Execution Against Land in New Brunswick

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This article traces the development of the law of execution against land in New Brunswick. The two traditional methods of proceeding against land are examined in detail; that is, the judgment lien created on the registration of a memorial or delivery of a writ of fieri facias *to the Sheriff. Particular attention is given to the problems of perfecting or realizing upon the lien of a judgment by the equitable order for sale method or by sale under the writ of fieri facias with relation back of title to the judgment lien. The problems and confusion caused by the decisions in* Tobias *v.* Bob Wilson & Co. *and by recent amendments to the* Memorials and Executions Act *will be considered. The possibility of a judgment creditor maintaining his priority against land will also be examined. Finally, some suggestions for reform in this unnecessarily complicated area of the law of execution will be made.*

De quelle façon peut-on grever un bien-fonds au Nouveau-Brunswick? Cet article relate le développement et la position actuelle du droit à ce sujet. L'auteur traite en profondeur des deux moyens traditionnels: l'enregistrement d'un extrait de judgment et la remise entre les mains du shérif d'un bref de fieri facias. *Cette étude porte sur les différents problèmes relevant de la vente d'un bien-fonds sous l'un ou l'autre de ces moyens. L'auteur analyse également les difficultés et la confusion occasionnées par la décision de l'arrêt* Tobias *v.* Bob Wilson & Co. *ainsi que par les récentes modifications de la* Loi sur les extraits de jugement et les exécutions. *On y examine la possibilité pour un créancier sur jugement de maintenir son rang prioritaire sur un bien-fonds. En guise de conclusion, l'auteur propose quelques idées de réforme qui pourraient simplifier ce domaine inutilement compliqué.*

INTRODUCTION

The fact that a creditor obtains a judgment does not guarantee that he will be paid by the judgment debtor. The judgment creditor may have to take the steps necessary to get his money and the law of execution provides the tools required for the judgment creditor to reach

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his objective — final payment. A standard procedure is the sale of property of the judgment debtor by the Sheriff, with the proceeds going to satisfy the judgment. Of the assets of the judgment debtor, land is often the most valuable. Until recently, the procedures involved in executing against this land appeared quite straightforward. However, as a result of developments in case law and recent statutory amendments, there is now considerable uncertainty. This is truly unfortunate since, in many cases, land is the only asset of the judgment debtor of significant value.

Despite its very broad title, this article will not examine all facets of execution against land in New Brunswick. Important questions such as what interests in land are exigible, advertising requirements, and the forms to be used are not dealt with. This article deals primarily with the questions of what interests are bound and subsequently sold by the judgment creditor; what procedural steps must be taken; and finally, what steps might be taken to maintain priority. In conclusion, suggestions will be made for reform in this unnecessarily complicated but important area of execution law.

BACKGROUND[1]

England

As with so much of the law of New Brunswick, in order to understand the situation relating to execution against land today, one must go back hundreds of years to the law of England.

> At common law, in accordance with the policy of the feudal law introduced into England after the conquest, the lands of a debtor were not liable to the satisfaction of a judgment against him except for debts due the King, and consequently no lien thereon is acquired under a judgment. In England this common law rule continued in force until the passage in 1285 of the Statute of Westminster II (13 Edward I), by which, in the interest of trade and commerce, the writ of elegit was for the first time provided for, and by construction of the courts it was held under this Act that the judgment was a lien on such lands from the date of its rendition on the first day of the term of the court at which it was rendered.[2]

The writ of *elegit* created by the *Statute of Westminster* entitled the judgment creditor *inter alia* to possession of one half of the judgment debtor's lands and the profits therefrom until the debt was satisfied.[3] It is important to realize that it was the judgment that created the lien and not the writ of *elegit* itself.[4] Both the nature and binding effect of this lien are significant.

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[1]Some of the material for this section is taken from a paper written by Richard J. Scott for a Supplementary Writing course at the University of New Brunswick Law School.

[2]*Corpus Juris Secundum*, Vol. 49, "Judgements", 454 at 884. (Authorities omitted).

[3]Blackstone, Sir William, *Commentaries on the Laws of England, Vol. III* (15th ed.), at 418-419.

[4]*Nortcliffe* v. *Warburton* (1862), 31 L.J. Ch. (N.S.) 777, at 782.

> It is true that the judgment was often spoken of as being a lien upon the lands of the defendant, but that only meant that under the Statute of Westminster the plaintiff was entitled to have a moiety of the lands put into his possession by the writ of elegit and the judgment debtor would not by any means withdraw the lands from the operation of the elegit. Also, a judgment creditor could come into equity to enforce his rights; but that was only after he had sued out his writ of elegit. That was decided in the case of *Neale* v. *Marlborough* (5 Law J. Rep. (N.S.) Exch. Eq. 98).[5]

Thus, a judgment obtained against a debtor would bind land so that even if it were conveyed to a *bona fide* purchaser for value without notice of the judgment, the judgment creditor could still issue his writ of *elegit* and seize possession of one half of the land. The reference to the role of equity is further explained in the following quotation:

> . . . a court of equity would not oblige a judgment creditor to wait until he is paid out of the rents, but would accelerate the payment by directing the sale of the moiety.[6]

This fits within the general principle that a court of equity would assist judgment creditors at common law where necessary. We shall see another application of this principle later.

The lien of the judgment originally related only to the writ of *elegit* under the *Statute of Westminster,* since that was the source of its existence. It was later codified by the enactment of 1 & 2 Victoria c. 110 in 1838. Under this statute, a judgment at both common law and equity created a general charge or lien on the lands of the judgment debtor. Though the basis of the lien had changed, the mechanics of perfecting that lien through the writ of elegit remained unaffected.[7] It was still the only writ available at the time in England which could reach the land of the judgment debtor. There was no need to worry about the binding effect of the writ of *elegit* on the land by itself. The lien of the judgment always came into existence first and the title at the time could not be removed from the operation of a writ issued subsequently.

New Brunswick to 1786

From the beginning of English settlement in the Province, the law of the Colony was the law of England at the time. This included the *Statute of Westminster* with its judgment lien and the writ of elegit as outlined above. This situation changed in 1732 when the Parliament in England passed 5 George II c. 7. Section 4 of that Statute provided in part:

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[5]*Bond* v. *Bell* (1857), 27 L.J. Ch. (N.S.) 233, at 235-236.

[6]Tedd, William, *The Practice of the Courts of Kings Bench and Common Pleas, Vol. II* (6th ed.), at 960-962. (Authorities omitted).

[7]*Bond* v. *Bell* (1857), 27 L.J. Ch. (N.S.) 233; *Nortcliffe* v. *Warburton* (1862), 31 L.J. Ch. (N.S.) 777.

> That . . . the house, lands . . . and other hereditaments and real estate, situate and being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, . . . owing by any such person to his Majesty or any of his subjects. . . .

The provision was taken to create a lien or charge on the lands of the judgment debtor, though its exact nature may not have been clear.[8] However, the analogy to the force and effect of the *Statute of Westminster* seemed quite clear. It would appear natural that the lien created would be perfected by the issue of a writ which would reach real estate. One might therefore expect to perfect this lien by using the writ of *elegit.* However, Section 4 of this Imperial Statute went further to provide:

> . . . lands of the judgment debtor shall be subject to the like remedies, proceedings and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes, and other hereditaments and real estate, towards the satisfaction of such devts, duties and demands, and in like manner as personal estate in any of the said plantations respectively are seized, extended sold or disposed of, for the satisfaction of debts.

By virtue of this second part of Section 4, the writ of *elegit* was not the only common law writ of execution to have the ability to reach land.

The usual means of executing against personal estate of the judgment debtor was the writ of *fieri facias.* This ancient common law writ directed the Sheriff to seize and sell the goods and chattels of the judgment debtor to satisfy the judgment. As a result of Section 4 the Sheriff would now be directed, in addition, to seize and sell the lands of the judgment debtor.[9] It would also seem logical that the lien of the judgment could now be perfected by the writ of *fieri facias.* If this were the case, then there was little sense in being concerned with the binding effect of the writ of *fieri facias* on land by itself. At common law, the writ bound property from the time of issue and that would always be after the binding of the judgment. The judgment and the writ of *fieri facias* would operate together as a single method of executing against land. It should be noted that for obvious reasons the writ of *elegit* would not be used any longer. It was far more effective and efficient to be able to sell the land under the writ of *fieri facias* rather than having only a right to one half possession under the writ of *elegit.*

There is not a great deal of authority on the effect of this statute in New Brunswick as new legislation was enacted soon after New Brunswick became a colony.

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[8] *Mills* v. *Mills* (1858), 9 N.B.R. 45, at 46 (N.B.S.C.).

[9] LaForest, G.V. "Some Aspects of the Writ of Fieri Facias", (1959) 12 *U.N.B.L.J.* 39, at 45-46.

New Brunswick from 1786 to 1854

In 1786 the Colonial Legislature passed a statute entitled, *"An Act Subjecting Real Estate in the Province of New Brunswick to the payment of Debts, and directing the Sheriff in his proceedings thereon."* In many respects 26 George III c. 12 re-enacted the provisions of the earlier Imperial Statute. Section 1 of the Colonial statute provided, for example, that:

> . . . the Houses, Lands and Estate and Hereditaments, situate or being in any part of this Province, belonging to any person or persons whatsoever, indebted, shall be liable to and chargeable with all just debts and demands, of what nature or kind soever, owing by or due from any such person to His Majesty, or any of his subjects, and shall be and are hereby made chattels for the satisfaction thereof in like manner as personal Estate in the Province are seized, sold or disposed of, for satisfaction of debts.

The lien of the judgment was preserved and the treatment of lands as personal property meant that the writ of *fieri facias* continued to be available for the sale of real estate. However, changes were starting to be made in the common law. Section 7 provided that no process against real estate could issue until one of the judges of the Supreme Court had inspected and certified the correctness of the judgment, and the certified judgment and process were recorded in a book or Judgment Roll to be kept for that purpose by the Clerk of the Supreme Court. This provision was primarily for the benefit of the judgment debtor.

