares not to be transferred while under seizure.

Sale under seizure to include all dividends.

21. If the company has more than one place where service of process may be made upon them, and there is some place where transfers of stock or shares may be notified to and entered by the company so as to be valid as regards the company, or where dividends or profits as aforesaid on the said stock or shares may be paid other than the place where service of such notice has been made, the notice shall not affect any transfer or payment of dividends or profits duly made and entered at any such other place, so as to subject the company to pay twice, or to affect the rights of any bona-fide purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of service by post from the place where it has been made to such other place, which notice it shall be the duty of the company to transmit by post. R. S. 1897, c. 72, s. 20.

Effect of service on company having more than one office for service, transfer of stock, etc.

Company to transmit by post notice of seizure to other officers, from office where served.

Shares to be personal property at place where notice of seizure served.

22. The stock or shares in the said capital stock shall be held to be personal property, found by the Sheriff in the place where notice of the seizure thereof is served as aforesaid. R. S. 1897, c. 72, s. 21.

Mode of proceeding to complete sale and transfer.

23. Where such stock or share is sold under a writ of execution, the Sheriff by whom the writ has been executed shall, within ten days after sale, serve upon the company, at some place where service of process may be made, an attested copy of the writ of execution, with his certificate indorsed thereon, certifying the name of the purchaser, who shall thereafter be the holder of the stock or share, and shall have the same rights and be under the same obligations as if he had duly purchased the stock or share from the proprietor thereof; and the proper officer of the company shall enter such sale as a transfer in the manner by law provided. R. S. 1897, c. 72, s. 22.

Saving of all other remedies.

24. Nothing in this Act shall be construed to impair the remedy which the plaintiff might, without this Act, have had against any stock or shares in such capital stock as aforesaid, by charging order, attachment, or otherwise, and the provisions of the last four preceding sections shall apply to such remedy in so far as they can be applied thereto. R. S. 1897, c. 72, s. 23.

Writs of elegit or fi. fa. lands abolished.

25. No writ of elegit or writ of fieri facias de terris shall be issued in this Province, but the writs of fieri facias de terris now in the hands of the Sheriff for any county shall remain in full force, virtue, and effect. R. S. 1897, c. 72, s. 25 (part); 1899, c. 27, s. 2.

In Some Aspects of the Charging Order as a Remedy for Unsecured Creditors (1967) 3 U.B.C.L. Rev. 83 C.R.B. Dunlop notes:

"Canadian courts early decided that the charging order sections of The Judgements Acts of 1838 and 1840 were part of Canadian law, insofar as they had not been repealed or amended by Canadian legislation."

Dunlop goes on to cite several cases including the Alberta division of McDougall and Secord v. Inglis (1909) 2 A.L.R. 341 (S.C.) that will serve as a convenient starting point.

In McDougal and Secord v. Inglis, an order was applied for and obtained to charge a Fund in Court. The importance of the case to us stems from the comment of Beck J.:

"The Imperial Acts, 1 and 2 Vict. c. 110, ss 14 and 15, and 3 and 4 Vict. c.84, s.1 mentioned in English Order 46, Rule 1, do not apply to moneys in Court, but nevertheless a charging order can be made against moneys in Court under the general jurisdiction of the Court....." This is the only mention by Beck J. of The Judgements Acts but implicitly I would submit, he accepted them as applicable to Alberta.

In Miller-Morse Hardware Company, Limited v. Smart, [1917] 3 W.W.R. 1113 (Sask. S.C.), where an application to have a charging order on shares made absolute was made by notice of motion, it was held that The Judgements Acts of 1838 and 1840 were in force by virtue of section 12 of the Northwest Territories Act, R.S.C. 1906, ch. 368, providing:

"Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed ... in the year [1870], shall be in force in the Territories, insofar as the same are applicable... and ... have not been, or are not hereafter, ... repealed, altered, varied, modified or affected by any Act"

Being, then, that The Judgements Acts were in force here before The Seizures Act - the question becomes one of whether The Seizures Act has replaced The Judgements Acts or they coexist. Little assistance is gained from the case law as there is, with the exception of a case to be noted shortly and the aforementioned McDougall and Secord v. Inglis, a lack of any decisions of Alberta Courts in the seizure of shares or use of charging orders on shares. For this reason the following judgements of B.C., Manitoba, Saskatchewan and Ontario, few as they be, must be considered.

