LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT

on

THE ENFORCEMENT OF JUDGMENTS

PART II: EXEMPTIONS UNDER *"THE JUDGMENTS ACT"*

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Report #40

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The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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INTRODUCTION

In December 1973 and in subsequent correspondence, the Honourable the Attorney-General requested that the Manitoba Law Reform Commission review the provisions relating to personal exemptions under *"The Garnishment Act"*,[1] *"The Judgments Act"*[2] and *"The Executions Act"*[3]. Since that time the Commission has issued a Working Paper and subsequently submitted its final recommendations regarding exemptions under *"The Garnishment Act"*.[4] In January 1978, we also published a Working Paper relating to exemptions under *"The Judgments Act"*.[5] Although Working Papers were issued on the first two Parts of this study, it was the Commission's opinion, after completion of our research in the summer of 1979, that Part III, Exemptions under *"The Executions Act"* need not be issued as a Working Paper but rather that a draft preliminary final report should be circulated to a group of interested individuals. Our final recommendations were subsequently submitted to the Attorney-General on October 22, 1979.[6]

The Report which follows, therefore, represents our final views on the question of personal exemptions for debtors - those provided for under *"The Judgments Act"*.

It will be noted, in reading this Report, that not all of our final recommendations are identical to those tentatively advanced in our Working Paper. Although some of the recommendations have been left intact, others have been slightly modified or deleted.

GENERAL

The right of a judgment creditor to satisfy his claim by proceedings against the land or interests in land owned by his judgment debtor is well established. As old and well established as the right of the creditor is the corresponding right of his judgment debtor to hold some portion of those lands exempt from execution.

As early as 1285 the *Statute of Westminster II*, 13 Edw. I, c. 18, which permitted a creditor to proceed against the chattels and, alternatively, the land of his judgment debtor, included the right of the creditor to have delivered to him "all of the chattels of the debtor (saving only his oxen and beasts of the plough) and the one-half of his lands, until the debt be levied upon a reasonable price or extent". Together the provisions of Chapter 18 prevented the forced sale of freehold land but permitted a creditor to satisfy his claim from a portion of its rents and profits, where execution taken first against the debtor's chattels proved insufficient. They appear to be the earliest mention of exemptions in the English law jurisdictions.[7]

In Manitoba the first provincial enactment which dealt with the subject of real property exemptions was *"The Homestead Act"* of 1871, 34 Vict.c. 16 which declared free from seizure "the land cultivated by the debtor provided the extent of the same be not more than one hundred and sixty acres", and "the house, stables, barns, fences on the debtor's farm". These exemptions were, with certain minor revisions, later incorporated into *"The Administration of Justice Act, 1880"*, S.M. 1880 c. 37 s. 85(8) and (9). In 1885 that Act was substantially amended and protection given to non-farm property. In order to appreciate fully the lack of change made by subsequent legislation, even in the almost 100 years since then, it is useful to set out both the provisions of the law as it

appeared in 1885 as well as the relevant portions of the legislation as it appears today:

"The Administration of Justice Act, 1885"

s. 117 The following personal and real estate are hereby declared free from seizure . . . namely:

(8) The land upon which the defendant or his family actually resides, or which he cultivates, either wholly or in part, or which he actually uses for grazing . . . , provided the same be not more than one hundred and sixty acres; in case it be more, the surplus may be sold . . .; said one hundred and sixty acres must be outside the limits of any city or town.

(9) The house, stables, barns and fences, on the judgment debtor's farm, subject, however as aforesaid.

. . .

(11) The actual residence or home of any person other than a farmer in any city, town or municipality, provided the same does not exceed the value of $2,500 (dollars); and if the same does exceed the value of $2,500, then before such residence or home shall be sold, the sum of $2,500 shall be paid to or secured to the person whose residence or home is so to be sold, which said sum . . . shall be exempt from seizure under execution, garnisheed or attached for debts.

"The Judgments Act", C.C.S.M. c. J10

s. 13(1) Subject to subsections (2), (3) and (4) . . ., no proceedings shall be taken under a registered judgment or attachment against

(a) the farm land upon which the judgment debtor or his family actually resides or which he cultivates, either wholly or in part, or which he actually uses for grazing . . . , where the area of the land is not more than one hundred and sixty acres;

(b) the house, stables, barns and fences, on the judgment debtor's farm, subject, however, as aforesaid;

(c) the actual residence or home, not held in joint tenancy or tenancy in common, of any judgment debtor, other than a farmer, where the value thereof does not exceed the sum of two thousand five hundred dollars;

(d) the actual residence or home held in joint tenancy or tenancy in common, of any judgment debtor, other than a farmer, where the value of the interest . . . does not exceed the sum of one thousand five hundred dollars.

s. 13(2) Where the area of land to which clause (a) of subsection (1) applies is more than one hundred and sixty acres, the surplus may be sold . . . .

s. 13(3) Where the value of a residence or home or interest therein

(a) to which clause (c) of subsection (1) applies exceeds two thousand five hundred dollars; or

(b) to which clause (d) of subsection (1) applies exceeds the sum of one thousand five hundred dollars;

it may be offered for sale.

s. 13(4) No residence or home or interest therein of a judgment debtor shall be sold unless the amount offered after deducting all costs and expenses

(a) exceeds two thousand five hundred dollars . . .

(b) exceeds one thousand five hundred dollars . . .

and no such sale shall be carried out, . . . until the amount of the exemption is paid over to the judgment debtor . . .; and that sum,until paid over . . ., shall be exempt from seizure under execution, garnishment, attachment for debt, or any other legal process.

The provisions of *"The Administration of Justice Act, 1885"* are strikingly similar to the present provisions of *"The Judgments Act"*. Notwithstanding the passage of time and rising rate of inflation these laws have, for the most part, remained static and unchanged. As a result, they are today incapable of providing the protection originally intended by the Legislature. The exemption provisions are not, however, simply inconsistent with present economic

conditions. Designed for a predominantly rural and agricultural society, they also fail to reflect the very drastic changes in the social and demographic conditions since their enactment in 1885. The result is that some forms of relief which were once of general application are now available to only a few particular groups of Manitobans - a discriminatory and unfair situation.

