SOUTH AUSTRALIA

THIRTIETH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

RELATING TO THE REFORM OF THE LAW ON EXECUTION OF CIVIL JUDGMENTS

1974

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX, Q.C., S.-G.

R. G. MATHESON, Q.C.

J. F. KEELER.

K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

THIRTIETH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW ON EXECUTION OF CIVIL JUDGMENTS

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration the reform of the law relating to execution on judgments in civil actions.

In all cases down to the Common Law Procedure Act, 1852 and in most cases until the making of rules in 1875 under the Judicature Act, 1873, a plaintiff selected his cause of action at his peril. If he chose the wrong cause of action, then however meritorious his case might be on the facts, he lost. For some reason which is unknown, the Nineteenth Century innovators did not extend their amendments beyond judgment in an action. After judgment the position still is, as it always has been at common law, subject to Sections 115 and 116 of the Supreme Court Act, that the plaintiff (or the party seeking to enforce costs if a successful defendant) selects his writ of execution at his peril. If he selects the wrong writ and it turns out that the party against whom execution is sought does not have assets answering the type covered by the specific writ, then the plaintiff in execution fails on that writ. The purpose of this paper is to carry forward the reforms made in 1852 and 1875 so as to produce the result that a plaintiff in execution does not lose the fruits of his judgment in some cases or in others pay costs unnecessarily incurred because the execution is set aside or is infructuous on the ground that he has selected an inappropriate writ of execution in the circumstances.

We therefore propose that, with the exceptions mentioned, the law should be reformed so that in place of the old writs of execution there should be substituted a simplified procedure by lodging the necessary documents with the Master of the Court. These documents will authorize the seizure of all classes of assets in the respondent's hands; an enquiry as to what those assets consist of; and will found an application to the Court or Master to bind assets of the debtor in the hands of third parties. The Master will then direct the Sheriff by letter or in any other way that he thinks proper to seize into his hands all the assets of the debtor which he can find and to pay thereout the plaintiff's judgment and costs and the costs of execution. A somewhat similar reform of the law, though not with quite the same machinery, has been in existence in New Zealand since 1882.

Secondly, we desire to recommend substantive amendments to the law governing the various forms of execution which a plaintiff may use.

South Australia has perhaps been spared some of the extreme consequences of the retention of the various writs of execution by the provisions now embodied in Section 115 of the Supreme Court Act. Since 1845 it has been possible to levy execution against the land of a judgment debtor under a writ of fi fa., and many of the potential problems to which the difference in the scope of the writs of fi fa. and elegit might otherwise have given rise have been thereby alleviated. Nevertheless, section 115 has not always proved satisfactory in operation, since it requires that execution be levied upon goods in the first instance, and only upon a failure to satisfy the judgment debt out of the personalty of the debtor is recourse to the realty permitted. The interval between the issue of the writ and the time at which execution against the realty became possible has often enabled the debtor to dispose of the realty and defeat the judgment creditor altogether.

In these circumstances the first reform we propose is designed to achieve two objectives. Firstly, we propose the abolition of the procedure whereby a successful plaintiff initiates execution by the suing out of a writ, such as fieri facias, levari facias, distringas, delivery, or venditioni exponas, and its replacement by a more informal procedure.

Secondly, we propose that execution be leviable against the realty of the judgment debtor without the need for the personalty to have proved inadequate. In the result we propose that instead of instituting the present procedures the plaintiff should simply file with the Master of the Court (or the Clerk of the Local Court in proceedings in that Court) a declaration that as at the date of filing the document the defendant in execution is liable to the plaintiff in execution for the sum of x dollars under the judgment plus y dollars for interest computed up to that date and continuing interest at the percentage allowed by the Rules of Court until the completion of the execution, and z dollars for costs of execution. He should also have to file an affidavit setting out what he knows of the assets of the defendant and requesting the Master to require the Sheriff to seize those assets into his hands and by any of the known forms of execution to realize them and account to the plaintiff for what is owed to him. Alternatively the plaintiff may first seek an order under an analogue to the present Order 42 Rules 32-34 of the Rules of Court, requiring the debtor to appear and be examined as to his assets and then after the examination, proceeding as before to direct the Sheriff to take into his hands the assets discovered by the examination and satisfy the claim of the plaintiff in execution. Mutatis mutandis the same procedures would apply in a Local Court. The provision should be extended to provide for the examination of any person who may be able to give evidence regarding the property of the debtor.