Of equal importance was the protection of a *bona fide* purchaser of land of a judgment debtor. As noted earlier, at common law the judgment bound from the first day of the term of the judgment. This situation left a *bona fide* purchaser no possible means of determining whether the land was subject to a judgment lien. The Legislature dealt with this problem in Sections 11 and 12 of 26 George III c. 14. All judges were required to date judgments when they were signed and they were to be treated as judgments only from that date. Further, Section 15 stated that *bona fide* purchasers could not be prejudiced by the lien of a judgment until after the judgment had been placed on the Judgment Roll at full length.

Though the binding effect of the judgment was being delayed and *bona fide* purchasers were being protected, there was still only one method of executing against land. The writ of *fieri facias* could not be issued until after the judgment bound. By analogy to the *Statute of Westminster,* a sale of land under a writ of *fieri facias* would relate back to or perfect the lien of the judgment. This result was clearly confirmed by Section 5 of 26 George III c. 12 which provided that the Sheriff's deed would vest in the purchaser of the land at the Sheriff's sale:

> . . . as good and perfect an Estate as the owner of such Houses, Lands, Real Estate or Hereditaments was seized of or entitled unto at or before the said Judgment . . .".

It should be emphasized that this provision is not the source of the doctrine of relation back of title but only recognizes it.

One strange aspect of the Legislation was the system of priorities it created. If Judgment Creditor No. 1 (J.C. No. 1) obtained a judgment against Judgment Debtor (J.D.), his lien would bind the land of J.D. immediately upon formal entry. If Judgment Creditor No. 2 (J.C. No. 2) then obtained a judgment against J.D., his judgment lien would be subordinate to that of J.C. No. 1. If J.C. No. 2 issued his writ of *fieri facias* and sold the land, one might question that title a purchaser at that Sheriff's sale would obtain. One's first reaction would be that the purchaser would obtain title subject to J.C. No. 1's judgment lien. However, s. 6 of the Act provided that:

> . . . the purchaser (at the Sheriff's sale) . . . shall hold the premises purchased as aforesaid, free and clear of all other judgments . . ., by virtue whereof no execution has been executed upon the real estate so purchased.

Thus, on the basis of the statute, the purchaser obtained title free and clear of the lien of J.C. No. 1.

Subsequent changes in the legislation during this period focused on the certification and recording requirements. In 1827 under 8 George IV c. 7, the requirement that a judgment be entered at length before process could issue against land was dropped. The public would now be protected by an alphabetical docket of judgments to be kept by the Clerk. This was open to inspection and contained particulars of all judgments obtained in the Supreme Court. No judgment could bind lands and no execution could issue thereon until the judgment was entered and docketed.

The next development was also in 1827 with the introduction of the memorial of a judgment. Under 8 George IV co. 8, a judgment could not bind lands as against purchasers or mortgagees for value until a memorial of the judgment containing prescribed information was registered in the appropriate county land registry office. This further protection for certain third parties did not affect in any way the existing priorities of executions against land outlined in the above example. These provisions were of a restrictive nature and in no way enlarged the scope of the lien of a judgment.[10] However, their effect was to create a separate method of executing against land.

Until the introduction of the requirement of a memorial, the lien of a judgment would always bind land before any binding effect of a writ of *fieri facias* issued thereon. The simple approach to executing against land was to sell under the writ of *fieri facias* with title relating back to the prior lien of the judgment. This basic approach was illustrated in *Peabody* v. *McKnight.*[11] Now, however, it was quite possible that a

[10]*Supra*, footnote 8, at 47.

[11]2 N.B.R. 376 (N.B.C.A.).

judgment could be properly docketed and entered but no memorial registered in the appropriate county Registry Office. A writ of *fieri facias* could be issued at this stage, delivered to the Sheriff and the land ultimately sold thereunder. Presumably, the land would be bound by the writ from the time of its delivery to the Sheriff.[12] A purchaser of the land sold by the Sheriff would get title as of that time. There could be no relation back of title to a judgment lien, at least in cases of *bona fide* purchasers, as there was no previously registered memorial.[13]

The existence of such a dual approach to execution against land was recognized by the New Brunswick Court of Appeal in the 1843 case of *Nesmith* v. *Williston.*[14] This case dealt with a summary judgment which could not affect land under the existing legislation. However, the writ of *fieri facias* could be issued on such a judgment and could be used to reach land. The Court considered at some length the practice as to execution against land on Supreme Court judgments which did bind land. The Court stated that in such cases there could be "... two foundations of title to land sold under execution."[15] A judgment creditor might register a memorial which would cause the judgment to bind the property. Eventually this lien would be perfected by a writ of *fieri facias* with the normal relation back of title. In the alternative, the judgment creditor might issue the writ of *fieri facias* without previously registering a memorial. The Court in this case was faced with the issue of what title was bound by the writ in such a case. It confirmed the conclusion reached above that the purchaser at the Sheriff's sale would obtain the title at the time the writ was delivered to the Sheriff. The stage is now set to look at the Revised Statutes of 1854 which contained provisions that remained virtually unchanged until 1978.

New Brunswick 1854 - 1976

Revised Statutes 1854

Chapter 113 of the *Revised Statutes of New Brunswick, 1854,* entitled, *"Of Judgments, Execution, and Proceedings Thereon,"* repealed, consolidated

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[12]This conclusion would have been reached on the basis of s. 1 of 26 George III which, as we noted earlier, stated that land would be eligible in the same manner as goods and chattels were in the Province. The writ of *fieri facias* would bind goods and chattels from the time of issuance at common law, but this was altered by the provisions of 26 George III, c. 14. Section 13 of that Act provided that goods and chattels could be bound only from the time of delivery of the writ to the Sheriff.

[13]A conflict seemed to exist between this result and s. 5 of 26 George III s. 12 which stated that when land was sold under the execution the purchaser at the Sheriff's sale obtained the title of the judgment debtor at or before the time of the judgement. By necessary implication, the provision must be taken to have been amended by this subsequent legislation relating to the requirement for the registration of memorials.

[14](1843), 4 N.B.R. 459.

[15]*Ibid.*, at 462 (*per* Chipman C.J.)

and revised all of those provisions previously discussed relating to execution against land. The requirement for docketing a judgment before land could be bound by the judgment or an execution issued thereon was retained in Section 1. The provisions in 26 George c. 14[16] relating to the requirement concerning the date of signing judgment were dropped. They had become superfluous since Section 4 provided:

> A memorial of every such judgment, registered in the office of the Registrar of Deeds in the County where the lands lie, or an execution thereon delivered to the Sheriff to be executed, shall bind the lands of the person against whom the judgment was recovered or the execution issued.

No judgment could bind land until a memorial was registered. Although Section 4 talked in terms of the memorial binding the land once registered, subsequent provisions indicated that it was still really the judgment lien that bound. Section 5 of the Act stated, for example:

> Every judgment, of which a memorial shall be registered, shall bind the lands of the person against whom it was recovered. . . .

The dual approach to executing against land was clearly continued, as Section 6 provided:

> The lands of every person, his possessory right, and right of entry may be seized and sold as personal estate to satisfy his debts. . . .

Further, Section 4 clarified that where the writ of *fieri facias* was used alone it bound land on delivery to the Sheriff.

The only significant change seemed to be the question of priorities. Previously, the judgment lien of J.C. No. 1 could be extinguished if the land was sold under J.C. No. 2's execution first. This result was based on s. 6 of 26 George c. 12. However, no equivalent provision was found in the Revised Statute. The effect of this omission was dealt with by the New Brunswick Court of Appeal in *Mills* v. *Mills.*[17] The facts of the case before the Court may be summarized as follows:

> J.C. No. 1 obtained judgment and registered a memorial.
>
> J.C. No. 2 obtained judgment, issued a writ of *fieri facias* and two days later registered a memorial.
>
> J.C. No. 2 proposed to sell the property under his writ of *fieri facias.*

The question to be decided was the title a purchaser at the proposed Sheriff's sale would obtain. In light of the reference in Section 4 to the

[16]The revised *Statute of Frauds* was R.S.N.B. 1854, c. 123 entitled, *"Of Frauds and Perjuries".*

[17](1858), 9 N.B.R. 45 (N.B.S.C.).

memorial binding land and there being no provision equivalent to s. 5 of 26 George c. 12, the Court concluded that:

> . . . a judgment, the memorial of which has been registered in the county, has a priority as a charge on the land over a later judgment followed up by an execution.[18]

This was clearly a major change in priorities. Therefore, the purchaser at the Sheriff's sale under J.C. No. 2's writ would take title subject to J.C. No. 1's judgment lien.

Kerr v. Jamieson

There is one further provision in the Revised Statutes worth noting. The old legislation stated that the purchaser at the Sheriff's sale would get the title of the judgment debtor "at or before the judgment". This recognized the doctrine of relation back of title but caused a potential problem[19] if the writ of *fieri facias* were delivered to the Sheriff before a memorial, if any, was registered. If there were no previously registered memorial, there could be no relation back of title. Section 10 of the new statute stated:

> The Sheriff shall execute to the purchaser a deed . . . which shall be sufficient to convey all the interests of the person against whom such execution was issued.

This provision was broad enough to cover either the memorial method or the writ of *fieri facias* method of executing against land. The title conveyed by the Sheriff's deed would vary depending on the method used.

What effect did this change have on the doctrine of relation back of title? The answer to this question was given by the Court of Appeal in *Kerr* v. *Jamieson.*[20] The relevant facts of the case in chronological order are as follows:

> Judgment Creditor obtained a judgment and registered a memorial against Robert Jamieson at a time when he owned no real estate.
>
> Robert Jamieson acquired title to the property.
>
> Robert Jamieson transferred the property to John Jamieson, the defendant in this case.
>
> Writ of *fieri facias* issued on the judgment.

