SOME ASPECTS OF THE WRIT OF FIERI FACIAS*

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INTRODUCTION

It may seem somewhat presumptuous of an academic lawyer to speak to a group of practitioners on a matter of such everyday importance as executions. Yet I believe there are few subjects in greater need of academic treatment and reform than this one. For however excellent our substantive law may be, it is only as good as the remedies to enforce it. The need for reform in this field I hope to demonstrate by a discussion of some aspects of the writ of *fieri facias*. Only a few aspects I may say, and those not exhaustively for time does not permit. But I hope to convince you of the need for a thorough study of the matter followed by legislative action.

The writ of *fieri facias* (or *fi fa*) is the maid of all work in the law of execution. So much is this so that in ordinary parlance when we speak of issuing execution we mean the *fieri facias*. It commands the sheriff to cause to be made *(fieri facias)* out of the lands and chattels of a judgment debtor an amount sufficient to pay the judgment creditor with costs.[1] The writ has been the most usual mode of execution for a long time; it is of great antiquity, dating to the earliest days of the common law.[2] This explains many things about the writ. It explains, first of all its extreme technicality, and, as we shall see, it assists in determining what property of the debtor may be seized under the writ. A discussion of problems respecting what property is seizable under the writ comprises the major portion of this talk, but before dealing with this I want to say a few words concerning a matter that is in crying need of reform — the binding effect of the writ.

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1. Rules of the Supreme Court of New Brunswick, 1956 (hereinafter referred to as R.S.C.), App. H, Forms Nos. 1-4.

2. See Plucknett, A Concise History of the Common Law, 4th Ed., p. 369; Pollock and Maitland, History of English Law, vol. II, p. 596; Tidd's Practice, vol. 2, p. 993.

BINDING EFFECT OF WRIT

At common law, the writ had effect from its teste. As soon as it was issued it bound the goods of the execution debtor into whosoever hands they came. So that if an execution debtor sold his goods after the issue of the writ, the execution creditor had a right to seize them even as against a ***bona-fide*** purchaser for value without notice.[3] The English Statute of Frauds[4] made an important alteration to this law. It provided, in effect, that the writ should not bind the goods of an execution debtor until it was delivered to the sheriff to be executed. This provision has been adopted as section 11 of the New Brunswick Statute of Frauds,[5] a necessary provision here because since a solicitor can obtain blank writs and fill them out as occasion requires,[6] it would be extremely difficult to determine just when the writ was issued.

It should be observed that the provision in the Statute of Frauds merely postpones the time when the writ binds the goods of the execution debtor; it does not otherwise alter the law. So that if a judgment debtor sells goods to an innocent purchaser after the writ has been placed in the hands of the sheriff for execution, the sheriff may seize the goods in the hands of the innocent purchaser.[7]

This blemish on the law was removed in England by section 1 of the Mercantile Law Amendment Act, 1856, which provided that no writ of ***fieri facias*** should prejudice the right of any person to goods acquired from an execution debtor in good faith, for valuable consideration and without notice.[8] This section and the provision of the Statute of Frauds just mentioned, were re-enacted by section 26 of the English Sale of Goods Act.[9] Unfortunately when the Sale of Goods Act was adopted by New Brunswick in 1919,[10] section 26 was not reproduced. The effect is that in New Brunswick if a person buys goods from a judgment debtor against whom a writ has been placed in the sheriff's hands for execution, those goods are subject to a lien and the purchaser will be liable to the judgment creditor for the value of the goods if the judgment debtor has not sufficient assets to satisfy the

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3. *Doe d. Nesmith v. Williston* (1844) 4 N.B.R. 459; *Woodland v. Fuller* (1840) 11 Ad. & E. 858; 113 E.R. 641.
4. (1677) 29 Car. II. c. 3, s. 16.
5. R.S.N.B., 1952, c. 218.
6. See R.S.C. Ord. 5, rr. 1, 2; Ord. 61, r. 1.
7. *Doe d. Nesmith v. Williston* (1844) 4 N.B.R. 459; *Woodland v. Fuller* (1840) 11 Ad. & E. 858; 113 E.R. 641.
8. 19 & 20 Vict., c. 97, s. 1.
9. (1893) 56 & 57 Vict., c. 71.
10. 8 Geo. V, c. 4.

debt. Clearly this situation is entirely unfair and I suggest our legislature should remedy the situation by repealing section 11 of the Statute of Frauds and enacting a section similar to section 26 of the English Sale of Goods Act in its stead.