In New Zealand the Sheriff has evolved a form of questionnaire which is used to interview the debtor and obtain a full statement of his assets position. This of course however assumes that the debtor will truthfully answer the questions put to him and also helpfully retain the assets in his hands after he has answered the questionnaire.

We may add that this suggestion for amending the law is not new. It was a recommendation made by the Commission for reforming the law presided over by Sir Matthew Hale in 1652 (see the Life of Hale by Hewart, page 45).

This reform would require a consequential amendment of the law as to priority of execution. The present law is as set out in *Mather on Sheriff and Execution Law, 3rd Edition* (1935), *pages* 79-80:—

> "Where a Sheriff has several writs issued by different creditors against the same debtor, it is his duty to execute that writ first which was delivered to him, and when he has sold sufficient to satisfy that writ, he should sell under the next in order, and so on, as long as there are goods unsold."

Under the new law it should be enacted first that creditors have priority in order of the date and time on which their request to execute is filed in the office of the Master and secondly that the property in the goods of the debtor should be bound from the date of filing of the request unless the request is accompanied by an application for discovery and not by an affidavit of assets in which case the goods should be bound from the date and time of the filing of the request to execute following the hearing of the application for discovery. A consequential amendment would be the repeal of Section 26 of the Sale of Goods Act, 1895. The usual protection should be extended to an innocent third party who acquires any of the goods of the debtor for value and without notice of the intended execution.

However if it is sought to affect assets in the hands of a third party by proceedings by way of equitable execution, garnishment or attachment of debts charging or stop orders, the execution creditor must take out the requisite application and obtain in the second and third cases an order nisi and then an order absolute to bind the assets in the hands of the third party or in the case of equitable execution follow the procedure in Order 50 Rules 13-21 as at present.

A request to execute should remain in force for six years from the date of filing and no orders for renewal should be necessary so that the present Order 42 Rules 20 and 21 would be repealed. Instead, if further assets were discovered from time to time, a further affidavit of assets would be filed and a further consequential direction given to the Sheriff to levy on those assets or a further application made to a Master, where the assets were in the hands of third parties, to bind the assets and obtain execution on them. Nothing in this proposed reform would interfere with the right of a Judge under Order 14 Rule 1 (4) to make an order summarily for the delivery up of a specific chattel claimed in any proceedings.

Turning now to individual forms of execution, we are of opinion that the writs of fieri facias, levari facias, venditioni exponas, distringas, delivery and sequestration should be abolished and in lieu it should simply be enacted that a direction by the Court (which we would envisage would be ordinarily a Master's direction) to the Sheriff to execute should be a sufficient authority for him to complete the execution subject to such directions as he may from time to time receive from the Court unless the plaintiff in execution shall by notice in writing to the Sheriff withdraw or postpone the execution.

Writs of elegit should be abolished and power given to the Court to impose a charge on any land or interest in land of a debtor. This would mean mutatis mutandis the enactment of sections equivalent to Sections 34 and 35 of the Administration of Justice Act, 1956 4 & 5

Eliz. II c.46 with the additional provision that if the land is under the Real Property Act the order of the Court must be registered by application against the title or titles affected in the office of the Registrar-General and takes effect accordingly. The charge should be enforcable by an order for sale. Sections 105 and 110 of the Real Property Act should be repealed and Sections 106-109 redrawn to cover this procedure.

We think it should be possible to appoint a receiver even though the remedies of execution at law are not exhausted. There are cases both ways on this point but we think *Bull & Co.* v. *Murphy* 21 *N.S.W.L.R. Eq.* 1, *Evans* v. *Robertson Orr* 1923 *N.Z.L.R.* 769 and *Morgan* v. *Hart* 1914 2 *K.B.* 183 put the present position beyond doubt. In addition it should be possible for a receiver to be appointed with power to act in relation to all legal estates and interests in land and property held at law. In respect to an estate or interest in land it should be possible for the receiver to exercise his powers whether or not a charge has been ordered to be imposed under the equivalent to Section 35 of the Administration of Justice Act, 1956. These amendments were made in England by Section 36 of the same Act and we think they should be made here.