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[18]*Ibid.*, at 47.

[19]See, *supra*, footnote 12.

[20](1871), 13 N.B.R. 446 (N.B.C.A.)

> Sheriff seized and sold the subject property under the writ of *fieri facias* to Robert Kerr.
>
> Robert Kerr then leased the land to a Kerr, the plaintiff in this action.

The plaintiff claimed the right to possession of the property pursuant to the Sheriff's sale under the writ. John Jamieson claimed title under the deed from Robert Jamieson which was executed prior to delivery of the writ. There was no argument that the property was not subject to the lien of the judgment.[21] The lien of a judgment binds not only property owned by the judgment debtor at the time of registration of a memorial, but also property acquired after registration while the lien is still in force. The issue was what title had been conveyed to the purchaser at the Sheriff's sale. The defendant attempted to argue that the title conveyed was only the title bound at the time the writ was delivered to the Sheriff. Since his conveyance was prior to such delivery, he claimed the better title. The Court rejected that approach. Nothing in the Revised Statutes, including s. 10, changed the doctrine of relation back of title. The Court's conclusions on this point could not be clearer:

> In the present case, we think that as soon as the grant issued to Robert Jamieson, the land became subject to the lien of the existing judgment, which then, by means of the memorial, became a charge upon the land; and that when the execution issued upon that judgment, it had relation back, and defeated the conveyance to the defendant.[22]

Until the decision in 1974 in the case of *Tobias* v. *Bob Wilson & Co.*[23] this procedure of perfecting memorials by a sale under a writ of *fieri facias* with the doctrine of relation back of title seemed unquestioned.

Equitable Order for Sale

At this stage we should turn to the somewhat mysterious role of the courts of equity in perfecting the liens of common law judgments. In England the Courts of Equity would assist a common law judgment creditor by ordering the sale of land to accelerate recovery on the writ of *elegit,* rather than requiring him to wait to be satisfied out of the profits of one half of the land. This function was not required in New Brunswick because the writ of *fieri facias* reached land and provided for the sale by the Sheriff. The writ of *fieri facias,* however, could not solve all problems which a judgment creditor might encounter in attempting

[21]The Sheriff's deed had recited the title of the judgement debtor at the time the judgement was being conveyed. The defendant claimed that since the judgement debtor had no interest in the property at that time, the plaintiff would have no rights to the property. The court said that such a misrecital did not affec the validity of the deed. It was stated, at p. 448, that "[t]he intention of the law . . . was that the deed should convey to the lessor of the plaintiff all the right and which the Robert Jamieson had in the land which was bound by the judgement and execution . . .".

[22]*Ibid.*, at 450.

[23](1974), 8 N.B.R. (2d) 365 (N.B.Q.B.).

to perfect the lien of his judgment. Thus, the Court of Equity might give assistance to a common law judgment creditor by ordering the sale of the land to perfect the lien of the judgment. Two older New Brunswick cases indicate the restrictions on the exercise of this jurisdiction by a court of equity. In the 1870 case of *Robertson* v. *Arm trong* it was stated:

> A decree will not be made for the sale of land bound by a memorial of judgment, unless the judgment nreditor shows some reason why he could not have obtained the fruit of his judgment by n execution. When a judgment creditor has a legal charge, he must take all necessary proceedings at law to enforce his claim before he can ask th assistance of a Court of Equity.[24]

In 1871 the New Brunswick Court of Appeal decided *Black* v. *Hazen*[25] in which the above position was confirmed. In addition to the requirement that a judgment creditor exhaust his legal remedies, the Court indicated that there would have to be clear evidence that all personal property had been sold. This latter requirement was to en ure consistency with the sale of land under the writ of *fieri facias.*[26]

Devebre v. Austin

The inter-relationship between the two methods of perfecting the lien of a judgment is well illustrated in the case of *Devebre* v. *Austin*[27] decided by the New Brunswicn Court of Appeal in 1875. The case focused on the scope and effect of various provisions of the federal *Insolvency Act*[28] of 1869. One must have a general understanding of the statutory scheme under this legislation to appreciate the decision. An insolvent person would make an assignment in insolvency to the Assignee in Insolvency. The duties of such an Assignee in Insolvency were largely the same as those of a Trustee in Bankruptcy today. The property of the insolvent person was to be liquidated with the proceeds to be distributed to those unsecured creditors entitled under the legislation. The rights of secured creditors which had arisen before the assignment were unaffected. Therefore, the sale of property by the Assignee would be subject to their security interest. Generally, the intention of the legislation seemed to be to place simple judgment

[24]*Robertson* v. *Armstrong*, an unreported decision of Allen J. in November of 1870; See Stevens, James, *Digest of New Brunswick Reports* (3rd ed.) at 647.

[25](1971), 13 N.B.R. 272.

[26]Section 6 of R.S.N.B., 1854 c. 113 provided, *inter alia* ". . . but the Sheriff to whom a writ of *fieri facias* is directed shall not sell the lands until the personal estate, if any can be found, is exhausted . . ."

[27](1875), 16 N.B.R. 55, at 66.

[28](1869), S.C. 32-33 Vict. c. 16.

creditors in the category of unsecured creditors. Section 59 of the Act[29] provided that any lien created by a writ of *fieri facias* issued by a judgment creditor was abolished but made no mention of a lien of a judgment.

In the case at hand, the judgment creditor had obtained a judgment but had not issued a writ of *fieri facias*. He had, however, registered a memorial of the judgment prior to the assignment. The issue was whether the lien of the judgment survived the assignment so that any sale of land by the Assignee would be subject to this lien. What title then would the purchaser get from the Assignee? Section 48 of the Act dealt with such a sale of real estate by the Assignee:

> All sales of real estate so made by the Assignee, shall vest in the purchasers all the legal and equitable estate of the insolvent therein, and in all respects shall have the same effect as to mortgages, hypothecs or privileges then existing thereon, as if the same had been made by a sheriff in the Province in which such real estate is situate, under a writ of execution issued in the ordinary course, but no other, greater, or less effect then such Sheriff's sale; . . . .

The section determines the title sold by using an analogy to a hypothetical Sheriff's sale in which the Assignee plays the role of the Sheriff. He sells title to the land as if it had been bound by the writ of *fieri facias* at the time the Assignment was made. Secured creditor interests are preserved because the effect of the sale by the Assignee on "mortgages, hypothecs or privileges" is to be the same as a Sheriff's sale under execution. A purchaser at such a Sheriff's sale would clearly take title subject to such "mortgages, hypothecs or privileges". If there had been a writ of *fieri facias* delivered to the Sheriff prior to the delivery of the writ under which the Sheriff was selling land, then a purchaser would normally take title subject to that first writ. However, the analogy to a Sheriff's sale did not apply here when the Assignee sold the property since Section 59 abolished the lien created by a writ of *fieri facias*.

What would be the situation for a previously registered memorial, however? Two aspects of this problem were discussed by the Court. First, though the lien of the judgment was not expressly abolished under s. 59, was it abolished by implication? Or was the lien of a judgment in the class of "privileges" and thus clearly preserved by that section? The Court examined the nature of the lien of a judgment carefully and concluded that clearer words would have to be used to abolish it:

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[29]Section 59 of the federal *Insolvents Act* provided:

No lien or privilege upon either the personal or real estate of the Insolvent shall be created for the amount of any judgement debt, or of the interest thereon, by the issue or delivery to the Sheriff of any writ of execution, or by levying or seizing under such writ, the effect or estate of the Insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor shall have been assigned to an interim Assignee, or shall have been placed in compulsory liquidation under this Act; . . .

> . . . By the Revised Statutes, chap. 113, it is contemplated that the lien of a judgment created by the registry of a memorial, may be a continuing security — in fact, it becomes a kind of statutory mortgage on the debtor's land, which binds it for five years, at all events, and may be continued beyond that time by re-registering the memorial, if the judgment creditor does not wish to enforce it. To destroy this security, and place the judgment creditor in the situation of a person who had taken no security, and was only entitled to a pro rata dividend of the insolvent's estate, would be entirely opposed to the express provisions of our Statute, and cannot be done unless such an intention is shewn by the clear and irrestible language of the Insolvent Act.[30]

At this stage the court determined that the lien of the "memorial" could be in the category of a "privilege" under s. 48.

Secondly, would the lien of a previously registered memorial survive a Sheriff's sale under a subsequent writ of *fieri facias* issued on a second judgment? The Court had no difficulty in reaching its conclusion.

> Again, the sale is to vest in the purchaser exactly the same estate which a Sheriff's deed would vest if the property had been sold under an execution. Then what estate would a Sheriff's deed have vested in the purchaser if an execution had issued on this hypothetical judgment and the land been sold. Clearly, not an absolute estate: but an estate subject to the judgment of a memorial which had been registered prior to the Assignment in Insolvency, the only interest which the judgment debtor had — as was decided in *Mills* v. *Mills*.[31]

It cannot be overemphasized that this statement from *Devebre* v. *Austin* and *Mills* v. *Mills*[32] itself, dealt with a situation where there were two separate and distinct judgments.

The Assignee made one last argument in favour of his position that the lien of the judgment had effectively been abolished by implication from the statutory scheme. Section 59 had the effect of requiring all proceeds from the sale of property under the writ of *fieri facias* to be distributed among the unsecured creditors. Since the lien of the memorial would be perfected by a sale under a writ of *fieri facias*, as a practical matter, there could be no priority for the lien. Therefore, the Assignee argued, the lien created by the registration of the memorial must have been intended to be abolished. The Court rejected that argument since it was based on the assumption that the only method of perfecting the lien of a judgment was by the writ of *fieri facias*:

> If, for the purpose of perfecting his lien, the plaintiff should issue an execution on his judgment, and should then be met by the impediment created by the *Insolvent Act* to the exercise of his legal rights, we think he would have made out a case to ask the interference of a Court of Equity;

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[30]*Devebre* v. *Austin* (1875), 16 N.B.R. 55 (N.B.C.A.).