So far we have directed our attention to goods. Under section 5 of the Memorials and Execution Act,[11] lands, too, are bound by the writ from the time it is placed in the hands of the sheriff. There is no objection to this as regards land because when a purchaser buys land he does or should make enquiries to the sheriff. But there is another aspect regarding the binding effect on lands that needs examination. This relates to priority among judgment creditors and the effect of memorials.

At common law, if several writs of *fieri facias* were delivered to the sheriff he had to execute them in accordance with the order in which he received them. Priority as between judgment creditors, therefore, was based on the time they placed their executions in the sheriff's hands.[12] The Creditors' Relief Act altered this. Section 3 of that Act provides that in general there shall be no priority among execution creditors, and section 4 provides that where a sheriff levies money upon a writ, he shall distribute the money rateably amongst all creditors whose writs are in his hands or who deliver writs to him within one month.[13]

But a judgment debtor, of course, does not have to issue a writ of execution. He may instead choose to file a memorial of judgment in the Registry Office. If he does, under section 5 of the Memorials and Executions Act it binds the lands, though not the goods, of the judgment debtor. This gives rise to the following problem. Suppose A, a judgment creditor, files a memorial of execution in the Registry Office against his debtor X. Subsequently, C, D and E issue execution and X's land is sold to a third party Y. Under section 4 of the Creditors Relief Act, C, D and E share rateably in the proceeds of the sale. Y acquires the land but it is a recognized principle that a purchaser at a sheriff's sale acquires the rights of the judgment debtor but no more. Now by virtue of section 5 of the Memorials and Executions Act, this land is bound by A's memorial. Does this mean that A may, following the sheriff's sale, issue execution to seize the lands in the hands of Y, the purchaser under the sheriff's sale? In the absence of judicial legislation, this would appear to follow from the language of the Memorial and Executions Act and common law principle. Surely there should be legislation to clarify the situation.

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11. R.S.N.B., 1952, c. 143.
12. *Hunt v. Hooper* (1844) 12 M. & W. 664; 152 E.R. 1365.
13. R.S.N.B., 1952, c. 50.

WHAT MAY BE SEIZED UNDER THE WRIT

(a) The Common Law Position

I turn now to what may be seized under a writ of *fieri facias*. The first point to observe is that the judgment creditor obtains at most the interest of the judgment debtor in the property seized, so he is subject to previously acquired rights of others relating to it. This can be exemplified by *The Continental Trusts Co. v. The Mineral Products Co.*[14] before Barker, J. There a company executed a mortgage of lands in New Brunswick. The mortgage included the minerals but at the time the minerals were vested in the Crown, not in the company. Later, mining leases were issued to the company by the province, so in equity the minerals were subject to the mortgage. A judgment creditor had the leases seized, bought in at the sheriff's sale and paid the Crown rent overdue under the leases, whereupon the Crown having no knowledge of the mortgage, issued the mining leases in the judgment creditor's own name. It was held that the leases were still subject to the mortgage. In the course of his judgment, Barker, J. said:

> I take it as long since settled that a purchaser at a Sheriff's sale under an execution stands in no better or different position as to the property than the execution debtor did. In *Wickham v. The New Brunswick & Canada Railway Co. . . . Lord* Chelmsford says: "There is no doubt upon principle as well as on the authority of the cases cited in the argument at the Bar, that the right of a judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff with all the charges and incumbrances, legal and equitable, to which it was subject in the hands of the debtor.[15]

Though sometimes difficult of application, the foregoing principle is well known. What is not so well known are the types of interests that can be seized under the writ. Can, for example, an equity of redemption be seized? Or a joint tenancy? Or the interest of a buyer — or a seller — under a conditional sale?