In the years since they were enacted, the Legislature has taken a piecemeal approach to the study and revision of exemption laws. The fact that their provisions have been largely unresponsive to changing social and economic patterns can, we think, be attributed to this type of limited scope amendment. It is now time that the traditional concepts governing exemptions be reconsidered and that a comprehensive study of their provisions be undertaken.

THE RESIDENCE EXEMPTION

In determining the value of property for the purpose of the residence or "homestead"[8] exemption, its dollar value generally is measured by the debtor's equity in the property, not its gross market value. Thus the amounts of any liens, mortgages or other encumbrances must first be subtracted from the market value in order to determine the value of the property for the purposes of the exemption.

Simply stated the effect of this exemption is to prevent any sale of the "actual residence or home" of a judgment debtor where his equity does not exceed $2,500 in the case of sole ownership by the debtor, or $1,500 where the debtor holds property jointly. For these provisions to operate, the property or the debtor's interest therein must (1) come within the limitations as to value and

(2) be the actual residence or home of the debtor. If the equity in the property exceeds the given limits, then it may be sold, but only if the amount offered for its purchase exceeds either $2,500 or $1,500 depending on the nature of the debtor's interest, plus the amount of all costs and expenses, and if the amount offered is sufficient to warrant a sale of the property, that sale cannot be completed or possession turned over to the buyer until the amount of the exemption is paid to the debtor.

In its earliest years the extent of this exemption easily immunized large numbers of debtors from the forced sale of their homes. Where the value of a home exceeded the amount of the relevant exemption, the debtor retained a, then, very substantial sum. Since an adequate home could be purchased for $2,500 the debtor and his family were always assured of a roof over their heads. Today the exemption no longer offers such a guarantee. One has only to think of the spiralling increases in land costs and values in the past few years alone to realize how minimal is the protection it currently provides.

In our discussions with the Winnipeg Real Estate Board we learned that in 1976 the estimated average price of a house sold by way of multiple listing was $39,362. In 1979 the average price of a house had risen to $49,306; an increase of almost $10,000 in three years! We could not, of course, hope to determine what is the extent of the equity holding of the average Manitoba homeowner today. We do, however, have a working knowledge of what is required in the way of a down-payment in order to purchase a home in today's market. Twenty-five hundred dollars does not represent much purchasing power, and in fact has not for several years.

Moreover, in the past five years the conventional mortgage rate has soared from 10 3/4% to 15 3/4% (as of March 21, 1980), significantly adding to the cost of replacing a home. If the purpose of the exemption is to ensure the debtor and his family adequate accommodation, we think that the Manitoba exemption is not realistic.

Our conclusions regarding the inability of these exemptions to accomplish their intended purpose have not been based solely on a consideration of the inadequacy of the dollar limits which they provide. Section 13(4) of *"The Judgments Act"* would, we think, defeat the purpose of any such exemption no matter how high it might now be set. The unfortunate effect of section 13(4) is that once the amount of the exemption has been paid to the debtor that sum will once again be liable to seizure by his creditors through garnishment or other enforcement proceedings. The conduct of a judgment creditor, not satisfied at sale, who would proceed against his debtor's exemption may seem reprehensible. Nevertheless the law is clear and there is nothing which prevents a creditor from employing its full force and effect. Fault clearly lies with the legislation.

In the course of our study of the Manitoba provisions we had occasion to review and consider similar legislation from a number of other jurisdictions. Many of these, principally in the United States, exempt completely from seizure and sale any property owned by the judgment debtor and resided in as his home. Such provisions are, of course, intended to prevent the imposition of hardship on the debtor and his family and to lend stability to their unfortunate circumstances by permitting continued ownership and occupancy of the family home despite their creditor's claims. Thus they set no dollar limit on the amount of the homestead; it is, irrespective of its value, totally exempt.

Those Canadian jurisdictions which exempt the homestead, on the other hand, have, for the most part, continued to maintain the more orthodox or traditional method of circumscribing the exemption by use of dollar value limitations even as they amend their homestead legislation. As land values have changed over the years, their approach has been to legislate higher ceilings or dollar limits on these exemptions. In this way these jurisdictions have succeeded in modernizing and increasing the relief which they variously provide. In Alberta, for example, *"The Exemptions Act"*[9] provides that where the value of the house and lot of an execution debtor exceeds $8,000 proceedings may be taken to sell the land. In Saskatchewan, *"The Exemptions Act"*[10] was revised in 1973, and presently sets $16,000 as the maximum value for its current residential exemption.

Our research leads us to conclude that a complete exemption of the homeowner's dwelling,without qualification, goes far beyond the spirit and requirements of a homestead exemption. The problem with this type of legislation is that not only does it ensure provision of a modest shelter to a distressed debtor but, because it applies identically to all homes irrespective of their value, it permits some debtors to maintain luxurious dwellings and thus high standards of living as well.

One can, for example, envisage that a shrewd businessman might pour all of his assets into and acquire clear title to some "Olympian" estate, all the while amassing an enormous financial debt. We can see no logical reason why, at the expense of the legitimate interests of his creditors, such a debtor should rightly be permitted to retain his home. A more modest dwelling would both easily satisfy the needs of the debtor and be more in accord with the purpose of the homestead legislation.