Equitable execution is not "execution" as it is usually understood. What is commonly called equitable execution as is pointed out in *Williams & Mortimer*: *Executors, Administrators and Probate* at page 907, is not in fact execution but equitable relief which is granted because there is a hindrance in the way of execution at law and it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the Court. Accordingly a receiver by way of equitable execution cannot be appointed of the estate of the deceased judgment debtor in the absence of the persons on whom the estate has devolved: see *Re Shephard* 43 *Ch. D.* 131 and *Norburn* v. *Norburn* 1894 1 *Q.B.* 448. We think that in such cases it should be possible to appoint Public Trustee or some other person to represent the estate as to whether an order should be made, if only to hold the assets whilst the matter is disposed of (compare Section 45 of the Administration and Probate Act, 1919 and Order 16 Rule 50 of the Rules of Court for the existence of similar powers).

The writ of scire facias is still referred to in Section 73 of the Supreme Court Act and Section 160 of the Local Courts Act. Originally it was the proper process for the recovery of debts of record due to the Crown whether by judgment, recognizance or bond or by inquisition in cases where there was no urgency or death so as to justify the issue of a writ of extent or a writ of diem clausit extremum. The writ also lay for the repeal of grants by the Crown. The writ has been abolished in England by the Crown Proceedings Act, 1947 Section 13 and in the first of its two uses we see no reason why it should remain in South Australia. As far as the second of the two uses is concerned, it may still be necessary for use for the cancellation of charters and possibly also of companies improperly registered under the Companies Act (see *Salomon* v. *Salomon* 1897 *A.C.* 22 *at page* 30 and *Attorney-General* v. *Colchester Corporation* 1955 2 *Q.B.* 207 in the judgment of Lord Goddard, C.J. at page 215) and this second use should be excepted from the repeal. Lord Goddard clearly thought

in the Colchester Corporation case that the second use was not taken away by the Crown Proceedings Act 1947 though it must be said that the wording of that Section is a very wide one. At all events for the sake of certainty it would be better to enact specifically that the writ is abolished in the first sense but not in the second.

The old writ of assistance has been largely superseded by the writs of possession and delivery but there are a few cases in which the Courts have held that the writ still applies. Thus, for example, it was held in *Wyman* v. *Knight* 39 *Ch. D.* 165 that the writ may still be issued for the purpose of recovering possession of and preserving chattels which have been ordered to be delivered to a receiver. Similarly in the case of *Kazet de la Bord* v. *Othon* 23 *W.R.* 110 an injunction had been granted to restrain the defendant from removing stock and trade at certain premises and an order was made appointing a receiver. Certain goods sought by the receiver were locked up by the defendant who kept out of the way and leave was given to issue a writ of assistance. And so it was held in *Bryant* v. *Patten* 4 *V.L.R.* (*E*) 218 that where an order has been made for the delivery up on demand by the plaintiff to the defendant of a freehold and chattels which had not been complied with the Court would grant a writ of assistance to obtain possession. Really this writ is a species of proceedings for contempt. We shall deal later in this report with the present position of the writs of attachment and contempt and we can only say that we think the writ is now unnecessary, provided that in the section dealing with the contempt proceedings which we envisage, the Sheriff or other officer of the Court is given power to break into premises if necessary to seize and take possession of property whether real or personal which has been ordered to be delivered into his possession and which a Judge is satisfied is being contemptuously withheld from the Sheriff.

As to the writ of extent it is doubtful whether the old prerogative writ has any application in South Australia today. Section 73 of the Supreme Court Act requires such proceedings as may previously have been taken by the writ to be instituted by action and prosecuted in the usual way between subjects.

Even before this was enacted, there seem to have been no reported cases of resort to the writ in South Australia. This is surprising considering the original advantages available to the Crown on issuing an immediate extent:—

1. All other proceedings at law were by-passed on proof by affidavit of the debt and the danger of its being lost;

2. by issuing the writ in successive degrees a mechanism was provided for discovering a chain of debts which could be reached if the immediate debtor had insufficient assets;

3. the writ combined the efficacy of fi. fa. and ca. sa. by authorizing the seizure of person, goods, lands and debts of the debtor in the one process (an inquest was held on the writ, inquiring as to the assets of the defendant; seizure of the assets was merely nominal, being effected by the mere finding of the jury).