The best way to answer questions of this kind is to approach the matter historically. I said a few moments ago that the writ is perhaps as old as the common law itself, and this should give us some idea of its original scope. In its origin only goods could be seized under the writ. This is only to be expected, for in feudal times land was much too important a commodity to allow it to be taken by a mere judgment creditor. In those days, it will be remembered, the relation of a man to his land determined his

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14. (1904) 3 N.B. Eq. R. 28.
15. *Ibid.*, at p. 39.

status in society.[16] It was not until 1285 that by the Statute of Westminster II[17] land was made exigible by another writ, the writ of elegit. But this writ did not authorize the land to be seized and sold. Rather, after seizure the land was delivered to the judgment creditor who held it as a tenant by elegit until his debts were paid out of the profit of the land. In so far as Canada and other British possessions are concerned, we shall see that sale of lands was later permitted but that was not so in England. There the writ of elegit continued to be the appropriate remedy available to a judgment creditor against the lands of his judgment debtor until 1956.[18] The important point to notice about this is that the writ of elegit is a very different remedy from the writ of *fi fa* and English cases on executions against land must be read with considerable caution. A second point to note is that seizure of land by *fi fa* must be done under authority of statute.

I also said that the writ was a common law writ. Now as everybody knows equitable interests were not recognized in common law courts. Equitable interests could, therefore, not be seized under a writ of *fi fa*,[19] and any seizure of equitable interests today must consequently be effected under some statute.

A third lesson can be learned from the great age of the writ. At its inception the forms of property were not diverse as they are in our commercial community. Intangible property, such as stocks and patents, was unknown. Only tangible goods, chattels, could be seized under the writ.[20] To the extent that intangible property can be seized today it must be done pursuant to statute.

From the foregoing you can surmise that most of what can be seized under the writ is done as a result of statutory enactment. The scope of the writ has been expanded piecemeal over the centuries as need arose and while it is today very broad, there are surprising and unjustifiable gaps. A study of these followed by a comprehensive statute would remove much unnecessary technicality. The idea stands as an open invitation to those who seek the reform of the law.

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16. For the early common law attitude, see Pollock and Maitland, History of English Law, vol. II, p. 596; Plucknett, A Concise History of the Common Law, 4th Ed., p. 369.

17. 13 Edw. I, c. 18.

18. By the Administration of Justice Act, 1956, 4 & 5 Eliz. II, c. 46 writs of elegit may no longer be issued in England. In *Weidman v. McClary Man. Co.* (1917) 33 D.L.R. 672 it was held that the writ of elegit is no longer applicable to the Northwest Territories, and it is suggested that is true of New Brunswick also.

19. *Scott v. Scholey* (1807) 8 East 467; 103 E.R. 423.

20. See *Harrison v. Paynter* (1840) 6 M. & W. 387; 151 E.R. 462; *Scott v. Scholey* (1807) 8 East 467; 103 E.R. 423.

(b) The Position Today respecting Chattels

Having now examined the scope of the writ at common law, we are in a position to examine the changes wrought by statutes. I will first examine the personal property now seizable under the writ, and then the real property.

As we saw, at common law the only personal property that could be seized under the ***fi fa*** was chattels. Chattels, of course, comprised tangible moveable property but the term also included chattels real or leasehold property, which, as you well know, were not considered to be the real property. Section 23(1) of the Memorials and Executions Act now expressly provides that goods and chattels, including leasehold interests may be seized and sold.[21] A leasehold can be seized even when it contains a covenant against assignment, because as may be seen from *Doe d. Mitchinson v. Carter*,[22] in the absence of clear terms, such a covenant refers to voluntary assignments.

So far we have been concerned with the situation where the judgment debtor owns the chattel seized absolutely. But what if he has given a mortgage on it? A mortgage, as you know, is the transfer of the legal title to goods to the mortgagee. In law, all the mortgagor has left is a contractual right against the mortgagee, but this is not property and cannot be seized. Equity, however, gives him a species of property called an equity of redemption. This, at common law, could not be seized because it was an equitable interest.[23] Now, however, by virtue of section 23(1) of the Memorials and Executions Act an equity of redemption in goods may be seized, and by virtue of section 1(a) of that Act this term includes the interest of a person who has given a second mortgage on the goods.[24] But suppose a writ of *fi fa* is issued? against the mortgagee of a chattel. Can his interest be seized? According to the Ontario Court of Appeal in *Ferrie v. Cleghorn*[25] "the interest of a mortgagee in goods mortgaged to him is not an interest that can be sold under a *fi fa* . . ." It would be necessary to obtain a garnishee order to attach the debt owed to the mortgagee under the mortgage.[26] There is, therefore, a remedy available to the judgment creditor, but I think a simpler procedure than a garnishee order could be devised.