One comment on the Minnesota exemption illustrates that exemptions without value limitations have indeed been the subject of abuse.[11]

> . . . [E]xemption of one-half acre and one-quarter acre of urban property, without a value limitation, cannot be defended. For example the recent case of *O'Brien v. Johnson* illustrates both the extreme injustices which homestead exemption laws can cause and the legislative indifference to those laws. Mrs. Johnson recovered a $96,000 judgment for personal injuries against the O'Briens. While the judgment was being appealed the O'Briens moved into an apartment on a $100,000 piece of property which they owned and which met the statutory limitation of one-third of an acre . . . . The Minnesota Supreme Court felt "reluctantly compelled" to apply the one-third acre exemption statute and held that the O'Briens' piece of property was exempt . . . .
>
> The Court "deplored the injustices" of the statutory exemption and described them as "a vehicle for fraud and rank injustice". The Court called upon the Legislature to place a monetary limit on the exemption. In 1969 the Legislature did indeed amend the law. It increased the one-third acre limitation to one-half acre! Certainly the interests of creditors are not so slight as to justify such results.
>
> Obviously, some dollar limitation on the homestead exemption is necessary. However, most states' exemptions are so low that the purpose of the law is defeated. Legislatures should re-evaluate these laws . . . limitations should be adjusted to reflect today's housing values.

In his address to the legal profession in 1974,[12] C. Gordon Dilts, Q.C., Professor of Law at the University of Manitoba, advocated a similar approach and encouraged that we recommend substantial increases in the homestead exemption. His comments are reproduced below.

> . . . [O]ne may expect that the Law Reform Commission will be recommending increases in the very near future to achieve at least the minimum objective of standardizing the exemption with the $8,000 figure in . . . Alberta.

With great deference to these authors, we do not agree that the problem of updating the Manitoba homestead provisions to provide more adequate protection to the debtor, without unfairly prejudicing the rights of creditors, is best accomplished by simply increasing the debtor's exemption. Setting the value of the homestead exemption at what may be considered the more realistic levels adopted in Alberta[13] or Saskatchewan also raises problems. For example, more spouses are today taking title to their homes in their joint names.[14] If both spouses are judgment debtors, the value of their combined exemption may create a very substantial shield against their creditors. Such an exemption may be unnecessary and indeed excessive, particularly in those cases where there are no minor dependents or where home ownership is in all other respects not required. In this respect, a dollar value exemption would create as much prejudice and is, we think, as much subject to abuse as Minnesota's blanket homestead provision.

Raising the dollar amount of the exemption would, of course, increase the protection currently provided under *"The Judgments Act"*. However, it would not necessarily preserve the home as a residence for the debtor and his family and would indeed simply continue the artificial distinctions that are already characteristic of our dollar exemption. Why, for example, should a person without dependents whose equity in the home is valued at $2,500 be allowed to retain this home while a person with dependents

whose equity in the home amounts to $3,000 be subject to the possibility of losing his home in a sale to satisfy his creditors? Why, in disregard of the large numbers of families who today make their homes in rented houses or apartments, should the legislation continue to provide an exemption which is exclusive to homeowners (with or without families) and offer no equivalent monetary exemption for tenants? An increase in the amount of the exemption would merely aggravate this discrimination.

In light of the foregoing observations and the complex problems which we have studied, we do not think that either the blanket exemption or the dollar value exemption are appropriate models for reform of Manitoba's current homestead provisions. There is, however, one further reform proposal which has attracted our attention and which we tentatively advanced in our Working Paper as the best solution for Manitoba.

In this proposal the homestead exemption takes the form of a stay of execution or right of occupancy which is granted to the debtor and which postpones the ultimate sale of his residence property. Unlike the Minnesota provision which contemplates both the complete and automatic exemption of the homestead from execution and sale, this exemption is confined to cases where occupation of the residence is shown to be essential for the maintenance and support of a debtor and his family and does not compromise the rights of creditors by permanently removing an asset from their grasp. Integral to the proposal is the philosophy that a judgment creditor has the right to have his debt satisfied from all of the debtor's real property including his residence. However, if the debtor and/or his spouse

and dependent(s) can be shown to require the residence for their occupation then, in the discretion of the judge, a sale of the dwelling may be temporarily deferred; otherwise, the property is liable to sale without further monetary "exemption" or advantage.

Since a right of occupancy "exemption" would be based on the need of a debtor, it would require judicial application on a case-by-case basis, not only to establish the "exemption" in the first place, but also to review its appropriateness from time to time.

Such a judicial determination would, of necessity, add an element of uncertainty to and lengthen the "exemption" process and add to the cost of its administration. It is these aspects of the proposal with which some of our readers expressed concern. However, only one was of the view that these consequences were fatal to the scheme. The others agreed that with some refinements, this scheme would properly justify the added expense and time involved in judicial review and would import considerable flexibility and individual tailoring into the law, thereby avoiding the rigidity and injustices of other exemptions. They suggested that the proposal might be improved and litigation curtailed by the enactment of statutory guidelines and by limiting the "exemption" to cases where the debtor or his family suffers substantial hardship as opposed to inconvenience. Observed one writer:

> If the only hardship involved in forcing the sale of a residence in Tuxedo is that the family will have to accept residential accommodation of an adequate but significantly more modest nature elsewhere, that ought not to suffice to delay a judgment sale.

Cautioned another, commenting on the Commission's early speculation that in a good many cases such an order would be granted until dependents living in the residence reached their majority:

> One must not make it a rule of thumb that when there are children, there can be no sale. Relocation within the same area does not necessarily create hardship. It may at most be an inconvenience.

One reader suggested the enactment of a provision which would direct the court to consider the factor of hardship to the creditor:

> Cases may arise where a disabled person has as a result of an accident or for other cause, only a judgment as his main asset. In such a case postponement might work great hardship on the creditor. The moral claim of the creditor [to have his judgment realized] . . . could well outweigh the inconvenience to a debtor.

Finally, one writer suggested that the enactment of a provision which would give the court a discretion to require as a condition of granting an order of postponement that the debtor make regular payments toward the satisfaction of the judgment, would do much to discourage abusive and vexatious applications. Indeed, the British Columbia experience with section 42(1) of *"The Executions Act"*[15] would support such a conclusion. That section provides in part that

> . . . where a premises situated on the land or interest therein of a judgment is the matrimonial home of the debtor and his spouse, the Court or Judge may defer the sale, <u>subject to</u> the performance by the judgment debtor of such terms and conditions of payment or otherwise as the Court or Judge may impose.[16] (emphasis added)

We have been able to locate only one reported case dealing with that provision since its enactment in 1970 and we are advised that applications for deferral are infrequent.