[31]*Ibid.*, at 70.

[32](1858), 9 N.B.R. 45 (N.B.S.C.)

> because he would have shewn that he had a right, by virtue of his judgment, but that, in consequence of the defendant's insolvency, he could not obtain satisfaction of it in the Court of Law by the ordinary process of execution.[33]

The Court reached this conclusion despite arguments by the Assignee that such a result would be equivalent to the court repealing the Federal statute.

Massey-Harris Co. v. Whitehead

One final case to examine in this period of development is *Massey-Harris Co.* v. *Whitehead.*[34] Unfortunately, the facts involved some confusing aspects which must be dealt with before the significance of this decision for the perfection of memorials can be understood. The plaintiff company obtained a judgment against the judgment debtor, Amasa C. Whitehead, and registered a memorial in the appropriate County Registry Office. At the time of registration, the judgment debtor owned the property in question. The memorial was renewed on two occasions and while subject to the renewed memorial the judgment debtor conveyed the property to the defendant in this case, Barry J. Whitehead. The judgment debtor then died intestate, and as found by the trial judge, without personal property. No administrator of his estate had been appointed when the plaintiff company made its application by way of originating summons. The plaintiff was seeking a declaration that the land was subject to the lien of its memorial. No writ of *fieri facias* had been issued prior to the plaintiff's application.

On the basis of the above facts, what would be the normal procedure for a judgment creditor to follow to perfect the lien of his judgment? Order 42, r. 23(a) of the New Brunswick Rules of Court requires that a judgment creditor obtain leave of the court before issuing a writ of *fieri facias* after the death of the judgment debtor. Normally, in a case where the judgment debtor died intestate, leave would not be granted until an administrator had been appointed. As was stated in the decision:

> Under the old practice the validity of a claim against an estate could only have been investigated after a decree for administration has been made.[35]

The significance of such a decree for administration would be to allow a court to grant leave to the judgment creditor to issue his writ of *fieri facias*. However, Order 55, r. 3 apparently contemplated another means of reaching this result. Under this provision, any creditor of a deceased person could apply by originating summons to a Judge for a

[33] *Supra*, footnote 30, at 71.

[34] (1923), 51 N.B.R. 282 (N.B.C.A.)

[35] *Ibid.*, at 288.

determination of any question affecting the rights or interest of the person claiming to be a creditor and make a declaration accordingly without an administrator of the estate being appointed. The defendant, Barry J. Whitehead, contested the right of the trial judge to make his declaration under this provision. The court stated however:

> The effect of the rule is, in my opinion, to change the law, and give to creditors . . . claiming any of the relief mentioned in the rule, the right to have their claims adjudicated upon and determined without an administrator of the estate or trust.[36]

Once such a determination was made under O. 55 r. 3, the next step for a judgment creditor would normally be an application for leave to issue a writ of *fieri facias*. The writ could then be used to perfect the lien of the memorial in the usual manner.

However, this did not happen in *Massey-Harris Co.* v. *Whitehead.* The trial judge made the declaration under O. 55, r. 3 and immediately exercised his equitable jurisdiction and ordered the sale of the land to satisfy the lien of the judgment. One of the grounds of appeal in the defendant's brief was:

> 4. The Court has no authority to interfere. The plaintiff should proceed to revive his judgment and sell the lands under execution.[37]

Such an objection would appear to be very well founded in light of earlier cases such as *Black* v. *Hazen.*[38] The Appeal Court, however, rejected this proposition in the following very important paragraph:

> Before the Judicature Act, when the jurisdiction exercisable by Courts of Equity and that exercisable by the Courts of common law was clearly defined, a judgment creditor who had obtained a lien on the lands of his debtor by registering a memorial of judgment, could not enforce his lien in a Court of Equity until he had exhausted his remedies at law: *Black* v. *Hazen.* But now by the Judicature Act, law and equity are to be administered concurrently and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail.[39]

The trial judge was, therefore, acting properly when he ordered the sale even before the writ of *fieri facias* had been issued and without any evidence of an impediment to perfecting the lien by that method. The Appeal Court did, however, confirm that the equitable order for sale would not be given unless it were clear that the property could have been sold under the writ of *fieri facias*. In this case, the evidence

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[36]*Ibid.*

[37]*Ibid.*, at 285.

[38](1871), 13 N.B.R. 272 (N.B.C.A.).

[39]*Massey-Harris Co.* v. *Whitehead* (1923), 51 N.B.R. 282, at 288 (Citations omitted).

indicated that there was no personal property and therefore the equitable order for sale was proper.

Despite the somewhat confused fact situation and the complications centering around the requirement for an administrator of the estate, it appears clear that this case makes a dramatic change in the mechanics of perfecting the lien of a judgment. One would apparently have the option of using either the equitable order method or the *fieri facias* method. In most cases the most efficient and least expensive method would be the writ of *fieri facias*. On the other hand, there may be some advantage is using the equitable order method, as will be discussed later.

Summary

At this stage in the development of the law relating to execution against land in New Brunswick, the rules and procedures appeared clear and settled. There were two separate, distinct and independent methods. First a judgment creditor could use a writ of *fieri facias* alone to bind, seize and sell land. Second, a judgment creditor could register a memorial. The lien of the judgment thereby created could then be perfected in one of two ways, more or less at the option of the judgment creditor. The judgment creditor could issue a writ of *fieri facias* and have the land sold thereunder with title relating back to the memorial. In the alternative, the judgment creditor could perfect the lien of the judgment by an equitable order. Now it is time to turn to the first of the two decisions involving the case of *Tobias* v. *Bob Wilson & Co.*[40]

1974 — *Tobias* v. *Bob Wilson & Co. Ltd.*

In 1974, the relevant provisions of the *Memorials and Executions Act*[41] had undergone few changes from the statutory provisions in force when cases such as *Kerr* v. *Jamieson*[42] and *Devebre* v. *Austin*[43] were decided. Section 5 of the Act stated:

> A memorial of judgment . . . or a writ of fieri facias . . . binds the lands of the person against whom the judgment was recovered or decree made or execution issued.

Section 6 of the Act stated:

> Every judgment or decree of which a memorial is so registered binds the lands of the person against whom the judgment or decree was recovered. . . .

[40](1974), 8 N.B.R. (2d) 365 (N.B.Q.B.).

[41]R.S.N.B. 1973, c. M-9.

[42](1871), 13 N.B.R. 466 (N.B.C.A.).

[43](1875), 16 N.B.R. 55 (N.B.C.A.)

Section 11 of the Act stated:

> The lands of a person may be seized and sold under execution as personal estate to satisfy his debts. . . .

Section 15 of the Act stated:

> The sheriff shall execute to the purchaser a deed . . . of lands sold by him under execution reciting the execution under which the same were so sold . . . which shall be sufficient to convey all the interest of the person against whom the execution was issued. . . .

Following is a chronological summary of the relevant facts in the case of *Tobias* v. *Bob Wilson & Co. Ltd.*:

(1) March 4, 1948 — subject property conveyed to John Wilson and Robert Wilson as joint tenants.

(2) August 13, 1963 — subject property was mortgaged to Eastern Trust — now Canada Permanent Trust.

(3) June 10, 1968 — judgment against Robert Wilson and his limited company.

(4) June 12, 1968 — memorial of judgment registered.

(5) July 16, 1969 — lease to Martin-Senour Co. Ltd. executed by John Wilson and Robert Wilson.

(6) August 13, 1969 — lease to Peacocks Flower Shop Limited executed by John Wilson and Robert Wilson.

(7) February 15, 1972 — John Wilson conveyed his one-half interest in the subject property to Robert Wilson.

(8) February 25, 1972 — Robert Wilson *et ux* mortgaged the subject property to John Wilson.

(9) July 21, 1972 — Robert Wilson conveyed the subject property to himself and his wife as joint tenants.

(10) December 20, 1971 — a second memorial of the June 10, 1968 judgment was registered.

(11) February 15, 1973 — a writ of *fieri facias* was delivered to the Sheriff.

The Sheriff proposed to sell the property at public auction on May 1, 1973 but a question arose as to the interest in the property that would be sold. The judgment debtor made an application for a determination of that question. Stevenson J. acceded to the request, stating:

> It seems to be in the interests of the efficient administration of justice to determine such issues before rather than after a sale.[44]

[44](1974), 8 N.B.R. (2d) 365, at 369.

Before undertaking a detailed examination of the decision, some of the peripheral issues raised by the facts of the case should be eliminated. First, there was no problem with the exigibility of an equity of redemption in land. Section 1 of the *Memorial and Execution Act* defines land as including *inter alia* ". . . the equity of redemption of a mortgagor who is a judgment debtor . . .". Second, although there is some authority[45] questioning the exigibility of a joint tenant's interest in land, Stevenson J. clearly decided that it was exigible.[46] He also followed authorities[47] to the effect that upon sale by the Sheriff, the joint interest is terminated and becomes a tenancy in common. Third, the leases were given in part by John Wilson whose interest in the land was not subject to the lien of the judgment, therefore, the tenants' interests were probably not fully subject to the lien. One final problem was the effect of the mortgage back to John Wilson from Robert Wilson. Would the after acquired property aspects of the memorial catch and bind the one-half interest in the property conveyed to Robert Wilson before the mortgage back to John Wilson? The answer would normally be yes. However, if it could be shown to be a purchase money mortgage, there is a line of authority[48] to the effect that the memorial would only bind the equity of redemption in the interest conveyed to Robert Wilson. As a result of the decision reached by Stevenson J. in this case, this question did not have to be answered.[49]

On the basis of the facts, the above comments and ignoring the leases, what would be the interest bound by the memorial of judgment. Previous authorities would seem to suggest that it would be:

> (a) the original one-half interest owned by Robert Wilson at the time of registration of the memorial subject only to the mortgage to Canada Permanent Mortgage Company.

plus

> (b) the one-half interest acquired from John Wilson also subject to the Canada Permanent Mortgage and possibly the mortgage to John Wilson if it were a true purchase money mortgage.