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21. R.S.N.B., 1952, c. 143.
22. (1798) 8 T.R. 57; 101 E.R. 1264.
23. *Scott v. Scholey* (1807) 8 East 467; 103 E.R. 423.
24. R.S.N.B., 1952, c. 143; see also R.S.N.B., 1952, c. 50, s. 30.
25. (1860) 19 U.C.Q.B. 241, at p. 244; see also *Henderson v. Fortune* (1859) 18 U.C.Q.B. 520.
26. See Garnishee Act, R.S.N.B., 1952, c. 97.

Far more common than the chattel mortgagee as a security device is the conditional sale. There A, the conditional seller, transfers possession of a chattel to the conditional buyer, B, but A retains title to the goods. Can the sheriff seize the interest of the conditional buyer in the goods? There is nothing in our statutes, as there is in the statutes of some of the other provinces, permitting the seizure of the interest of a conditional buyer so we must turn to the common law. If it is an equitable interest as some judges suggest,[27] it cannot be seized under a writ of *fieri facias* because equitable interests are not seizable under a *fi fa* in the absence of statute, and even if it is legal the cases of *Ruscheinsky v. Spencer*[28] and *Overby v. McLean*[29] indicate that it cannot be seized. If, therefore, A buys a car worth $3,000 under a conditional sale agreement, it is very doubtful if the car can be seized by A's creditors even if he has paid, say, $2,500. It seems to me that the interest of a conditional buyer should be exigible and that legislation should be passed accordingly.

Let us take the opposite situation. A sells a car to B under a conditional sale. Can the creditors of A, the conditional seller, have the car seized under a *fieri facias* It would appear that the car cannot be seized because the conditional buyer is rightfully in possession. Taking possession under these circumstances would constitute a trespass, and this the sheriff is not empowered to do.[30] However, the creditor should be able to garnishee the debt owing under the conditional sale, but the garnishee is, as you know, rather a complicated remedy.

The principle that the sheriff cannot commit a trespass against a third person applies in other cases as well. Thus if a judgment debtor has pledged or leased goods, they cannot be seized while in the possession of the pledgee or lessee.[31]

As has been mentioned before, at common law an equitable interest in chattels could not be seized under a *fi fa*. This can be exemplified by *Scott v. Schotey*[32] where it was held that a mere equitable interest in a term of years could not be taken into execution under a ***fi fa.*** In the judgment of Lord Ellenborough, there is a passage that gives such an excellent statement of the attitude of the law regarding the *fi fa* as to merit quotation. He says:

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27. See *Ruscheinsky v. Spencer & Co.* [1948] 2 W.W.R. 58, at p. 60.
28. *Ibid.*
29. [1928] 4 D.L.R. 917.
30. See *Kinnear v. Kinnear* (1924) 26 O.W.N. 111.
31. *Young v. Lambert* (1870) L.R. 3 P.C. 142 (pledgee); *Kinnear v. Kinnear* (1924) 26 O.W.N. 111, and *Fraser v. Jenkins* (1888) 20 N.S.R. 494 (lessee).
32. (1807) 8 East 467; 103 E.R. 423.

> The language of these writs and return evidently imports, that the goods and chattels, which are the object of them, are properly of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such also as are conveniently capable of sale and transfer by the sheriff, to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, and also in respect of the instrument by which the term is created and secured, (both of which are capable of delivery to a vendee,) has been always held to answer the description of the writ, and to be saleable thereunder . . . . But no single instance is to be found in the history and practice of the Courts of Common Law, in which an equitable interest in a term of years has ever been recognized as saleable, (seizable of course it cannot be,) under a fieri facias.[33]

To the rule that equitable interests in chattels were not exigible there was one exception, namely, where the debtor was entitled to the whole beneficial interest in the chattel, for there he could if he wished have had the legal title transferred to him.[34] A judgment creditor cannot avoid having goods seized simply by putting them behind a bare trust. But if he does not have the whole beneficial interest in a chattel, it cannot be seized under a *fi fa*, and resort must be had to equitable execution.