Accordingly, we recommend that section 13(1)(c), (d), (3) and (4) of *"The Judgments Act"* be repealed. It should be replaced by a provision whereby on the application of a judgment creditor for an order to sell the debtor's actual residence or interest in it, the judge should, in granting such order, have a discretion to postpone the sale, if he is persuaded by the judgment debtor that the residence is necessary for the maintenance and support of the debtor and/or his family and that they would suffer substantial hardship from such a sale. The judge should also have a discretionary power to impose such terms and conditions as to payment of the judgment debt as he deems fit. The judge in exercising his discretion should be required to consider all relevant facts, including:

(a) the relative hardship as between the creditor and the debtor;

(b) any other person's legal obligation and ability to support and maintain the debtor and/or his family;

(c) the cost and availability of suitable alternate accommodation, including rented premises;

(d) the likelihood and reasonableness of satisfaction of the creditor's claim by other enforcement proceedings;

(e) the value of the residence;

(f) the amount of the judgment;

(g) the special requirements of the debtor and/or his family; and

(h) the value of the debtor's and any other person's interest in the property.

In practice all orders for sale make reference to the exemption rights existing under the Act,[17] and it has been held that they must be granted notwithstanding the failure of the debtor to appear or raise the issue of his entitlement.[18] However, we recommend that the debtor and/or his family may, at the time the creditor seeks to have the property sold, make application for a postponement of sale before a judge of the Court of Queen's Bench in the form of a concurrent application. In other words, it would be incumbent on the debtor to come forward and show cause why the property should not be sold. As has been held to be the case with the existing provisions,[19] the postponement provisions should be available for the benefit of the judgment debtor or his family and not be personal to the judgment debtor alone. This should be clearly set out in the Act itself and family members should be subject to the same onus of proof as the judgment debtor.

Where in the opinion of the court substantial hardship would result if the creditor were allowed to have the debtor's residence sold, the judge should, we believe, also be given wide powers by the legislation to make such disposition with respect to the duration of the postponement period as he deems proper. The postponement period might, for example, be of short duration only, enabling the debtor and his family to find alternative accommodation. There will be some cases however when a debtor's need or disability would require a much longer term, and the jurisdiction of the court should be flexible enough to permit postponements of both fixed and indefinite periods.

Subsequent changed circumstances might, of course, call for the shortening, termination or extension of the postponement period. We therefore further recommend that provision be made in the legislation for an application by either the creditor or the debtor to the Court of Queen's Bench for a review order for sale subject to a postponement period in light of changed circumstances.

The order for sale subject to a postponement period would, of course, operate in the immediate interest of the debtor and his family, in the short run preventing the imposition of hardship on the family and forestalling their dislocation. In addition, it might provide some debtors with sufficient opportunity to satisfy their creditors in some more convenient manner and in that way enable them permanently to avoid the sale of their homes. Until ultimate satisfaction is had the priority position of the creditor's claim in respect of the property should be determined as of the date of the registration of his certificate of judgment.

One of our readers also suggested that in such cases a judgment creditor should not be obliged continually to renew his judgment every two years, nor should he have to face the prospect of re-suing on the judgment if ten years have elapsed from the date of the original judgment.

Section 6 of *"The Judgments Act"* provides:

> 6 Every judgment heretofore registered or re-registered, or which may be registered or re-registered under this Act, ceases, in two years after the last registration thereof, to form a a lien or charge upon the lands of the judgment debtor or anyone claiming under him, unless before the expiration of the period of two years the judgment is re-registered; and the lien or charge ceases when the period of two years has at any time elapsed without a further registration of the judgment.

Section 3(1)(j) of *"The Limitation of Actions Act"*, C.C.S.M. c. L150, provides:

> The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

. . .

> (j) Actions on a judgment or order for the payment of money, within ten years after the cause of action thereon arose, but no such action shall be brought upon a judgment or order recovered upon any previous judgment or order.

We have discussed these suggestions with Mr. Donald Lamont, Q.C., Registrar General, Land Titles Office, and he is opposed to both proposals. He points out the fact that although the sale of land may be postponed, that in no way prevents the creditor from exercising other remedies available to him and recovering judgment in full. He also notes that section 6 of *"The Judgments Act"* is a housekeeping provision; that is, it is a legislative provision designed to clear away liens for judgments which have been satisfied but which have not been vacated from the general registry. He believes that if a judgment creditor were not required to re-register his certificate of judgment every two years, there would be administrative difficulties in determining which liens could legally be vacated from the general registry.

As noted in our earlier Report on *Improved Methods of Enforcing Support Orders Against Real Property*:

> [The general] registry is an anomaly in the Torrens System which embraces the principle that a certificate of title should reflect all of the relative rights and interests attached to any title of property.[20]

However, in view of the fact that a system for registration of certificates of judgment in the general registry pursuant to section 3 of the Act does exist, we agree that a judgment creditor should be required to re-register certificates of *judgment every two years if his right of lien is to continue* against property where no order of sale subject to postponement has been granted. Where such order has been granted, however, we recommend that there be enacted a provision allowing registration of such order against that specific piece of property. As against that property only, such order

would operate as a lien and charge without the need for further registration. This would alert third parties to the fact that the property might ultimately be sold to realize the creditor's judgment in the event that the debt is not satisfied from other sources during the currency of the postponement period. In addition, of course, a provision would have to be enacted to deal with vacating or discharging such order in the event of the judgment creditor's debt is satisfied or forgiven.

Where a debtor's residence is owned by him as a joint tenant with someone else, a postponement of sale such as we propose could unfairly defeat the claim of the judgment creditor in the event of the debtor's death. This raises the question of what happens now, under *"The Judgments Act"*, when a debtor who owns property in joint tenancy dies before the creditor has instituted sale proceedings under the Act. Does the property pass *in toto* to the debtor's joint tenant by virtue of the right of survivorship, and thus extinguish the creditor's lien on the land, or does registration of the judgment sever the joint tenancy so that the debtor's interest becomes an asset of his estate and liable to be sold by virtue of section 7 of *"The Judgments Act"*?