Further, on the basis of previous authorities, the lien of the judgment should be perfected by the sale of the property under the writ of *fieri facias*. This is in fact what the judgment creditor was attempting to do.

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[45]Third Report of the Consumer Protection Project, Vol. II, *Legal Remedies of the Unsecured Creditor After judgement*, by Robert W. Kerr, October 1976, Published by the Province of New Brunswick, at 16.

[46]*Supra*, footnote 44, at 372.

[47]*Power* v. *Grace*, [1932] 2 D.L.R. 793 (Ont. C.A.).

[48]*Nevitt* v. *McMurray*, (1886) 14 O.A.R. 126 (Ont. C.A.); *McMillan* v. *Munro*, (1898) 25 O.A.R. 288 (Ont. C.A.).

[49]*Supra*, footnote 46.

However, Stevenson J. did not treat the sale under the writ as perfecting the lien of a memorial, but as if it were a sale under a writ of *fieri facias* by itself. As authority for this approach Stevenson J. made the following statement:

> If an execution issues on a judgment a memorial of which has been registered and the debtors land is sold pursuant to the execution, the Sheriffs deed does not vest in the purchaser an absolute estate but only an estate subject to the judgment, that being the only interest the judgment debtor has *Devebre* v. *Austin*.[50]

There is no question that the statement was made in *Devebre* v. *Austin*, but not in the context of a single judgment with a registered memorial and a subsequent writ of *fieri facias*. That decision, as emphasized previously, involved a hypothetical Sheriff's sale with two separate judgments. The first judgment had a registered memorial and the second judgment had the writ of *fieri facias* issued thereon under which the property was sold. This statement taken out of context led Stevenson J. to the conclusion that the interest to be sold at the Sheriff's sale was that bound at the time of the delivery of the writ of *fieri facias* to the Sheriff. This meant that any purchaser would buy the property subject to the lien of the same judgment creditor's memorial since the sale had in no way perfected that lien. As to how that lien would be perfected, Stevenson J. suggested the following:

> It will be asked — how is the lien of a memorial of judgment enforced? While it is not necessary for me to do so I would refer to Order 51, rule 1 and also to Order 55, rule 3 and the case of *Massey-Harris Co.* v. *Whitehead*.[51]

This statement would appear to allude to an equitable order for the sale of the property to perfect the lien of the judgment. The clear inference is therefore that such an equitable order is the only method now available to perfect the lien of the judgment and that it could be obtained at any time upon proper application.

The attempt to sell under the writ of *fieri facias* was abandoned in this case and the judgment creditor attempted to get an equitable order for sale. In *Tobias* v. *Bob Wilson & Co. No. 2*,[52] which will be discussed in detail later, Stevenson J. expressed surprise that the judgment creditor had not sold the property under the writ of *fieri facias*. However, in light of his previous decision, that would seem understandable since any purchaser at the Sheriff's sale would take subject to the lien of the memorial. For example, assume a property is worth $10,000 free of any liens or encumbrances and that a memorial is registered against it for $20,000. No one would pay anything for the property at a Sheriff's sale

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[50] *Ibid.*, at 371.

[51] *Ibid.*, at 373.

[52] (1976), 13 N.B.R. (2d) 20, at 25 (N.B.Q.B.).

under a writ of *fieri facias* subsequently issued on that judgment. Whereas one would expect the property to be sold only once to satisfy the debt, now it could be sold twice; once under the writ of *fieri facias* and again by equitable order. It would almost be the same as asking someone to buy a $10,000 property that had a $20,000 mortgage on it.[53]

Can such a result be correct, either on the basis of the authorities we have reviewed or on the basis of common sense? It would seem that the decision is incorrect on both points particularly in light of *Kerr* v. *Jamieson.*[54] This is not to say, however, that the decision can be ignored since it is the most recent authority in this Province dealing with the question of perfecting memorials. Further, there is a possible ground for the decision which was not discussed in the reasons for judgment although the provision was cited. Section 20(1) of the *Memorials and Executions Act* read as follows:

> The effect of the sale and conveyance under execution of an equity of redemption in lands shall be to vest in the purchaser, his heirs and assigns, all the interest of the mortgagor therein at the time the writ was delivered to the sheriff to be executed, as well as at the time of the sale, and also the same rights as the mortgagor would have had if the sale had not taken place.

Read in isolation, one could conclude that this provision requires, in all cases, that a purchaser at a Sheriff's sale under a writ of *fieri facias* can only obtain title to the equity of redemption determined from the time of delivery of the writ to the Sheriff. It should be remembered that at common law, an equity of redemption was not exigible. In 1903 our legislation was amended so as to redefine "land" to include an equity of redemption in land.[55] One of the problems with equities of redemption involved the contractual rights under the mortgage which would ultimately determine the mortgagor's right to redeem. Normally, a sale under a writ of *fieri facias* would convey only proprietary rights and not such contractual rights. To solve this problem, the final clause of s. 20(1) ensures the transfer of all rights, both proprietary and contractual. Sections 20(2) and 21 make further provisions as to the rights of a purchaser of the equity of redemption. The solution to the problem of contractual rights seems to be the primary purpose of Sections 20 and 21.

Can s. 20(1) justify the decision reached by Stevenson J.? Could the reference in s. 20(1) to the title at the time of delivery of the writ to the Sheriff have been intended to abolish the doctrine of relation back of title in cases of equities of redemptions? If so, an anomally would exist

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[53]The problem exists only if the value of the property is less than the amount of the judgement. If the property is worth $21,000 and the judgement is for $20,000, a purchaser would pay $21,000 since the $20,000 would eliminate the lien of the memorial.

[54](1871), 13 N.B.R. 446 (N.B.C.A.).

[55]R.S.N.B. 1903, c.-128, s. 1.

with cases where the land sold was free from any mortgage. It is not impossible that the doctrine of relation back of title was eliminated in the case of an equity of redemption, but there does not appear to be a good reason why this would be done. It makes far more sense to treat s. 20(1) as applying only to cases where the writ of *fieri facias* is used by itself. Any drastic change in the law which would clearly create anomalies should only occur after clear statutory direction.

There is an even stronger argument that Section 20(1) could not have abolished the doctrine of relation back of title in cases of equities of redemption. It rests on the theoretical basis for the doctrine itself. It is submitted that the doctrine does not depend in any way on statutory authority; especially provisions such as s. 15 and s. 20(1) of the statute. It depends on the meaning of a judgment binding land and can be traced to the *Statute of Westminster* and the writ of *elegit* in England. The decision of the New Brunswick Court of Appeal in *Devebre* v. *Austin*[56] is very instructive in this regard. Following are a few excerpts from that decision:

> Now what is meant by this expression, "binds the lands"? . . . It seems to us that . . . when a memorial of a judgment is duly recorded, it creates a charge upon the land, and that the judgment debtor, though he still continues to be the legal owner, cannot dispose of the land except subject to the payment of the judgment. Unless the Act means that, we are at a loss to know what it does mean.[57]

And further in the next paragraph:

> Independently of our Statute, the lands were bound at common law from the time of signing the judgment, *so that execution could be had of them though the debtor aliened bona fide before execution sued out: Tidd's Pr. 968.* In *Cruise's Dig. Title XIV, Sec. 47,* it is said that "a judgment binds all lands whereof the debtor was seized at the time when the judgment was entered, or which he afterwards acquires, and no subsequent act of his, not even an alienation for a valuable consideration to a purchaser without notice of the judgment, will avoid it." This doctrine was acted on by this Court in Doe dem. *Kerr* v. *Jamieson*. Under the Statute of Westminster, the judgment debtor could not withdraw his land from the operation of the writ of *elegit: Bond* v. *Bell. This rule of the common law* was limited and restrained by our Act, which declared that judgments should only be binding against subsequent purchasers from the time of the registry of a memorial. But when a memorial was registered, no subsequent conveyance by the judgment debtor could avoid the judgment, nor could he, by any subsequent act, withdraw his land from the operation of it.[58] (Emphasis added; citation omitted.)

It is submitted that the doctrine of relation back of title to the registration of the memorial as applied in *Kerr* v. *Jamieson*[59] rests today

[56](1875), 10 N.B.R. 55 (N.B.C.A.).

[57]*Ibid.*, at 66-67.

[58]*Ibid.*, at 67 (Citation omitted).

[59](1871), 13 N.B.R. 446 (N.B.C.A.).

on s. 5 of the *Memorials and Executions Act* and not on provisions such as Sections 15 and 20. The possibility that subsequent cases will treat *Tobias* v. *Bob Wilson & Co. No. 1* as standing for the proposition that the doctrine of relation back of title depends on Section 15 or 20 is the greatest danger of the decision in light of subsequent amendments to those sections.

In conclusion, the effect of *Tobias* v. *Bob Wilson & Co. No. 1* is unclear but cannot be ignored since it represents the most recent pronouncements on the subject in the Province. On initial reading, the decision does not recognize the existence of the doctrine of relation back of title to a memorial. This position appears untenable in light of previous authority. The alternate ground for the decision, s. 20(1) dealing with the effect of the sale of an equity of redemption, appears to be unacceptable also. Aside from the fact that an anomolous situation would be created, such a position would suggest that the doctrine of relation back of title rests on such statutory provisions. However, as just indicated, the basis of the doctrine is the provision in s. 5 of the *Memorials and Executions Act* stating that upon registration of a memorial, a judgment "binds" land of the judgment debtor. The common law doctrine of relation back of title would then come into effect. The principle purpose and effect of s. 20 would be of a housekeeping nature to ensure a proper transfer of both proprietary and contractual rights under the mortgage. It is, therefore, this writer's view that the common law doctrine of relation back of title continues in all situations despite the decision in *Tobias* v. *Bob Wilson & Co. No. 1.*

TOBIAS V. *BOB WILSON & CO. No. 2*[60]

After the first decision, the attempt by the judgment creditor to have the land sold under the writ of *fieri facias* was abandoned. In this second case, an application was made to have the Court exercise its equitable jurisdiction to have the land sold to satisfy the lien of the memorial. Mr. Justice Stevenson had no problem in deciding that he had the power to make such an order,[61] but refused to do so in the circumstances of this case on the grounds that *Black* v. *Hazen*[62] required that all legal remedies must have been exhausted first. This decision seems to be contrary to the Court of Appeal decision in *Massey-Harris Co.* v. *Whitehead*[63] discussed in detail earlier. As noted, that decision appeared to overrule *Black* v. *Hazen* on the basis of the merging of law and equity under the *Judicature Act.* Mr. Justice Stevenson's decision is

[60](1976), 13 N.B.R. (2d) 20, at 21 (N.B.Q.B.).