Thusfar I have confined myself to tangible personal property. Let us now direct our attention to intangible property. And first of money. At common law money could never be seized under a *fi fa*. The strictness of this rule can be seen in *Fieldhouse v. Croft*[35] where the sheriff held money belonging to the judgment debtor, the surplus of a former execution against the judgment debtor. The money thus in the sheriff's hands could not be seized under a subsequent execution and had to be returned to the judgment debtor. Now section 26(1) of the Memorials and Executions Act provides that "The sheriff on any execution shall seize and take any money including any surplus of a prior execution . . ."[36] The power to seize money is not in general too valuable because there is, for example, no right to search a debtor.[37]

In common with money, other forms of intangible property could not be levied against.[38] Section 26 of the Memorials and Executions Act now provides, however, that cheques, bills of

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33. (1807) 8 East 467, at p. 484; 103 E.R. 423, at p. 429.
34. *Stevens v. Hince* (1914) 110 L.T.R. 935.
35. (1804) 4 East 510; 102 E.R. 926; see also *Bradley v. Hopley and Gault* (1828) 1 N.B.R. 147.
36. R.S.N.B., 1952, c. 143.
37. *Yakimishyn v. Bileski* [1946] 1 W.W.R. 663.
38. *Harrison v. Paynter* (1840) 6 M. & W. 387; 151 E.R. 462.

exchange, promissory notes, bonds, specialities and other securities for money may be seized, and the sheriff may hold these for the benefit of the judgment creditor and maintain an action thereon. Any payment made to the sheriff discharges the party liable under these securities.[39]

Again, at common law debts were not seizable.[40] Now, of course, they can be garnished by the judgment creditor under the Garnishee Act,[41] but in addition where there are several executions, the sheriff may obtain an order attaching the debts himself under section 35 of the Creditors' Relief Act,[42] but I have never heard of this procedure being used in this province.

Even shares and dividends of a stockholder in any incorporated company in New Brunswick may be seized. This is done by the sheriff's serving a copy of the execution upon the company and a notice stating that the judgment creditor's stock in the company is seized, and a simple procedure is provided in section 23 of the Memorials and Executions Act for the sale of these for the benefit of the judgment creditor.[43]

Before going on to interests in land, I might mention goods and chattels that cannot be seized under execution. Section 33 of the Memorials and Executions Act exempts from seizure certain domestic and personal effects, tools and other materials required by the debtor in making a living, and certain government annuities.[44] Again section 39 of the Landlord and Tenant Act, provides that chattels on leased land are not liable to execution unless the judgment creditor pays the landlord any rent then due up to one year's rent. And section 40 provides that standing crops continue to be liable for distress for rent even though they have been sold by the sheriff.[45]

(c) The Position Today respecting Land

Let us now examine the extent to which real property may be seized under the *fieri facias*. As I mentioned earlier, at common law the writ was originally confined to goods and chattels. Land could be executed against by means of the writ of eligit. But in 1732 an English statute provided that lands and other heriditaments and other real estate in the colonies were subject

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39. R.S.N.B., 1952, c. 143.
40. *Harrison v. Paynter* (1840) 6 M. & W. 387; 151 E.R. 462.
41. R.S.N.B., 1952, c. 97.
42. R.S.N.B., 1952, c. 50.
43. R.S.N.B., 1952, c. 143.
44. *Ibid.*
45. R.S.N.B., 1952, c. 126.

to the same remedies as might be used against personal property.[46] Now since the *fieri facias* was the usual process used to recover against personal property, this meant, in effect, that lands became subject to seizure under that writ in British possessions. Further, one of the first statutes passed by the New Brunswick legislature[47] made lands subject to seizure, with one qualification, that personal property must first be seized. This statute was re-enacted from time to time[48] and now appears as section 11 of the Memorials and Executions Act[49] which reads in part as follows:

> 11. The lands of a person may be seized and sold under execution as personal estate to satisfy his debts, . . . but the sheriff to whom the writ of fieri facias is directed shall not sell the lands until the personal estate, if any is found, is exhausted . . .

The scope of this section must depend on the meaning of the word "lands". The term is given a fairly extensive meaning in section 1(d) of the Act. This section provides first of all that lands include the possessory right and right of entry (i.e. the right to possess against a squatter).[50] This means that present legal estates in fee simple or for life can be seized.