It was contended for some time in Manitoba, following the British Columbia Supreme Court's decision in *In Re Penn* (1951) 4 W.W.R. 452, that the registration of a judgment against a joint tenant had the effect of "suspending" the tenancy and that if the debtor tenant died, there was no way of reviving it, and the deceased debtor's interest in the property consequently passed, not to the surviving joint tenant but to his estate and thus remained available to his creditors. This finding was expressly rejected in

favour of the Ontario Court of Appeal's ruling in *Power v. Grace* (1932) O.R. 357, by Williams, C.J.Q.B. in the Manitoba case of *Brooklands Lumber and Hardware Ltd. v. Simcoe* (1956) 18 W.W.R. 328, in which a judgment creditor moved for an order that the interest of the judgment debtor as a joint tenant in certain property be sold to satisfy the judgment.

In *Power v. Grace* it was held that the mere delivery of a writ of execution against lands into the hands of the sheriff was not sufficient to sever the joint tenancy and that until execution or sale proceedings were actually commenced a joint tenancy remained intact. If the debtor joint tenant died before execution, the property passed to the other joint tenant, discharged of the execution. In the *Brooklands* case Chief Justice Williams expressly preferred the reasoning in *Power v. Grace* over that of *In Re Penn*. He did not, however, expressly state that the commencement of proceedings by the judgment creditor to enforce his judgment lien would convert the debtor's interest in the land from that of a joint tenant to a tenant in common and thereby fully secure the judgment creditor's claim. Although some readers are of the view that the case is authority for that proposition, we think it is unclear. Hence, the legal position of a judgment creditor who has commenced sale proceedings against land but has been temporarily frustrated in his attempts by a postponement in the event his debtor dies during the currency of the postponement is uncertain and calls for statutory clarification.

As stated in our Working Paper, we believe that as a matter of policy the judgment creditor should not be completely defeated in the situation described and that the judgment should continue to charge the debtor's interest in

the hands of the surviving owner. We are not convinced, however, that the judgment should continue to charge the debtor's interest in the hands of the surviving owner when a judgment creditor has not commenced proceedings for sale. We see a clear distinction between those cases where a judgment creditor prejudices his legal position by "sitting on his rights" and those cases where the judgment creditor has demonstrated an intention to sever the tenancy and to ensure payment of his debt by exercising a legal remedy, but is frustrated in his attempts by the postponement of sale.

We therefore are of the view that the solution tentatively adopted in our Working Paper and based on a proposal of the British Columbia Law Reform Commission[21], is unnecessary and inappropriate. That proposal read as follows:

> If a judgment is registered against a debtor who has an interest, as a joint tenant, in land, the joint tenancy is not severed but if the debtor dies and the judgment remains unsatisfied then the judgment continues to charge the interest of the debtor in the hands of the surviving owner(s); and
>
> (a) if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is greater than the claims of <u>all</u> creditors, then
>
> (i) a registered judgment creditor should look first to the estate of the debtor for satisfaction of his judgment, but his claim is subordinated to the claims of ordinary creditors who have not registered a judgment against the debtor's interest in land, and
>
> (ii) if the debtor's estate, after the claims of ordinary creditors, is insufficient to

satisfy a registered judgment the judgment creditor should then be entitled to look to the debtor's interest in land in the hands of the surviving joint owner; and

(b) if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is less than the claims of all creditors, then

(i) a registered judgment creditor may share rateably in the estate, but his claim therein is reduced by the value of the debtor's land which is available to satisfy his claim, and

(ii) a registered judgment creditor is entitled to look to the debtor's interest in land in the hands of a surviving joint tenant to satisfy the deficiency.

(c) notwithstanding (a) and (b), if, at the time of the debtor's death, the judgment creditor had commenced proceedings under section 3 of *"The Judgments Act"* to enforce the charge created by the registration of his judgment he may continue those proceedings.

(d) a joint tenancy is severed by a sale of a joint interest in land pursuant to *"The Judgments Act"*.

Our decision to reject this scheme has not been based exclusively on the fact that a solution is not required. The recommendation has also been the subject of criticism. In a recent article[22], A.J. Maclean objected to the proposal on the ground that it was "rather complicated" and "excessively advantageous to the judgment creditor". He observed that

If his debtor dies first he will in substance retain his security against his debtor's former interest. If his debtor survives the other joint tenancy (sic) his security will now operate against all of the land. It is surely going too far to give the judgment creditor the best of all worlds.

One of our respondents expressed the view that the proposed scheme would promote litigation.

> [Ordinary] creditors would have an incentive to rush to the court as soon as a joint tenant became ill to ensure that they could catch jointly owned property.

He also noted that "the simplicity of a joint tenancy to the surviving owner is presently one of the chief benefits of this type of property ownership".

We reject the provision on yet another ground. While this proposal was clearly intended to improve the position of the judgment creditor, we believe that its benefits will, in some circumstances, prove to be illusory. In fact, a judgment creditor may find himself in a worse position than an ordinary creditor.

Under the existing law, except for property held in joint tenancy, a certificate of judgment registered in the general registry prior to the death of a judgment debtor continues, notwithstanding the death, to bind and form "a lien and charge on all lands of the judgment debtor in the land titles district in the land titles office of which the certificate is registered" to the extent of the judgment debtor's interest. When the debtor's estate is comprised of interest in land, either in whole or in part, which interest is subject to a certificate of judgment, an executor or administrator who wishes to dispose of that interest must first obtain from the registered judgment creditor either a whole or a partial discharge and have it registered before he can deal with the property. In the alternative, the interest in the property could be dealt with subject to the certificate of judgment. So, a registered judgment creditor has, at least

for practical purposes, some priority over the claims of unsecured creditors. (The extent of a registered judgment creditor's legal priority over the claims of unsecured creditors with respect to interests in land will be dealt with more fully later in this Report.) With regard to any personalty which may comprise the estate, the registered judgment creditor usually ranks equally with ordinary creditors.