In Goodbun v. Mitchell (No. 5), [1929] 3 W.W.R. 622 (Man. C.A.) Trueman J.A. took the position that the remedies provided by The Execution Act, R.S.M. 1913, ch.66 were additional to and not in place of the remedies offered by the The Judgements Act of 1838 against shares:

"Sec. 14 and its related sections were enacted to give to a judgement creditor a more direct and simpler method of reaching shares of a bank or company owned by the judgement debtor than that provided by The Judgements Act, 1838, 1 & 2 Vict. ch. 110. This Act is not repealed or superseded in all its parts by sec. 14 and may be resorted to independently or in aid of the section." (7)

The court refused to grant the order holding (1) that the court had no jurisdiction in equity to appoint a receiver to sell the interest in the shares (2) equitable execution could only be used in aid of legal execution and here, as the company was not a "company in Manitoba" (not having a place for service in Manitoba) legal execution was not possible (3) the order was not within The Judgements Acts of 1838 and 1840 - there being no order nisi.

One aspect of note arises in respect of the first listed ground of decision. Fullerton J.A. said:

"With the exception of Sayre v. Gilfoy, [1925] 1 W.W.R. 992 (Alta. S.C.) no case was cited to us in which an order for the appointment of a receiver and the sale of an equity in shares by way of equitable execution was made."

Later Fullerton J.A. added:

"There may have been something in the procedure or practice of the Courts of Alberta which justified the making of the order in that case but in view of the authorities quoted above, I am not prepared to follow it."

(7)

The Section 14 referred to provided:

"All shares and dividends of stockholders in any incorporated bank or other company in Manitoba having transferable joint stock shall be held, considered and adjudged to be personal property, and shall be liable as such to bona fide creditors for debts and may be attached, seized and sold under writs of execution issued out of the Court of King's Bench in like manner as other personal property may be sold under execution."

The authorities to which he referred were in respect of the inability to order a receiver to sell and included Herold v. Budding (1916) 37 O.L.R. 605.

In Sayre v. Gilfoy, [1925] 1 W.W.R. 992 the defendant debtor had an equitable interest in some shares (a right of redemption - the shares being held as security for a debt due him from the defendant) and the plaintiff applied for the appointment of a receiver. Ives J., after stating the facts, rendered judgement - the whole of which is reproduced on the next page.

Unless Fullerton J.A. had more before him than just the case report of Sayre v. Gilfoy it is not clear why he made reference to Sayre v. Gilfoy as a case where "a sale of an equity in shares by way of equitable execution" was made. My reading of the judgement would lead me to submit that Ives, J. felt that the appointment of a receiver was what "he is entitled to ... as and by way of equitable execution". The receiver was not to sell without leave. At any rate, the Alberta provisions respecting shares in effect at the time of Sayre v. Gilfoy were contained in the Rules of the Supreme Court (1914), set out earlier in this paper. Ives J. made no reference to them or any other authority. (8)

Returning to the question of the position of The Judgements Act and its charging order today. In Annett and Annett v. Randall, an unreported decision of MacFarlane J.

(8)

In Tehane et al v. Porteous et al, [1917] 2 W.W.R. 560 (Sask. S.C. Ch.) Elwood J. held that one could not reach stock by the appointment of a receiver (only the dividends) but one had to get a charging order.

In my opinion the defendant's interest is not exigible under *fi. fa.* goods, but the plaintiff is entitled to have the interest applied in payment of the debt and his application for the appointment of a receiver should be granted. He is entitled to this as and by way of equitable execution and the most convenient method of attacking this property. The receiver should not be permitted to sell without leave and, if the Trusts & Guarantee Co., Ltd., will consent to act as receiver that company under the circumstances here, will be appointed; if not then I appoint the sheriff without his being required to give security.

[Faint, illegible text, likely bleed-through from the reverse side of the page]

(B.C.S.C.) of July, 1952. The opposite position to that taken in Goodbun v. Mitchell was taken - i.e. that the remedies were not coexisting.

MacFarlane concluded that where a remedy against shares was available under the Execution Act, then The Judgements Acts had been repealed to that extent.

In the same vein, Sullivan J. noted, obiter, in Re Patmore (Cestui Que Trust) in resolving a question concerning the charging of shares in a foreign corporation that "... the discussion leads one to consideration of The Judgements Act of England, 1838, 1 & 2, Vict. ch. 110 and its amendment in 1870, the provisions of both of which become the law of this jurisdiction and remained so until the British Columbia enactment of the Execution Act, R.S.B.C. 1897, ch.72." [Goodbun v. Mitchell was distinguished in Re Patmore, so that the charging order was allowed, on the ground that the "street certificates" in the foreign company were as exigible as money itself and fell under the section of the Execution Act dealing with money - not shares.]