In the absence of express provision equitable interests cannot be seized, for it should not be forgotten that the *fi fa* is a common law writ.[51] True the definition of "lands" in the Memorials and Executions Act mentions equitable interests but the definition only includes equitable interest that are otherwise seizable under the Act.[52] Section 12 of the Act looks promising. It reads:

> 12. The right of the party beneficially interested in lands held in trust for him, may be taken in execution for the payment of his debts, in the same manner as if he were seized or possessed of the lands, and his equitable and legal estate shall vest in the purchaser.

However, there is good reason to believe that this section only permits seizing equitable interests when the whole beneficial interest in the land belongs to the judgment debtor; where under the rule in *Saunders v. Vautier*[53] the debtor could require the legal title to be tranferred to him. The last words in the section providing that the purchaser of such interest obtains both the

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46. 5 Geo. II, c. 7.
47. (1786) 26 Geo. III, c. 12.
48. Its early history is discussed in *Doe d. Hazen v. Hazen* (1854) 8 N.B.R 87.
49. R.S.N.B., 1952, c. 143.
50. *Ibid.*, s. 1 (d).
51. *Scott v. Scholey* (1807) 8 East 467; 103 E.R. 423.
52. R.S.N.B., 1952, c. 143, s. 1 (d).
53. (1841) 4 Beav. 115; 49 E.R. 282; affd. Cr. & Ph. 240; 41 E.R. 482.

legal and equitable right suggests this view and it is supported to some extent by authority. In *Doe d. Hull v. Greenhill*[54] a trust in favour of a judgment debtor and another person was held not to fall within a rather similar section in an English statute.[55] It is submitted, therefore, that equitable interests less than the total beneficial interest in the land cannot be seized under a *fi fa*. The appropriate remedy would appear to be equitable execution by means of a receiver.

Let us now turn to lands that are encumbered with a mortgage. Can the interest of the mortgagor be seized, and can that of the mortgagee? As regards a mortgagor, this interest could not have been seized at common law because it existed only in equity, but land as defined in section 1(d) of the Memorials and Executions Act expressly includes the equity of redemption of a mortgagor.[56] And by section 20 the purchaser of an equity of redemption from the sheriff acquires all the rights of the mortgagor, and by making the mortgage payments as and when due he may acquire full title to the land.[57]

But what of the mortgagee's interest: can this be seized? An early New Brunswick case, *Doe d. Vernon v. White*,[58] answers this question in the negative. But sections 24 and 25 of the Memorials and Executions Act now provide an excellent remedy against a judgment debtor who owns a registered mortgage.[59] When a notice in the form set forth in section 24 is registered in the registry office and served on the mortgagee, the mortgage debt is attached and becomes payable to the sheriff — a most efficient procedure. The remedy is, however, available only when the mortgage is registered; otherwise one must resort to garnishee proceedings. The remedy should be extended to unregistered mortgages, though I quite understand that the judgment creditor is not as likely to know of the existence of such mortgages. A similar remedy should also be devised covering the interests of chattel mortgagees and conditional sellers.

Sometimes, instead of giving a deed and taking a mortgage in return, a vendor of land will enter an agreement of sale under which he retains the title but gives up possession to the buyer and agrees to transfer the title to the buyer when a number of monthly or yearly instalments have been paid (a transaction relating to land that resembles a conditional sale of goods). As a secur-

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54. 4 B. & Ad. 684; 106 E.R. 1087.
55. (1677) 29 Car. II, c. 3, s. 10.
56. R.S.N.B., 1952, c. 143.
57. *Ibid.*, s. 20; see also, s. 21.
58. (1859) 9 N.B.R. 314.
59. R.S.N.B., 1952, c. 143.

ity device this seems as good as a mortgage. The vendor has the title until the instalments are paid and the buyer has an equity in the lands. But the important point to note for our purpose is that the buyer's interest is not an equity of redemption, so it does not fall within the definition of "lands" in the Memorials and Executions Act. Nor is it a trust. The effect is that this interest cannot be seized under a *fieri facias*; it would be necessary to seek the appointment of a receiver.[60] Further the vendor is not a mortgagor so that the convenient remedy I mentioned above is not available against him if he is a judgment debtor. But he has the legal title and this, it would seem, can be sold by the sheriff without making an actual physical seizure of the land.[61] The buyer under the sheriff's sale would then be entitled to the payments owing under the agreement.[61a] It is submitted that provisions should be made placing these agreements for sale in virtually the same position as mortgages.