However, the effect of the British Columbia scheme would be to postpone or subordinate, under certain circumstances, the rights of registered judgment creditors to those of ordinary creditors against all estate assets, including interests in land, if the debtor was a joint tenant of property immediately prior to his death. In those cases where the estate is solvent, this would be of little practical consequence. Registered judgment creditors would rank after ordinary and other secured creditors but, ultimately, their debts would be realized in full. But in those cases where the estate assets are insufficient to satisfy both the claims of registered and ordinary creditors, in other words, in cases of insolvency, the effect of the British Columbia scheme might be to reduce the rights of registered judgment creditors to less than those of ordinary creditors. Under the existing law in Manitoba in the case of an insolvency, registered judgment creditors probably rank *pari passu* with ordinary creditors pursuant to section 65(1) of *"The Trustee Act"*, C.C.S.M. c. T60. That section provides:

> On the administration of the estate of a deceased person, in the case of a deficiency of assets, debts due to the Crown and to the personal representative of the deceased person, and debts to others, including therein debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as are payable in like order of

> administration as simple contract debts, shall be paid pari passu and without any preference or priority of debts of one rank or nature over those of another; but nothing herein prejudices any lien existing during the lifetime of the debtor on any of his property. (emphasis added)

In *Toole Peet Trust Company (Pallesen Estate) v. London Life Insurance*[23] the court considered a virtually identical section in *"The Trustee Act"* of Alberta, R.S.A. 1922 c. 220, in determining whether the effect of the registration of a certificate of judgment in a land titles office was to create a lien within the meaning of that section so as to give the creditor priority over simple contract debts. The court held that it did not. However, the case may be distinguishable. The Alberta equivalent of section 3(1) of *"The Judgments Act"* did not expressly say that the registration of a certificate of judgment created a lien on the debtor's land.

Under the British Columbia scheme, on an insolvency, registered judgment creditors would not rank *pari passu* with ordinary creditors against all of the estate's assets (which would be the case if *Toole Peet* is the law in Manitoba) nor would they rank prior to ordinary creditors in respect of any interest in land which formed all or part of the estate (which would be the case if *Toole Peet* is not the law in Manitoba). If the British Columbia scheme were adopted, section 65(1) of *"The Trustee Act"* would have to be amended because it is inconsistent with the British Columbia scheme. Moreover, a registered judgment creditor would have to commence proceedings for sale against the surviving joint tenant in order to attempt to realize full payment of his debt. If the surviving joint tenant was the spouse of the deceased judgment debtor and the property the deceased's actual residence or home, the spouse could probably make application for postponement of the sale of the property.

In *Mymryk v. Canada Permanent Trust Company*,[24] the court held that the protection afforded by the existing exemption provisions of *"The Judgments Act"* did not cease on the death of the judgment debtor but continued for the benefit of his wife and children. The widow in that case was consequently entitled to be paid $2,500 of the proceeds of the sale of her deceased husband's residence.

Applying the reasoning in *Mymryk*, it would appear that a spouse of a deceased judgment debtor could successfully oppose the creditor's application for an immediate sale and obtain a postponement, if she could demonstrate substantial hardship. Her case would be particularly strong in view of the fact that all of the estate's assets had been distributed amongst the ordinary creditors. A registered judgment creditor would then find himself in a position where the assets of the estate had been distributed in satisfaction of the claims of ordinary creditors while his debt remained unsatisfied for perhaps an indefinite period of time collecting interest at the unrealistically low rate of 5%. In addition, he would have incurred additional costs in defending the spouse's application for postponement.

If the proceedings for sale did not result in the registered judgment creditor recovering a share equal to that which he would have recovered under section 65(1) of *"The Trustee Act"*, he would be treated less favourably than an ordinary creditor.

Therefore, in our view, if the British Columbia scheme were adopted, registered judgment creditors may, in cases where the deceased debtor's estate is insolvent,

pay a high price and, in fact, may be penalized, for the right to go against jointly held property. We can conceive of only one situation in which the British Columbia scheme would be beneficial to a registered judgment creditor when his deceased debtor's estate is insolvent. That would be where either the value of the registered judgment creditor's share in the estate after the claims of ordinary creditors were satisfied or his "rateably reduced share" in the estate, together with the net proceeds of the sale of the jointly held property to which he would be entitled under the British Columbia scheme, exceeded the share in the estate to which he would have been entitled pursuant to section 65(1) of *"The Trustee Act"*.

If *Toole Peet* is not the law in Manitoba and if the *Brooklands* case is authority for the proposition that a joint tenancy is severed with the commencement of sale proceedings, the use of the British Columbia proposal in Manitoba would be of no advantage to the registered judgment creditor who has commenced sale proceedings. He then has priority over ordinary creditors (based on his lien under section 65(1) of *"The Trustee Act"*) and the right to proceed with the sale proceedings against the interest of the judgment debtor in property owned by him in joint tenancy immediately prior to his death. We think the right so to proceed is desirable.

In order to ensure that the *Brooklands* case is authority for the proposition stated above, we recommend the enactment of a provision which would provide for severance of a joint tenancy once proceedings for sale had been commenced. This would remedy the situation in

which a registered judgment creditor is defeated when a debtor joint tenant predeceases his co-tenant and would not disturb the essential attributes of joint tenancy nor affect the existing rights of registered judgment creditors.

Yet another issue to which our proposal gives rise but to which we did not address ourselves in our Working Paper, is the rights of a judgment creditor as against the debtor and his property in the event the property suffers damage or is destroyed or is permitted to deteriorate during the currency of the postponement. Can a judgment creditor maintain a common law action for damages in waste or secure an injunction restraining the further commission of the tort? May he place fire insurance on the premises with extended coverage so as to give himself some measure of protection in the event the debtor's premises are damaged or destroyed by fire or some other insurable peril? Does his "interest" in the property merit and deserve protection and justify legislative intervention in the event that adequate remedies do not exist under the law now?