However, once execution against the person is removed from this category (as it generally would be by the provisions of the Debtors Act 1936 and as we recommend later in this paper), the advantages are greatly decreased. Similarly, once the Courts required strict proof of the debt (which became necessary after abuses of the requirements became apparent) the advantages were reduced once more. The administrative burden became too great. And above all, the changing concept of government brought into question the sweeping extent of Crown privilege. So the use of the old writ has been whittled away.

In the United Kingdom it was abolished by Section 33 of the Crown Proceedings Act of 1947.

The "ordinary" writ of extent, which required as a preliminary a commission on a sci. fa. to establish the debt, became sufficiently unwieldy as to bring about its own demise, despite the fact that the commissioners often found debts on the slightest evidence proffered by the Crown.

So it may now be concluded that the writ is obsolete. It is interesting however to note a very recent case in Canada where the writ was used to advantage: *Re Kansas City Traders Ltd.* 18 *D.L.R.* 3*d*. 238. In our opinion it should be abolished as should the writ of diem clausit extremum which was the writ issued where the debtor had died.

As to the writ of ne exeat regno (or ne exeat colonia as it is in South Australia) it is probable that this writ is no longer available to assist in the execution of judgments, at least in any practical sense: see *Felton and Another* v. *Callis* 1968 3 *A*11 *E.R.* 673 and *Parsons* v. *Burk and Others* 1971 *N.Z.L.R.* 244. The latter of these two cases may well be explained in any case as an attempted misuse of the processes of the Court.

It would seem desirable in many ways if relief of some similar nature could be obtained. The history of the matter is as follows:—The writ was initially established for the King's purposes, to prevent his subjects from leaving the Kingdom 'because that every man is bound to defend the King and the Realm'. Whether the writ was always available at common law or introduced by statute is debatable.

At the beginning of the eighteenth century the writ came to be issued by the Chancellor on the application of a private person to prevent his debtor from evading his equitable liabilities by leaving the land. The rationale behind this extension was the old maxim that 'equity follows the law'. At law, an absconding debtor could be arrested on mesne process and hence brought before the Court. It therefore seemed only just to allow this resort in equitable suits. The legal creditor has nevertheless been strictly held to his legal remedy, and the writ made available only in equitable situations.

The writ of ne exeat colonia is expressly referred to in South Australian Ordinance No. 9 of 1845, and is carried through into the South Australian Equity Act of 1866. Those statutes were repealed by the Supreme Court Act of 1935, Section 3 (*a*) of which provides that "the repeal shall not affect any principle or rule of law, or any established jurisdiction, notwithstanding that the same may have been affirmed by, or derived from, any of the repealed enactments". At the

same time, Section 35 of the Act was enacted, enabling a prospective plaintiff to arrest an apparently absconding debtor under certain conditions. The procedure is regulated by Order 69 of the Supreme Court Rules. This was, no doubt, an attempt to cover the ground of the writ, though in fact there are differences.

The conditions precedent to issue of the writ were elaborated authoritatively by Lord Eldon in *Boehm* v. *Wood* (1823) *Turn & R.* 333, and his words were quoted by Dixon J. on an application before the High Court in the case of *Glover and Another* v. *Walters* (1958) 80 *C.L.R.* 172:—

> "In the first place the debt must be equitable; in the second place it must be due; and in the third place it must be a debt in respect of which the court can see its way to direct what sum shall be marked upon the writ. To the rule that the debt must be equitable there is one case of exception, the case of account; . . .".

The demand in relation to which the writ is sought must clearly be of a pecuniary nature.

Because of its origin in the maxim "equity follows the law", the writ was not granted in any case where the defendant would not otherwise be liable to arrest (Daniell's Chancery Practice, 1845 ed. Vol. 2 p. 1562 ff.).

Section 35 of the South Australian Supreme Court Act 1936-1972 is the nearest equivalent in our legislation to the United Kingdom Debtors Act provision. Like the English Act, it limits its scope to actions before final judgment.