[61]*Ibid.*, at 24-25.

[62](1871), 13 N.B.R. 272 (N.B.C.A.).

[63](1923), 51 N.B.R. 282 (N.B.C.A.).

even more surprising as it indicates that there must be a sale under the writ of *fieri facias* which would be an attempt to perfect the lien of the memorial. That proposition seems totally contrary to his approach in the first decision.[64] Even if *Black* v. *Hazen* were applicable, it would seem reasonable that a judgment creditor would be entitled to an equitable order if he could show that a sale under the writ of *fieri facias* would be a futile effort. To require such a time consuming and costly attempt at a sale seems totally unnecessary. It is this writer's opinion that this decision cannot stand in light of previous authority.

AMENDMENTS TO MEMORIALS AND EXECUTIONS ACT

Writ of *Fieri Facias* Method

Since the decisions in *Tobias* v. *Bob Wilson & Co.*, there have been several amendments to the *Memorials and Executions Act* with respect to execution against land in New Brunswick. Until September 1, 1978, Section 5 of that Act had provided that:

> . . . a writ of fieri facias issued . . . and delivered to the sheriff to be executed, binds the lands of the person against whom . . . the execution issued.

As of the above date, the section was amended to read as follows:[65]

> 5. A memorial of a judgment obtained in the Supreme Court, or of a decree of The Court of Divorce and Matrimonial Causes providing for the payment of alimony or other money, or of a judgment obtained in the County Court registered in the registry office of the county in which the lands are situated, binds the lands of the person against whom the judgment was recovered, decree made or execution issued, but no writ of *fieri facias* issued on such judgment or decree, and delivered to the sheriff to be executed shall bind such lands.[66]

The purpose and effect of the amendment was stated in the Explanatory Notes to the Bill to be as follows:

> This amendment takes away the binding effect of a writ of *fieri facias*, but a memorial of judgment will continue to bind land. This will do away with the necessity of checking the Sheriff's records to determine if real property is bound by a writ of *fieri facias*.

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[64]This apparent inconsistency may be explained if Stevenson J. has interpreted *Black* v. *Hazen* as requiring that all legal steps be taken to satisfy the judgement, rather than that all legal steps be taken to perfect the lien of the judgement on the land. Such an approach to *Black* v. *Hazen* is unfounded in cases of judgement liens. The principle was for the removal of an inpediment to execution at common law.

[65]1978 S.N.B., c.-37, s. 2.

[66]The reference to "or executions issued" immediately prior to the last comman in the section should not be there since this new provixion deals only with memorials of judgements.

On September 1, 1978 when the provision came into effect, it was conceivable that a judgment creditor could have previously delivered a writ of *fieri facias* to the Sheriff and not have registered a memorial. Serious questions arose with this amendment. Was the lien of all writs of *fieri facias* now abolished? Or was the amendment to prevent only writs delivered to the Sheriff after September 1, 1978 from binding land? What would be the status of a writ delivered to the Sheriff before September 1, 1978 but renewed after that date? The Explanatory Note would seem to require the conclusion that all writs of *fieri facias* ceased to bind land on that date. However, there is a recent decision in which the opposite conclusion was reached.

In *Attorney-General of Canada* v. *Boucher et al,*[67] the Attorney-General had delivered the writ of *fieri facias* to the Sheriff in October of 1959. The writ was renewed faithfully, the last renewal being on June 19, 1979.[68] The Attorney-General sought a declaration that the writ of *fieri facias* continued to bind the land with priority tracing to the delivery of the writ to the Sheriff in 1959. The argument against such a proposition was that the effect of the amendment to s. 5 was the termination of any lien of the writ, particularly where the present status depended upon a renewal after September 1, 1978. After reviewing authorities on the question of statutory interpretation, Meldrum J. concluded:

> I can not find any indication in the legislation to suggest an intention to make it retrospective. Without a clear and unequivocal wording I can not read the section so as to eliminate rights which may otherwise have vested in the Crown in right of Canada as a result of the judgment and execution.[69]

Thus a writ delivered to the Sheriff before September 1, 1978 and validly renewed will continue to bind land in this Province. Therefore, a lawyer acting for the purchaser of real estate would still be well advised to obtain a Sheriff's certificate for some time to come despite the declared intention of the amendment.

In addition to the above transitional problem, the amendment to s. 5 raises questions as to the status of what previously had been a separate method of executing against land. Can one say that the separate method of using the writ of *fieri facias* alone still exists? Theoretically the answer is yes. Section II of the *Memorials and Executions Act* was unaffected by the 1978 amendments. That section continues to provide that:

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[67](1980), 28 N.B.R. (2d) 213 (N.B.Q.B.).

[68]The issue of the effect of s. 2 of the *Limitation of Actions Act,* R.S.N.B. 1973, c. L-8, stating that: "No action . . . upon any judgement . . . shall be brought but within twenty years after the cause of action arose". In view of the apparent lack of a limitations period under the federal legislation, it would appear that this provincial section would apply pursuant to the *Federal Court Act* R.S.C. 1970 2nd Supp., c. 10, s. 56. This is further assuming that on the facts there were no grounds for extending the limitation. "Action" is defined under the *Limitations of Actions Act* to include "any civil proceeding". "Proceeding" is defined to include inter alis "sale proceedings under an order of a court".

[69]*Attorney-General of Canada* v. *Boucher et al.,* (1980), 28 N.B.R. (2d) 213, at 216 (N.B.Q.B.).

> The lands of a person may be seized and sold under execution as personal estate to satisfy his debts. . . .

As a practical matter, however, the answer is no. The recent amendments force the judgment creditor to proceed by the memorial of judgment route. This is due to the delay in the binding of the writ and the effect on the title sold by the Sheriff. Clearly, the Sheriff can seize real estate under a writ of *fieri facias*, the writ itself directs him to. But what interest is to be sold? Surely the amendment to s. 5 was not intended to have the effect that at no time could the writ ever bind the land. If this were the case, then s. 11 would be useless. The sensible result would be to say that in light of s. 11 the writ would bind only upon seizure of the land by the Sheriff. It would follow that the interest sold at the Sheriff's sale would be the interest of the judgment debtor at the time of seizure.

It was not until 1979 that the situation was clarified by further amendments to the *Memorials and Executions Act.*[70] The effect of these amendments to sections 15 and 20(1) was that a Sheriff's deed to land sold under a writ of *fieri facias* would convey the interest of the judgment debtor in the property ". . . at the time the lands were first advertised for sale in a newspaper or *The Royal Gazette* under s. 13(1) . . .". One would logically conclude that the time of first advertisement must now be the time when the writ binds land. A lawyer acting for the purchaser of land may rely on the fact that he has seen no such advertisement. Further, since any judgment creditor after September 1, 1978 is almost certainly going to register a memorial to ensure an early binding of the property, a lawyer for the purchaser of land may rely on the fact that he found no memorial in the record office. However, the only certain method is to continue to obtain a Sheriff's Certificate. If it reveals a writ in the Sheriff's hands, then the lawyer must determine whether the property has been advertised and thus bound by that writ.

Perfecting Memorials of Judgment

One final question raised by these recent amendments relates to the methods now available to perfect the lien of a judgment. There have been no changes with regard to the equitable order for sale. The areas of concern involve the use of the writ of *fieri facias* to perfect the memorial and the problems created by the decision in *Tobias* v. *Bob Wilson & Co. No. 1.*[71] Aside from the problem that the decision treated any sale under a writ of *fieri facias* as having no relation to a previously registered memorial of judgment, there is the greater problem that the

[70]S.N.B. 1979, c. 40, ss. 1 and 2.

[71](1974), 8 N.B.R. (2d) 365 (N.B.Q.B.).

case will be rationalized on statutory provisions such as s. 20(1). If this happens, then the effect of the amendments to s. 15 as well as to s. 20(1) will be that the doctrine of relation back of title has been abolished completely. As noted previously, the basis for the doctrine of relation back of title seems to demonstrate that the reliance of the *Tobias* case on such a provision was incorrect. It is the meaning of the binding of the judgment when a memorial is registered that is critical. The property cannot later be withdrawn from the operation of a writ of execution with power to reach land which is subsequently issued on that judgment. As s. 11 has been unaffected, the writ of *fieri facias* is still such a writ and could be used to perfect the lien of a judgment. Therefore, the purchaser of the land at the Sheriff's sale would get title of the judgment debtor at the time of registration of the memorial. Sections 15 and 20(1) as amended should have no effect whatsoever where the sale is being held to perfect the lien of a memorial.

PROBLEMS OF PRIORITY

Renewals

Section 6 of the *Memorials and Executions Act* provides as follows:

> Every judgment or decree of which a memorial is so registered binds the lands of the person against whom the judgment or decree was recovered for five years from the registry, and after that period, if the judgment or decree remains unsatisfied, the memorial may be renewed for a further period of five years, with like effect, and so on as often as required.