We believe that a registered judgment creditor does indeed have a vested interest in the care, custody and control of property which is the subject of a postponement of sale. However, whether the creditor would have a legal interest in the property such as would give rise to a right to maintain an action in waste or to place fire insurance is unclear. In *Re Judgments Act, R. v. Hamilton* (1962), 39 W.W.R. 545 (Man. Q.B.) the court held that a judgment creditor acquired no property rights in the subject matter of the sale, as such remains in the judgment debtor until the sale of the property is perfected and fully completed; and that there is only one right which

a judgment creditor has under section 3 of *"The Judgments Act"* and Queen's Bench Rule 511, and that is the right of the judgment creditor to sell the exigible land of his judgment debtor in order to satisfy his judgment and costs.

Professors John Irvine and A. Burton Bass, both instructors of real property law at the University of Manitoba, have confirmed our findings that actions in waste have been up until now confined to cases where the relationship between the parties is that of landlord and tenant, mortgagee and mortgagor, remainderman and life tenant, and occasionally joint tenants. In their view a judgment creditor whose right to sale was postponed would have no cause of action at common law for waste against the judgment debtor.

We have also been unable to locate any case law where the courts have dealt with the question of whether a judgment creditor, either at the time of filing his certificate of judgment or once sale proceedings have been commenced, has an insurable interest. However, there is well established law that a creditor has no insurable interest in the property of his debtor by reason of his debt.[25] There is, however,some authority for a lienholder or equitable mortgagee of specific property having such an interest. Cases in which the courts have held that the lienholder has an insurable interest are, based on our research, confined to marine law. But even there the courts have not always recognized an insurable interest in the judgment creditor. For example, in *Moran,Galloway v. Uzielli* [1905] 2 K.B. 555, the court held that a creditor for ordinary debt who had no right to arrest the property of his debtor except after judgment under writ of execution, did not have an insurable interest.

The uncertainty in the law, in our view, further underlines the need for a provision which would allow the court to review the postponement from time to time in light of changed circumstances such as we suggested at page 15. In addition, however, we also recommend that a provision be enacted giving a judge power to impose terms and conditions respecting the custody and care of the property as he deems just and equitable. Although we make no specific recommendation regarding the drafting of such a provision, section 199 of the *Bankruptcy Act* (Canada)[26] might prove a useful model. That section provides:

> The court may, in deciding any matter brought before it, impose such terms on a debtor with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect registered creditors and may give such directions for that purpose as the circumstances require.

Although such a provision would, we think, be wide enough to permit a judge to require that a judgment debtor place fire insurance on the property with the judgment creditor as named beneficiary, a judgment creditor would be better protected if he were able to place such coverage himself. Accordingly, we also recommend that an amendment be made to *"The Insurance Act"*[27] so as to allow a judgment creditor, whose right to sale has been postponed pursuant to *"The Judgments Act"*, to insure the subject property.

A RESIDENCY EXEMPTION AND BANKRUPTCY

Although this scheme is clearly the most desirable of all the reform proposals which we have examined, it is

not without flaws. A re-examination of the proposal at the suggestion of one of our respondents in relation to the *Bankruptcy Act* (Canada), *supra*, leads us to the conclusion that it would likely have the effect of making the residence wholly available for division amongst creditors on a bankruptcy.

Section 47(b) of the *Bankruptcy Act* provides that:

> The property of a bankrupt divisible among his creditors shall not comprise
>
> . . .
>
> (b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides, ...

This section, together with the existing exemption provisions, have the combined effect of requiring the trustee in bankruptcy on the sale of the actual home or residence to pay to the bankrupt the sum of $1,500 or $2,500, depending on how he holds title to the property. Whether the residence will be shielded under our proposal depends, we think, on whether the postponement of sale would be viewed by a court as an exemption for the purposes of the *Bankruptcy Act*. As noted earlier, the British Columbia *"Executions Act"* contains a provision which allows the court a discretion to defer the sale of the matrimonial home of the debtor. However, we have been unable to locate any reported cases where the courts have addressed themselves to the issue of whether this is a form of exemption for the purposes of the *Bankruptcy Act*. Indeed, the Registrar General in Bankruptcy of British Columbia advises that, to his knowledge, the question has not even arisen.

Attempts to shield the residence on a bankruptcy by framing the postponement provision in the language of an exemption would likely be ineffectual in the opinion of Mr. Rae Tallin, Legislative Counsel.

> The right to postpone the sale is not, in essence, an exemption. Whatever language is used, the courts would, in my opinion, be entitled to look beyond the wording of the Act to determine what the true essence or intent of the provision was.

An alternate approach, suggested with a view to remedying this difficulty and which we considered, would exempt the residence but permit a judgment creditor to apply to the court to lift the exemption subject to the equities we have contemplated. However, we find such an approach unacceptable; in the event that a bankruptcy occurred prior to the granting of an order lifting the exemption or if the application for the order lifting the exemption was unsuccessful, the residence would remain completely exempt and unavailable for the satisfaction of a creditor's claim. Such a provision could give rise to the same abuses and inequities as the blanket exemption provisions which we discussed earlier in our Report.

We therefore remain committed to the postponement provision but recommend that representation be made to the federal Government of Canada to enact a provision in the *Bankruptcy Act* which would provide for a suitable monetary exemption in respect of the residence which would adequately reflect today's escalated housing costs in the event of a bankruptcy.

THE FARM LAND EXEMPTION

As we noted earlier in this Report, "*The Adminis-*

tration of Justice Act" of 1885 made special provision for Manitoba farmers. The legislation, passed in part to encourage and promote settlement in the area,[28] exempted the land on which a defendant or his family actually resided or which he cultivated or which he used for grazing together with his home, stables, farms and fences which were situated on the land, up to a maximum of 160 acres. Any acreage in *excess of the 160 acres, including any buildings on the* surplus land were liable to be sold, subject, of course, to any existing liens or encumbrances. The present *"Judgments Act"* continues this favoured treatment for farmers.