However, it varies significantly from the English provisions in not providing that the debtor must otherwise be liable to arrest. This greater breadth in the law must lend to the writ a slightly wider scope in South Australia than it would have in England. On the other hand Section 35 (1) (*c*) seems to be an unnecessary fetter on the use of this jurisdiction and in our view ought to be repealed.

It is possible, in the Chief Justice's view, that the equitable writ of ne exeat colonia may still exist in certain areas. The whole history of this writ is so obscure that the Chief Justice's point has force and we think that a saving clause should be inserted in the new legislation to provide for any cases still covered by the old writ. An alternative and possibly a better way would be to provide that the new procedure shall cover all cases in which either under the repealed Section 35 or prior to the enactment of this Act, the writ of ne exeat colonia would have issued. In addition to the extended use listed in this report the new procedure should therefore be enacted to have effect covering all three areas.

In the Local Court jurisdiction, powers of arrest in relation to absconding debtors both before and after judgment are wider still (see Part XIII Local Courts Act 1926-1972). However the words in Section 271 (*b*) "with intent to avoid" are an unnecessary fetter and should be removed.

In practice the use of the writ has been virtually superseded by the statutory provisions of the Supreme Court Act and the Local Courts Act.

The final report of the Committee on Supreme Court Practice and Procedure (1953: Cmd 8878), as quoted by Megarry J. in Felton's case, reads:—

> "456. In our view this writ is useless in its present application and we recommend that (i) the writ should not be available to a plaintiff before judgments, and (ii) if a judgment creditor satisfies the court that there is reasonable cause to believe that the judgment debtor intends to leave the jurisdiction for the purpose of avoiding payment of his debts, the writ should be available."

Whilst one concedes Megarry J.'s comment that—

> "This proposal, if carried out, will of course transform the writ; instead of being available before judgment, and not after, it would be available after judgment, and not before; it would cease to be a writ which facilitates the obtaining of judgment, but not its execution, and instead would become a writ which aids the execution of a judgment but not the obtaining of it",

it is clear that unless the terms of the writ are extended in this way, resort to it, with its often debatable limitations, should be dispensed with.

Section 35 of the Supreme Court Act should then be extended to cover the execution of judgment debts, as does the Local Courts Act. The provisions of the Local Courts Act seem, if anything, over-liberal, but as Judges have traditionally been reluctant to exercise their discretion in this field in favour of the creditor, any reasonable defences by debtors will still protect them. The minimum amounts of money involved should be increased to justify the severity of the action sought to be taken. In these days of constant overseas travel it must be ensured that people are not kept back frivolously or vexatiously. On the other hand the fact that a person is leaving Australia owing money should, if a demand for payment has been made and not complied with, be prima facie evidence sufficient to justify the making of an order.

Turning now to writs of attachment and committal, there are two major problems in this field. First, the confused distinction between the two, and secondly, the lack of clarity in the procedural rules which often renders these modes of execution cumbersome and ineffectual. The second can be covered by Rules of Court and is not the concern of this Committee. The first seems to us to be completely unnecessary. It would seem to us best to abolish the writ of attachment, and enact that all disobedience to orders of the Court in civil proceedings shall be punishable as a contempt but that unless the contempt is committed in the face of the Court, the summary process of contempt should not be available and that an order nisi should be made in the first instance requiring the alleged contemnor to show cause why he should not be dealt with for contempt of court. It should be provided that nothing in this Act interferes with the duty of the Sheriff to serve writs of attachment issued by another Court in Australia whether Commonwealth or State or writs of attachment under the Commonwealth Matrimonial Causes Act.

We have not dealt in this paper with writs of possession as these are in a separate class, appear to be working satisfactorily and would raise questions of the amendment of the Real Property Act Part XVII which are probably outside the scope of this reference.

The next matter that requires attention is the position of the Crown in relation to execution. The Debtors Act 1936 as in the case of its English and interstate equivalents, does not bind the Crown: see *Attorney-General* v. *Randall* 1944 1 *K.B.* 709 and *Ex parte Patience* 57 *W.N. N.S.W.* 65, and this position is maintained by Section 80 (*b*) of the Supreme Court Act. However the position may possibly be altered since the Crown Proceedings Act 1972 came into force on December 14 last because Section 9 of that Act provides:—

> "Subject to this Act, and any relevant rules of court, any judgment recovered by the Crown in any proceedings may be enforced in the same manner as a judgment in proceedings between subjects, and not otherwise."