In Gould, Thorpe and Easton et al v. Albitt (1958), 26 W.W.R. 274 MacFarlane J. commented on his judgement in Annett v. Randall:

"I come to the conclusion that the said Judgements Act became part of the law of British Columbia and is in force in this province in so far as it is applicable and in so far as it has not been altered by our Execution Act.

In respect of shares standing in the name of the judgement debtor or in the name of any other person in trust for him, if they are not subject to execution under the Execution Act, a charging order may be made. If the shares are subject to execution, under the Execution Act, there is no need for a charging order and in fact I do not think the English Act is then applicable."

The decisions of MacFarlane, J. in Annett v. Randall and the Albitt case were followed in Associates Finance Company Limited v. Webber and Dixon [1972] 4 W.W.R. 131 where an application for a charging order on shares was refused because the Execution Act was available to provide a remedy.

What would be the position in Alberta? I would respectfully submit that the Alberta Courts would probably take the position that the remedies of The Seizure Act and The Judgements Act were both available [i.e.: the former Act did not replace and repeal the latter Act]. The rejection of the B.C. cases in favor of the Manitoba case of Goodbun v. Mitchell can, I submit, be justified on the basis that the B.C. cases did not give effect to what was section 24 of the Execution Act, R.S.B.C. 1911, ch. 79 (See page 14) and became section 23 of the Execution Act, R.S.B.C. 1960, ch. 135 which compares with subsection 7 (9) of The Seizures Act, R.S.A. 1970, ch. 338 (see page 12). This subsection, it seems to me, means that the remedies that were available before the Act - and the charging orders were - continue in existence. C.R.B. Dunlop takes this position in his already noted article and goes on to comment that the arguments of MacFarlane are "somewhat weak in the face of the express words of Section 23."

If the B.C. cases were to be followed - in contrast to the above submission - The Judgements Act would be available only as a remedy where execution under The Seizures Act was not available (as per Annett v. Randall and the Albitt case). The scope of circumstances not covered by The Seizures Act would, I submit, be smaller than the scope of circumstances not encompassed by the B.C. Execution Act as our statute, by the wording of section 7 (1) ["Shares and dividends, and any equitable or other right, property or interest or equity of redemption in or in respect of shares or dividends ... may be seized....."] seems to encompass a great deal more than the comparable section of the B.C. Act (see section 19 on page 14).

Seizure of Private Company Shares.

Leaving aside the problem just under consideration and assuming a valid seizure of shares - what would happen if after sale under execution the directors of the private company refused to register a transfer of the shares to the execution purchaser (the limitation in the transferability of shares being a requirement of the consent of the directors)?

The first thing to be noted is the procedure for the seizure and sale of shares in a private company provided by subsections 10 and 11 of Section 7 of The Seizures Act (see page 12). The subsections clearly provide that the shares must first be offered to the shareholders but that does not solve the already mentioned problem.

In Re Goodwin v. The Ottawa and Prescott Railway Company (1863), 13 U.C.C.P. 254, an application for mandamus to compel the transfer of stock to an execution purchaser was allowed, there being sufficient proof of a demand and a refusal.

In the Matter of Guillot and The Sandwich and Windsor Gravel Road Company (1867), 26 U.C.Q.B. 246, an application for mandamus to compel the company to transfer stock to an execution purchaser was denied because the demand and refusal were not after the service of an attested copy of execution. Impliedly, had the demand and refusal been after the service of the attested copy of execution, mandamus would have been granted.

In Oliver v. Granby Consolidated Mining, Smelting and Power Company, Limited, [1923] 1 W.W.R. 50, an application for mandamus to compel registration of a transfer was allowed by the B.C.S.C. even though the company kept its register of shareholders at an office situate outside of B.C. (The Court found that the shares represented property situate in B.C. and the situs of the shares was in B.C. as far as the Execution Act was concerned).

In Re Montgomery and Wrights Limited (1916-17), 38 O.L.R. 335 stock was seized and sold and the execution purchaser applied for a mandatory order directing the company to record him as owner of the share. However, an employee (Nelles) of the debtor claimed a lien against the share, having it as security for a loan made to the debtor. The court held that "the purchaser must therefore elect to take an issue with Nelles as to the bona fides of his claim, or the application must be refused." This implication is that without the claim of Nelles, the order would have been granted.