The provision does not specify how the renewal is to be made though registration of a new memorial would presumably be effective. Further, there are indications in *Devebre* v. *Austin*[72] to the effect that registration of the original memorial will also be a sufficient renewal. What will be the effect of this so called renewed memorial? The intention appears to be that property will be bound by a judgment only when a current memorial is registered; current referring to the five-year term of a memorial. Assume the following fact situation:

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[72](1875), 16 N.B.R. 55 (N.B.C.A.). At page 70, it was stated:

". . . it is contemplated that the lien of a judgement created by the registry of a memorial, may be a continuing security — in fact, it becomes a kind of statutory mortgage on the debtor's land, which binds it for five years, at all events, and may be continued beyond that time by re-registering the memorial if the judgement creditor does not wish to enforce it."

It should be pointed out, however, that 10 Vict. c. 42 provided *inter alia*:

. . . that after the expiration of five years from and after the time of the registry of any such memorial of judgement shall be of no force or effect against lands and C., as to any purchaser (mortgagee not named) unless a like memorial is again registered within five years before the conveyance to any such purchaser is duly registered.

October 1, 1974 — Memorial registered against J.D.
October 1, 1975 — X purchases land from J.D.
October 1, 1980 — Memorial re-registered
October 30, 1980 — Y purchases land from X

Does Y take title to the land free and clear of the lien of the memorial against J.D.?

The answer would seem to be yes. The apparent intention of the provision is that the judgment will cease to have any effect on the land of the judgment debtor after five years. Therefore, if the memorial is not renewed before the expiration of that five year period, the purchaser from J.D. has good title free of the judgment lien. When the memorial is renewed, it can only bind land of the judgment debtor in the same manner as the original. The original memorial binds the lands of J.D. at the time of registration. Since the judgment debtor no longer owns the land on October 1, 1980, the renewed memorial cannot affect the purchaser's title in any way. To maintain one's priority against the land of a judgment debtor in the above situation, the judgment creditor must ensure that there is not one day beyond the five-year period that there is not a current memorial in the Record Office.

Suppose, on the other hand, the judgment debtor does not convey the property during the term of the original memorial or the period prior to the registration of the renewed memorial but makes a conveyance after the renewal. The answer would seem clearly to be that the property is bound in the hands of the purchaser since the renewal is to bind in the same manner as the original and at the time of registration of the renewal the judgment debtor still owned the land.

In the case of a writ of *fieri facias*, renewal is dealt with by Order 42, r. 20[73] of the Rules of Court. This provision is relatively straightforward and should cause no problems.

Unregistered Instruments

Assume a judgment debtor has conveyed his land prior to the registration of a memorial but the deed is not registered until after the memorial. Does the memorial take priority over the conveyance? An argument for this would appear possible on the basis of s. 19(1) of the *Registry Act*:[74]

[73]A writ of execution, if executed, shall remain in force . . ., unless renewed in the manner hereinafter provided, but such writ may, at any time before its expiration, be renewed by the party issuing it for two years from the date of such renewal, and so on from time to time during the continuance of the renewed writ, ...

[74]*Registry Act*, R.S.N.B. 1973, c. R-6.

> All instruments may be registered in the registry office for the county in which the lands lie, and if not so registered, shall . . . be deemed fraudulent and void against subsequent purchasers for valuable consideration whose conveyances are previously registered.

Since the memorial was registered first, why can't it be said that the judgment creditor won the race to the registry office and therefore the deed would be deemed fraudulent and void as against him? In *MacDonald* v. *Royal Bank of Canada*[75] that argument was rejected. It was held that s. 19(1) was not intended to change the basic common law principle that a judgment creditor cannot obtain any greater right or priority to property than the judgment debtor himself had at the time the property was bound. At the time the memorial was registered the judgment debtor had no interest in the property, therefore, the memorial had no effect on the land.

Such a situation would be intolerable. No one could rely on good record title when purchasing property at the Sheriff's sale. Section 19(2) of the *Registry Act* appears to solve the problem. It states that such unregistered conveyances are deemed fraudulent and void as against a judgment creditor who had previously registered a memorial unless the conveyance is registered within three months of its execution. The purpose of the section was to permit a purchaser of land at a sale perfecting the lien of a memorial to rely on record title as long as the sale was held more than three months after the memorial was registered. Despite its apparent purpose, there appears to be a major problem with the effect of s. 19(2). It is based on the assumption that only instruments creating rights can prejudice a judgment creditor. A judgment creditor will clearly take subject to equities for example that are not created by an instrument. One should therefore be extremely cautious before relying completely on good record title bound by the memorial.

The same situation existed where the judgment creditor used the writ of *fieri facias* rather than the memorial. The writ when delivered to the Sheriff would take subject to unregistered instruments. Section 19(2) at one time dealt with this situation by declaring such conveyances fraudulent and void as against judgment creditors who delivered a writ to the Sheriff unless the conveyance was registered within three months of its execution. However, section 19(2) has recently been amended in an apparent attempt to bring it in line with recent changes regarding the writ of *fieri facias* binding land. The reference to such conveyances being deemed fraudulent and void as against judgment creditors who have delivered a writ of *fieri facias* has been dropped. However, the new provision does not seem to recognize the possibility of a writ of *fieri facias* binding at some other time or the possibility that land can still be sold under the writ of *fieri facias* alone. Therefore, a purchaser of land at a Sheriff's sale under a writ of *fieri facias* alone must determine

[75][1973] 2 D.L.R. 680 (Ont. C.A.).

priority according to the common law rules. This means that such a purchaser cannot rely on a record title. This is another reason why it is not a practical method even though the writ of *fieri facias* used alone continues to be available in theory. Purchasers understanding the effect of this amendment will be extremely reluctant to pay for such property.

Creditor's Relief Act[76]

The basic purpose of this legislation is stated in s. 3:

> Subject to the provisions hereinafter contained there is no priority among creditors by execution from The Court of Queen's Bench of New Brunswick.[77]

The principle is implemented in s. 4(1) as follows:

> Where a Sheriff levies money upon an execution against the property of a debtor . . . the money shall thereafter be distributed rateably amongst all execution creditors and other creditors whose writs or certificates given under this Act were in the Sheriff's hands at the time of the levy, or who deliver their writs or certificates to the Sheriff within one month from the entry of notice of the levy;. . . .

Under these provisions, if a judgment creditor proceeds to sell land under a writ of *fieri facias* alone, he must share rateably with those entitled under s. 4 even though he may have been the first judgment creditor to bind the land.

On the other hand, suppose judgment creditor (J.C. No. 1) simply registers a memorial. Then he delivers a writ of *fieri facias* to the Sheriff with a view to executing against the personal property of the judgment debtor. Assume that other memorials have subsequently been registered and other writs of *fieri facias* subsequently delivered to the Sheriff. The Sheriff will execute against all available personal property of the judgment debtor and J.C. No. 1 will be entitled to share in the proceeds from these levies under s. 4. In an attempt to satisfy the writs in his hands, the Sheriff will then attempt to sell the land by using the writ with the highest priority in order to get the best possible prices. In this case, it will be the writ of J.C. No. 1. Assuming that such a sale will perfect the lien of the memorial pursuant to the relation back of title doctrine, what would happen to the proceeds of the sale? One might argue that there should be no sharing in these proceeds pursuant to s. 4. The title being sold was that bound by a judgment lien and not an execution lien. However, since the machinery used to perfect this judgment lien was clearly a writ of execution, chances of success on this argument are slim.

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[76]*Creditors Relief Act,* R.S.N.B. 1973, c. C-33.

[77]*Creditors Relief Act,* R.S.N.B. 1973, c. C-33, as amended S.N.B. 1979 c. 41, s. 32.

Therefore, J.C. No. 1 should request a return of the writ before the Sheriff has an opportunity to sell the land thereby perfecting the memorial. The right to make such a request exists and is contemplated by s. 26 of *The Creditors Relief Act.*[78] If the writ of J.C. No. 1 is so returned, the Sheriff will only be able to sell under the writ of judgment creditor No. 2 (J.C. No. 2). Assuming the sale conveys the title bound by J.C. No. 2's memorial, the purchaser at the Sheriff's sale will take title subject to J.C. No. 1's memorial. By so ensuring that his memorial is not perfected, J.C. No. 1 leaves open several courses of action by which he may retain his priority and not be required to share with other creditors. One course of action J.C. No. 1 may take could be labelled a wait and see approach. There may be a sale by a subsequent execution creditor as above or the judgment debtor himself may eventually attempt to sell the property. In either case, it will likely be a requisition on title by the purchaser that J.C. No. 1's memorial be discharged. As a result, a direct payment to J.C. No. 1 will be made. Such direct payments to a judgment creditor are outside the *Creditors Relief Act* and thus provide one means of maintaining priority.

A variation of this approach would be to wait until there are no longer writs or certificates in the Sheriff's hands. J.C. No. 1 would then issue another writ of *fieri facias* and attempt to perfect the lien of his memorial. The danger here is that under s. 4 other creditors have thirty days after such a levy to place their writs or certificates in the Sheriff's hands. Though this method may result in recovery sooner than waiting for direct payment, it is riskier from the standpoint of maintaining priority.

A different approach is for J.C. No. 1, once the writ has been returned, to immediately sell the land under an equitable order to perfect the lien of the memorial. There are two questions that must be answered at this stage: first, will the proceeds from a sale pursuant to such an order be subject to the provisions of the *Creditors Relief Act;* and secondly, when can a judgment creditor get such an equitable order? In answer to the first question, there are strong arguments that the answer is no, the sharing provisions of the *Creditors Relief Act* do not apply.[79] Simply having a judgment lien come into existence on the registration of a memorial would not be sufficient to make one a "creditor by execution" pursuant to s. 3. Further, the memorial is not an execution and, therefore, Section 4 would not apply since the Sheriff has not levied money "upon an execution".

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[78]*Creditors Relief Act,* R.S.N.B. 1973, c. C-33, s. 26(1) provides *inter alia*:

". . . he [the sheriff] shall not, except on the request of the party issuing the writ . . . return the writ until it has been fully satisfied. . . ."