The difficulty with the wording of the Section is that there are "relevant rules of court" in existence which preserve the Crown's prerogative rights so that unless "relevant rules of court" means relevant rules of court under the Crown Proceedings Act and that is not the ordinary meaning of the words, Section 9 really achieves nothing because the Rules governing proceedings on the Crown side set out in the schedule to the Supreme Court Procedure Act 1866 are still in force pursuant to the provisions of Section 4 (1) (*b*) of the Supreme Court Act. Accordingly it seems to us that it would be wise to put beyond all doubt that the Crown can no longer imprison the subject for non-payment of a debt except for default in the payment of a fine or penalty in criminal proceedings.

Whilst on this subject it is worthwhile pointing out that it is possible that a surety for bail may on non-payment also be the subject of a ca. sa. because whilst in one sense there is an "order" which is caught by the definition of "judgment" in the Crown Proceedings Act, in another there is not, because the bail is forfeited by the act of the accused in not answering to his bail and any order for payment is really declaratory of something that has already happened. Certainly bail forfeitures were held to be outside the exempting sections of the comparable Alberta legislation in *Straka* v. *Straka* (1970) 11 *D.L.R.* 3*d*. 733 and the position should be put beyond doubt when the amendment of Section 9 of the Crown Proceedings Act is being considered.

In our opinion a writ of capias ad satisfaciendum at the suit of the Crown should only continue to exist in the cases set out in Sections 3 (*a*) and 3 (*b*) of the Debtors Act 1936 and the categories in Sections 3 (*c*) and 3 (*d*) should be abolished. The Act will therefore have to be expressed to bind the Crown.

Under the Statute 33 Henry VIII c.39 s.74 which appears to be still in force in South Australia, a Crown execution has priority over the execution of a subject even if the subject has issued his execution first provided it has not been completed (see *Butler* v. *Butler* 1 *East* 338: 102 *E.R.* 131). Again we think that this Rule should be abolished by Statute and that that Section of the Act of Henry VIII should be declared to be no longer in force in South Australia.

We should point out what is possibly only a legal curiosity today, but which ought to be abolished, and that is the possibility of outlawry. Rules 54 and 55 of the Schedules to the Supreme Court Procedure Act 1866 deal with escheats and outlawries. Escheats of course will continue as a Crown right which has nothing to do with the present questions of execution, but writs of capias utlagatum would appear to be still available, certainly at the instance of the Crown, under the two Rules to which we have referred. Clearly outlawry is completely obsolete today and should be abolished by law.

With regard to garnishee proceedings there are certain technical exceptions which we think should be swept away. Thus a garnishee order cannot be obtained on a rule of court as distinct from a judgment or order (see *Re Frankland L.R.* 8 *Q.B.* 18) nor on an order dismissing an action for want of prosecution (see *Cremetti* v. *Crom* 4 *Q.B.D.* 225) and a garnishee order does not lie against an equitable debt (see *Horsley* v. *Cox* 4 *Ch. App.* 92). We think that all sums due to the debtor whether at law or in equity should be the subject of garnishee proceedings except wages, pensions and payments of workmen's compensation, all of which are by the policy of the law exempt from any such process.

A plaintiff cannot split up his judgment debt into several parts (see *Rothschild* v. *Fisher* 1920 2 *K.B.* 243) but we see no reason why this rule should be applied where there is an assignment of part of a judgment debt for valuable consideration and the assignee seeks to issue execution in relation to the part assigned to him. Here one has a completely different situation and the assignee should be able to execute for his share of the debt and the decision to the contrary in *Forster* v. *Baker* 1910 2 *K.B.* 636 should be reversed by Statute.