Re Phillips and La Palomo Sweets Ltd. (1921), 66 O.L.R. 577 (Ont. S.C.) introduced a complication to what seems to be a smooth flow of case law. In response to a motion for a mandatory order directing the recording of a transfer of shares to an execution purchaser Middleton J. relied on Lindley on the Law of Companies, 6th ed., vol. 1, p. 647 which provided that:

"....if their [the directors] consent to a transfer is necessary, and, in giving or refusing their consent to a transfer, they act bona fide, with a view to the protection of the interests of the company, the exercise of their discretion will not be interfered with"

In result, Middleton J. held that the directors could not be compelled to record the transfer and the execution creditor's remedy was to apply for a receiver to collect the dividends. In regards to the Execution Act, R.S.O. 1914, ch. 80, Middleton J. said that as the sections provided only for the seizure and sale of "transferable" shares [see the present section 7 (1) of The Seizures Act, R.S.A. 1970, ch. 338 on page 11 for the same phrase.], they did not apply to shares which could be transferred only with the director's consent as they were not "transferable".

The result of this case would have been, then, that the shares in private companies could never be seized under the Execution Act of Ontario. This problem arose primarily because the earlier cases noted did not make it clear whether or not there was a restriction in the articles with respect to the transfer of shares.

In Associates Finance Company Ltd. v. Webber and Dixon, [1972] 4 W.W.R. 131 (already noted) the B.C.S.C. was again faced with the question of whether the company could be forced to record a transfer where its articles contained a restriction. After noting all of the cases already canvassed above, Anderson J. followed Ex parte Trevascus; Re Wm. McCulloch & Co. Ltd. (1879), 5 V.L.R. 195. Stawall C.J. stated that: "The power of the company to decline to register a transfer, can apply only to a voluntary transfer, not to a transfer in invitum." Anderson J. refused to follow Re Phillips and La Paloma Sweets Ltd. and stated that the word "transferable" should not bear the restricted interpretation placed upon it by Middleton J. Anderson J. stated that he was aware of the contention that the freedom of the shareholders in a private company was being jeopardized but asked whether the judgement creditor is to be deprived of his right to have his judgement satisfied. In result, Anderson J. stated that "The company cannot refuse to register the transfer merely because the articles provide that the directors may decline to accept any transfer."

I would submit that Associates Finance would be followed in Alberta and a private company could be forced by mandamus to record a transfer to an execution purchaser. That "transferable" should not bear the restricted meaning is, I submit, evidenced by subsection 10 and 11 provision for private companies. As well, I submit that the argument with respect to the limiting of private company shareholder's freedom is of lesser force here because the offer of shares is made to them first by virtue of the just mentioned subsections.

The Role of a Corporations Act

The last major question to face us is the prospective role of a Corporations Act in respect of the seizure of shares.

The Canada Business Corporations Act section 70 provides:

"Seizure of security - no seizure of a security or other interest evidenced thereby is effective until the person making the seizure obtains possession of the security."

Section 70 of The Corporations Act, S.M. 1976, ch. 40 and of The Business Corporations Act, 1977, S.S. 1976-77, ch. 10 both follow, word for word, the C.B.C.A. provision.

It is of interest to note the provisions of the Uniform Commercial Code from which the C.B.C.A. drew its provision:

"Art. 8-317 (1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source."

"(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot be readily attached or levied upon by ordinary legal process."

The reason why it is advantageous to make seizure of a share effective only on the actual taking of the share stems from the needs in respect of the negotiability of securities. If a constructive seizure is effective, how does a purchaser of a security know that he is not buying a security that

has been constructively seized by a creditor of his vendor? Who bears the burden if an execution purchaser gets the security: the company? the execution purchaser? the bona fide purchaser from the debtor? In the interests of the negotiability of the securities, I would submit that it is best if only actual physical seizure is allowed (as I submitted earlier is the case for Alberta).

The question then becomes whether we, in Alberta, need a provision similar to that of the C.B.C.A. I would submit that we do not need it as The Seizures Act is sufficiently clear; however, in the interests of clarity and completeness, a provision like that in the C.B.C.A. could be included. I submit that provisions respecting the procedure of seizure should not be included in a Corporations Act and are best left - to avoid unnecessary duplicity and possible conflicts - to other legislation such as The Seizures Act.

Chris Nixon

August 8, 1978.