[79]This also seems to be the conclusion reached by Professor Kerr in his "Report on the Legal Remedies of the Unsecured Creditor After Judgement" prepared for the Consumer Protection Project, October, 1976, at 25.

Will the equitable order, however, be labelled an execution the proceeds from which will be treated as a levy? Will a court take a broad policy approach to applying the *Creditors Relief Act*? On the latter question, indications are that the courts will take a very restrictive approach to the statute. In *Roach* v. *MacLachlan*[80] Osler J. stated:

> We must be careful not to extend the *Creditors Relief Act* or the Act respecting wages to cases which they do not expressly provide for. They are Acts of an exceptional and incomplete character, and necessarily so, being, as it were, even if *intra vires*, but crippled substitutes for insolvent legislation. Those, therefore, who attempt to take advantage of these provisions must shew that they are clearly within them.[81]

Further in *McLean* v. *Allen*[82] it was stated:

> The decisions upon this subject (application of the *Creditors Relief Act* to receivers) are conflicting, and for the present, I think I should follow those of the learned Chief Justice of the Queen's Bench Division and of Common Pleas Division, in which my brother Falconbridge has concurred, and hold that the provisions of the *Creditors Relief Act* form an exception to the general rule, and are not to be extended to cases not actually provided for in that Act.[83]

Although certain remedies made available by the courts of equity are generally labelled "equitable execution", it is not "execution" in the strict sense but simply equitable relief. The courts have dealt with the application of the *Creditors Relief Act* to types of so called "equitable execution" other than orders to perfect memorials. In an article published in 1962 dealing with equitable changing orders, S.R. Ellis[84] concluded as follows:

> While there is nothing in any of the above to justify a firm conclusion as to whether an Ontario Court would apply the provisions of the *Creditors Relief Act* to the charging order, there is sufficient evidence, it is submitted, to establish a reasonable probability that those provisions would not be applied and that the priority of a holder of a charging order over other execution creditors in proceedings under the *Creditors Relief Act* would be recognized.[85]

In the case of equitable execution by means of appointment of a receiver, *McLean* v. *Allen*,[86] noted earlier, held that the appointment of a

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[80](1892), 19 O.A.R. 496 (Ont. C.A.).

[81]*Ibid.*, at 500.

[82](1890), 14 P.R. 84 (Ont. Q.B.D.).

[83]*Ibid.*, at 88.

[84]Ellis, S.R., "The Changing Order — A Neglected Means of Enforcement?", (1962) *U. Toronto Law Rev.* 35.

[85]*Ibid.*, at 44.

[86]*Supra*, footnote 82.

receiver should not have been declared for the benefit of all of the creditors of the debtor.[87] In an Alberta case, *Giguere* v. *Pelon,*[88] the issue was the extent to which a receiving order appointing a Sheriff as receiver was subject to sharing provisions equivalent to our *Creditors Relief Act.* It was stated:

> The Sheriff could not treat the money as then being received 'by him' in respect of an execution. They remained moneys received by him as a result of the order appointing him receiver, and the statutory provisions, such as the 14-day waiting period, did not apply. It is the order made on May 2, 1975, that is to be interpreted not the *Execution Creditors Act,* as far as the $1,500 is concerned.[89]

There appears to be no reason why the same rationale should not apply to an equitable order for sale of property to perfect the lien of a memorial. In New Brunswick we have *Devebre* v. *Austin*[90] in which our Court of Appeal protected the priority of a judgment lien which was categorized as a "Statutory mortgage" rather than requiring *pro rata* sharing under the Federal *Insolvents Act.* As stated by the Court, the lien and priority of a memorial can only be abolished by very clear language. In an analogous situation, the Court of Appeal was quite willing to permit the judgment creditor to use the equitable order to maintain the priority of his memorial. Why should this not be convincing authority today when a judgment creditor wishes to retain priority despite the *Creditors Relief Act?*

Even if a New Brunswick court accepts that the proceeds from the sale of the land pursuant to an equitable order are not subject to the *Creditors Relife Act,* it is possible that a court as part of the equitable order will require that the proceeds be treated as if they were for the benefit of all the creditors. *Giguere* v. *Pelon* indicated that such directions may be given in the case of receiving orders. In that event, one must look only to the terms of that order for the method of distribution of the proceeds. It is suggested, however, that where a judgment lien is involved, particularly in light of *Devebre* v. *Austin,* that our courts would not give such directions in the order for sale.

The possible gains as a result of maintaining priority would certainly be sufficient incentive for a judgment creditor to attempt this equitable order route. When will a judgment creditor be entitled to such an

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[87]In light of this decision the Ontario *Creditors Relief Act* was amended and s. 24 of the present legislation, R.S.O. 1970, c. 97 provides *inter alia* "Where a judgement creditor obtains the appointment of a receiver by way of equitable execution of property of his debtor, the receiver shall pay into court the money received by him by virtue of his receivership, and it is subject to s. 23 [providing for money in court to be paid to the sheriff and deemed to be levied by him on an execution]."

[88](1976), 66 D.L.R. (3d) 693 (Alta. S.C., T.D.).

[89]*Ibid.,* at 696.

[90](1875), 16 N.B.R. 55 (N.B.C.A.).

order? This depends on whether *Massey-Harris Co.* v. *Whitehead*[91] is to be followed or whether subsequent cases will follow Stevenson J. in *Tobias* v. *Bob Wilson & Co. No. 2.*[92] If *Massey-Harris* is followed the judgment creditor would have the option of using the equitable order. If the *Tobias* case is followed, a judgment creditor will be required to show an impediment to execution at common law. At first glance there will be no such impediment. However, one might argue that the confusion caused by the decision in *Tobias* v. *Bob Wilson & Co. No. 1*[93] creates such an impediment as a practical matter. An even stronger argument for the existence of an impediment would be based on *Devebre* v. *Austin,* the impediment being the *Creditors Relief Act* itself.

In conclusion, it seems reasonalbe to argue that a judgment creditor can obtain an equitable order virtually at any time, thereby circumventing the *Creditors Relief Act* and retaining the priority of his memorial.

SUMMARY AND PRACTICE NOTES

Today the law regarding execution against land can be summarized as follows:

(1) Writ of Fieri Facias Method

This method is still available, at least in theory. The writ would appear to bind on first advertisement if delivered to the Sheriff after September 1, 1978.

In the case of writs delivered prior to September 1, 1978, they will continue to bind the land from the time of delivery as long as they are renewed pursuant to O. 42, r. 20.

> *Practice Note*: To be certain, lawyers for purchasers of real estate should continue to require a Sheriff's Certificate before closing.

> *Practice Note*: Lawyers acting for purchasers of real estate at a Sheriff's sale under a writ of *fieri facias* alone should realize that unregistered instruments as well as other equitable rights will have priority despite s. 19(2) of the *Registry Act.*

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[91](1923), 51 N.B.R. 282 (N.B.C.A.).

[92](1976), 13 N.B.R. (2d) 21 (N.B.Q.B.).

[93]*Ibid.*, at 365.

(2) Memorial Method

The registration of a memorial would appear to be the only practical means of executing against land today. Two methods are available to perfect the lien of the judgment which attaches on registration of the memorial:

(i) Writ of *Fieri Facias*

Despite the problems with *Tobias* v. *Bob Wilson & Co.* and amendments to Sections 15 and 20(1) of the *Memorials and Executions Act,* properly understood, the doctrine of relation back of title continues to apply.

(ii) Equitable Order for Sale

This method should be available virtually at the option of the judgment creditor in light of *Massey-Harris Co.* v. *Whitehead. Tobias* v. *Bob Wilson & Co. No. 2* does, however, raise the question of whether one may still be required to exhaust his legal remedies. Such an order gives a judgment creditor a reasonable possibility of evading the sharing provisions of the *Creditors Relief Act.*

RECOMMENDATION FOR REFORM

This area of the law of execution must be clarified, and this can only be completely accomplished by legislation action. There is no need to retain two separate and distinct methods of executing against land. The fact that two methods exist today is simply a result of historical development. Recent amendments have tended to eliminate the writ of *fieri facias* method as a practical matter and this method is now more a source of confusion then anything else. These amendments have only gone part way, and further steps must be taken to eliminate it. Under a new system, it should be clear that land can only be bound if a memorial is registered in the appropriate Registry Office. Section 11 of the *Memorials and Executions Act* must be amended so that land can no longer be seized and sold under the writ of *fieri facias* as personal property. Also, amendments may have to be made to other statutes such as the *Garnishees Act*[94] to make it clear that no writ of execution binds land.

When such steps are taken to eliminate any effect of the writ of *fieri facias* on land, the memorial method must be clarified. If s. 11 is amended as suggested, then the writ of *fieri facias* will no longer be available to perfect the judgment lien. Only writs of execution which reach land can perfect the lien. The only practical method for perfection would be the equitable order for sale. Such an equitable order would

[94]*Garnishee Act,* 1973 R.S.N.B., c. G-2.

presumably be available on request, though this should be expressly stated in a statute. Also, conditions precedent such as having all personal property sold first, should be clearly stated. It might, however, be better to have a more efficient and cheaper method of perfecting the memorial, something analogous to the writ of *fieri facias* method with relation back of title. It may be advisable to create a new special writ or order for this sole purpose. As long as the equitable order for sale method is available, the legislation should be clarified to indicate clearly whether or not the proceeds from the sale must be distributed *pro rata* under the *Creditors Relief Act.*

In the absence of any legislative action, the best that can be hoped for from the standpoint of a judgment creditor is that the Court of Appeal will overrule both decisions in *Tobias* v. *Bob Wilson & Co.* This would remove much of the present uncertainty and permit the judgment creditor to perfect the lien of his judgment in a convenient and efficient manner by a sale under a writ of *fieri facias*. Further, a judgment creditor would then have a better opportunity of attempting an equitable sale of the property to maintain priority. Only time will tell what the next step will be, by either the Courts or Legislature.