We do not seem to have any procedure in South Australia, as Victoria has, for foreign attachment, that is to say, for proceedings to be taken by a plaintiff within South Australia against a defendant outside South Australia to attach assets situate in South Australia pending determination of the claim so that the assets cannot be removed out of the jurisdiction with a view to defeating or delaying the plaintiff's claim and the defendant is thereby obliged to answer the plaintiff's claim or risk judgment against him and execution on the attached assets. The procedure is set out in Sections 142-159 of the Victorian Supreme Court Act 1958 and we recommend that a similar procedure be adopted here: see also *Williams' Supreme Court Practice in Victoria* Volume 2 pages 771 ff.

Pursuant to the Act 56 Geo. III c.50, an Act to regulate the sale of farming stock taken in execution, which appears to be in force in South Australia, a Sheriff is precluded from seizing farm produce in execution except in certain defined cases. The reason for the Act was to protect the landlord's right to distress. Distraint is today a remedy which the law does not encourage and we recommend that it be enacted that this Act no longer have effect in South Australia.

By the Statute 8 Anne c.14 s. 1 which appears to be in force in South Australia, a landlord is entitled to be paid rent due not exceeding arrears of more than one year before goods seized in execution on behalf of a judgment creditor may be removed from the leased premises. This again is a protection to landlords which comes from another age

and although it has held to be in force in New South Wales (see *Marcus Clarke & Co.* v. *Coates* 54 *W.N. N.S.W.* 185) we think that it should be enacted that Section 1 of the Act of 8 Anne should cease to have effect in South Australia.

At common law the office of Sheriff was an office held for one year and whilst the shrievalty continued, the Sheriff could serve no other office, an expedient which was once used against the formidable Sir Edward Coke himself to stop him sitting in Parliament. This was originally the position in South Australia: see the Ordinances 5 of 1837, 12 of 1840, 15 of 1842 and 3 of 1843, but at some stage the Sheriff became an officer of the public service, probably when the granting of offices in South Australia ceased to be a Crown prerogative on the attainment of self-government in 1856. Accordingly all property taken in possession by the Sheriff should simply be deemed to be in the possession of the Court and the writ of distringas nuper vicecomitem which is now used to recover property from a former Sheriff should be abolished.

There is no section so far as we can see in the Supreme Court Act or in any other Act relating to execution of judgments in the Supreme Court which says what may not be taken in execution so that presumably the common law still applies that the Sheriff may not take the wearing apparel of the judgment debtor and his family (though it seems that if the defendant had two gowns the Sheriff may seize one: see 1 Comb. 291); nor tools or implements of trade to the value of five pounds following the English Act of 1848. Under the Local Courts Act Section 168 the wearing apparel and bedding of the person are exempt and tools of trade not exceeding in value twenty pounds. All of these are very much out of date in terms of present day currency. In common law jurisdictions where the amount has been looked at recently, as for example in the Ontario Act of 1960, the exemption is one thousand dollars (see *Robinson* v. *Robinson* 48 *D.L.R.* 2*d.* 42) and whilst we feel that the question of what exemption ought to be granted is a matter of policy for the Government we draw attention to the problem and to our view that the matter ought to receive attention so as to be brought into line with more modern ideas of what ought to be exempt from execution. If that is to be done, although it is not within the scope of this report, we also draw attention to Section 87 of the Justices Act which has the same exemptions as Section 168 of the Local Courts Act. We also draw attention to Sections 43-46 of the Landlord and Tenant Act 1936.

It has been recently held in Canada that where the Sheriff sells shares in a private company, that the shares are sold freed of the restrictions on share transfer which are normally placed in private companies. We are not sure that this states the law correctly but it would be a most undesirable thing if it were so and we think the matter should be put beyond doubt by amendment. The case is *Associates Finance Company Limited* v. *Webber* (1972) 28 *D.L.R.* 3*d.* 672.

One of the difficulties with Sheriff's sales which depresses greatly the price of assets paid by purchasers is the fact that the debtor's estate may be subject to unknown equities. This is referred to by Dean J. in *Owen* v. *Daly* 1955 *V.L.R.* 442 at 449-450; Barwick C. J. in *Anderson* v. *Liddell* 117 *C.L.R.* 36 *at* 42 expressed agreement with the

views of Dean J. We think that the law should be amended to provide that a purchaser from a Sheriff of the debtor's property takes a good title, subject only in the case of land to interests registered at the Lands Titles Office or in the case of goods to Bills of Sale in the General Registry Office and subject also to any interpleader proceedings taken by any third party prior to the date of sale.