Lands, of course, are often held concurrently with others in joint tenancy or as a tenancy in common. Can the interest of a joint tenant or tenant in common be seized? Land, we saw, includes all possessory rights,[62] and this would seem to include such concurrent interests. Further there is authority in other jurisdictions supporting the view that such interests can be seized.[63] But in the case of a joint tenancy, if the judgment debtor dies before his interest is sold his joint tenant will take the interest by survivorship in priority to the judgment creditor.[64]

Up to now the interests of which I have spoken have been for the most part present interests. I want to say a word now of future interests. Suppose, for example, that A has an estate for life in a piece of land, and the remainder or reversion of the fee simple belongs to B, a judgment debtor. Can B's interest be sold under a *fi fa*? There is an early New Brunswick case, *Doe d. Hazen v. Hazen*,[65] holding that such interests could be sold under execution under the Act of 1786, and while the court there relied to some extent on the fact that that statute permitted seizure of any heriditament, other reasoning in the case indicates that the law would be the same today.

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60. *Kimniak v. Anderson* 63 O.L.R. 428; [1929] 2 D.L.R. 904.

61. *Weidman v. McClary Man. Co.* (1917) 33 D.L.R. 672; *cf., Parke v. Riley* (1866) 3 E. & A. 215, aff. 12 Gr. 69. See also *Doe d. Hazen v. Hazen* (1854) 8 N.B.R. 87, at p. 98 and Sale of Lands Publication Act, R.S.N.B., 1952, c. 200.

61a. See *Morton and Cowell v. Hoffert* [1924] 2 W.W.R. 529; *sub nom. Re Smith* [1924] 3 D.L.R. 16.

62. Memorials and Executions Act, R.S.N.B., 1952, c. 143, s. 1(d).

63. *Re Craig* 63 O.L.R. 192; [1929] 1 D.L.R. 142.

64. *Power v. Grace* [1932] O.R. 357; [1932] 2 D.L.R. 793.

65. (1854) 8 N.B.R. 87; see also *Doe d. Cameron v. Robinson* (1850) 7 U.C.Q.B. 335.

It is possible that other interests in land may be seized. For example, it has been suggested in an Ontario case that a profit a prendre may be sold under execution.[66] I think that would be true here, especially if, as may well be the case, the English statute of 1732 is in force in this province.[67]

Finally, the broad definitions of "goods", "lands", and "property" in section 38 of the Interpretation Act[68] should not be overlooked. If these apply to the Memorials and Executions Act, it is difficult to imagine what interests cannot be seized under a *fi fa*. But these definitions, it should be observed, apply only if the context is not inconsistent with the statute concerned,[69] and if they are applicable to the Memorials and Executions Act, it is not easy to understand why it is felt necessary to set forth in detail various types of interest that could not be seized at common law or to define "lands". What is more, there is no adequate procedure spelled out for seizing many interests. The better view would appear to be that these definitions are not applicable to the Memorials and Executions Act, but there is clearly room for argument.

CONCLUSION

The end result, then, would appear to be that the *fi fa* has a very wide scope, probably much wider than the average practitioner suspects. But there are gaps that cannot be justified on any ground of rational policy. It seems incredible that in the new world and in the twentieth century we are still relying on a method of execution that was found wanting in the thirteenth. The ideal should surely be that no debtor should be able to deprive his creditors of their just claims simply because he is shrewd enough or lucky enough to have his property in one form rather than another.

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66. *Totten v. Halligan* (1863) 13 U.C.C.P. 567.
67. 5 Geo. II, c. 7. In *Doe d. Hazen v. Hazen* (1854) 8 N.B.R. 87, it appears to be assumed that this statute continues in force.
68. R.S.N.B., 1952, c. 114, s. 38(13), (17).
69. *Ibid.*, s. 1.

The advantage that might result to the science of the law itself, when a little more attended to in these seats of knowledge, perhaps would be very considerable. The leisure and ability of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads, for improving its method, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system; a task which those who are deeply employed in business, and the more active scenes of the profession, can hardly condescend to engage in.

—Sir William Blackstone, at the opening of the Vinerian lectures on the common law at the University of Oxford, October 25, 1758.