We think also that Section 100 subsection (2) of the Supreme Court Act should be modified. A sheriff receives some slight protection in relation to his duties under the Statute 1 & 2 Will. IV. c.58 s.6 which appears to be in force in South Australia but the standard which the sheriff must attain to get protection is extremely high and we think unreasonably so. We think that a sheriff should only be personally liable for wilful default not for some form of mistake or technically wrongful act because in this area of the law the possibilities of enquiry are few and unlikely to be productive whereas the likelihood of mistakes even by the most conscientious sheriff is very great, and accordingly sheriffs and similar officers frequently desist from taking property which almost certainly belongs to the debtor because of some false claim which if it were even possibly true might subject the sheriff to liability for an act which would be "wrongful" in its technical sense at common law.

For the same reason we think the rules as to "walking possession" should be cleared up. There have been a number of recent cases on the case, particularly *Watson* v. *Murray & Co.* 1955 2 *Q.B.* 1. As to walking possession generally see *Halsbury Laws of England* Volume 16 paragraph 46. It should be possible for the sheriff to be in the constructive possession of goods without having to watch them night and day unless the creditor is prepared to pay a special watching fee for this purpose and we so recommend.

In the course of our discussions with the Sheriff and of our own researches we have come across certain modifications in sheriff law which we think could properly be added as recommendations to this paper. They are as follows:—

(*a*) Court bailiffs should be directed to act in aid of the Sheriff in the same way as the Police and the old writ of mandavi ballivo ought to be abolished. This would mean that a letter from the Sheriff to the court bailiff to execute would be all that is necessary.

(*b*) In England the law is that the Sheriff has a general authority to carry out any order of a Court which it is not the duty of any other officer of the Court either at common law or by Statute to execute. This is in fact the position in practice in South Australia but it is doubtful whether the English authority for so doing was in existence in 1836. It is certainly both convenient and satisfactory for the law to be as it now is in practice and we think that the position should be put beyond doubt by Statute.

(*c*) In relation to the new procedure which we recommend, there will need to be express provision as to the order in which the Sheriff is to realize assets. Either the plaintiff in execution must give an express direction as to the order in

which he wants the assets realized or the Sheriff must be given a discretion, in the absence of express direction, to realize assets in the way most convenient to carry out the execution.

(*d*) The Sheriff ought to have an express right to sell by private treaty if there is no reasonable bid at public auction. There is at present some right at common law to sell by private treaty but the limits are quite unclear and the position should be made plain by Statute. The Sheriff tells us that at Sheriff's sales it sometimes happens that the only bids are to his knowledge made by dealers and he desires to have the right to say in effect that there is no true auction because there is only a "ring" bidding or else that the price offered is so far below a fair price that it is reasonable that he withdraws the auction and proceeds by private treaty in which case he is confident that reasonable bids would be obtained. This seems to be sensible and a reasonable protection to the subject and we so recommend.

We have referred to the following textbooks in the course of preparing this report:—

Atkinson's: Sheriff Law 5th Edition (1869);

Churchill and Bruce: Sheriff Law (1879);

Edwards on the Law of Execution (1888); and

Mather on Sheriff and Execution Law 3rd Edition (1935).

The draft report has been considered by Senior Judge Ligertwood, Q.C., of the Local Court and by the Honourable Mr. Justice Bleby, O.B.E., E.D., of the Industrial Court who both agree with the reform proposed.

The Committee express their appreciation to Mrs. P. Stratman formerly Miss P. Griffith, the then Associate to the Chairman who assisted the Chairman with research for the preparation of the draft of this report.

The Committee express their gratitude to the Honourable the Chief Justice for acting as commentator and to Mr. J. T. Eichelbaum of the firm of Chapman, Tripp & Co., barristers and solicitors, of Wellington, New Zealand, to whose kindness and courtesy we are indebted for a statement of the New Zealand law and its operation in practice.

We have the honour to be

HOWARD ZELLING

R. G. MATHESON

JOHN KEELER

K. T. GRIFFIN

Law Reform Committee of South Australia