The practical effect of these provisions is to combine within the homestead exemption both the residential and the income-generating realty of the farming community. No other occupational group within Manitoba receives treatment equivalent to that which is accorded the farming population under this Act.

In practice, the farm land exemption gives rise to a variety of anomalous results. In the case of the wheat producer or cattle rancher the acreage requirements for a viable farming operation are so great that the exemption of 160 acres is actually ineffectual. The high costs of equipment, buildings and other capital requirements needed for these types of agricultural operations necessitate that they be spread over large tracts of land. The per acre cost to a wheat farmer, reduced to farming only a 160 acre field, would be exorbitant, and his livelihood, as a result, so precarious, that he would soon be forced to abandon its operation and seek alternate employment.

On the other hand, farmers specializing in the production of hogs or poultry require a small acreage of land,

often much less than 160 acres. For them, the exemption may bestow a benefit far in excess of their legitimate needs. It is the creditor who suffers since the practical effect of the exemption is to place outside his reach land which may be of considerable value.

In an interdepartmental memorandum dated June 6, 1974, the Farm Management Section of the Economics Branch of the Manitoba Department of Agriculture suggested that the farm exemption might be improved by raising its acreage limit and by imposing a monetary limitation so as to prevent its further abuse and prejudice to creditors. They offered the following amendments:

> Section 13(1) could be changed to exempt 320 acres rather than 160 acres and a further provision made so land plus buildings would not exceed $20,000.

It is the view of the majority of the Commission that an amendment to the farm land exemption, such as the one suggested by the Economics Branch, would be undesirable. Although it would eliminate the discrepancy between grain farmers and other farmers, it would magnify the discrepancy between farmers and other Manitobans. The farmer, after all, is not the only individual for whom land forms the major capital asset of his business enterprise. A large number of individuals earn their living directly from their land. Consider the parking lot operator or warehouseman, whose sole incomes are derived from rentals received for their land. Surely land is as essential to the viability of their business operations as it is to the farmer, and yet, under both the existing legislation and the proposed amendment, no portion of their lands are exempt. And if those premises

deserve to be exempt from sale, why should grocers and other small entrepreneurs who support themselves and their families by businesses on property they own be denied similar protection?

There are a minority of us who believe that the cyclical nature of farm profits is such that it is unreasonable and unrealistic to expect that a farmer would be able to satisfy his creditor within a period of one year. They assert that the enactment of like provisions will not necessarily create equality. Despite stabilization and insurance programs, grain farmers are still most vulnerable to the effects of the weather. The weather is an overriding factor in their own production as well as on price fluctuations on the international market. For these reasons the minority believe that farmers deserve special consideration in *"The Judgments Act"*. As an alternative they propose that section 3(2) of *"The Judgments Act"* be amended to include a proviso that in the case of farm land sale proceedings shall not be taken until two years from the date of the registration of the certificate of judgment.

However, the majority of the Commission's members are of the opinion that the Legislature should eliminate the treatment it now accords to farm land and buildings, etc. and we so recommend. The effect of this proposal would be to place all land owners in Manitoba on an equal footing. Like other owners, farmers would be left to rely, for their protection, upon the general provisions of section 3(2) of *"The Judgments Act"*. This section, which permits the sale of land for the benefit of registered judgment creditors, prohibits the commencement of proceedings for any such sale "until after one year from the date of the registration of a certificate in respect thereto". Its practical effect is to stay execution against a debtor's real property for a minimum

period of one year. Such an approach is consistent with recommendations contained in one of our previous Reports, wherein we recommended *inter alia* that certain farm animals, farm machinery, dairy utensils and farm equipment be exempt from seizure for a period of twelve months.[29] The Alberta Institute of Law Research and Reform has also considered eliminating the farm exemption of 160 acres in favour of a stay of seizure of all farm assets for one year.[30] During this period of immunity from judgment sale and, at any time, until its actual sale, the debtor may pay his creditor and prevent the loss of his property. In addition, of course, our earlier proposal for postponement of the sale of residential property in appropriate circumstances would apply to farm homes.

The majority of us are reinforced in our view by virtue of the fact that we received only one brief in opposition to this proposal, even though in addition to making our Working Paper generally available for criticism and comment we directly solicited opinions from no less than 15 members of the rural bar and a number of rural and farm organizations, associations and unions.

A NEW DEFINITION

In an earlier section of this Report, we recommended that the residence or homestead exemption be amended. We did so to ensure that debtors, who could establish and show a continuing need to occupy their homes, might postpone their sale by creditors. It was, and is, our intention that this general recommendation and the principle which it enshrines should apply equally to both city and farm residences.

The residence exemption is currently provided in

section 13(1) of *"The Judgments Act"* which exempts "the actual residence or home" of the judgment debtor. The farmer's residence is presently included in the 160 acre farmland exemption which exempts "the house . . . on the debtor's farm". Having recommended that these exemptions be repealed, we now require a comprehensive definition so that we may bring farm dwellings within the residence provisions of the Act.

What is needed is a comprehensive definition of "residence". We emphasize residence because we think it and the expression "actual residence" ought to be maintained in the legislation since there is already a very considerable and satisfactory body of common law precedent which defines these terms.

"Residence" has been held to include, for example, the usual dwelling house and surrounding lot occupied by a debtor or any building which he occupies in part as his home "but which is also used for business or other purposes".[31] We think it would also include less traditional forms of home-ownership, such as the condominium home or apartment. To remove any doubt however, we suggest that they be specifically included in the statutory definition.

Finally, we think that consideration must be given to the extent of surrounding land which is to be included in the definition. We are of the view that the enactment of a statutory definition setting out a maximum lot, block or acreage would be unsatisfactory and inappropriate in many instances;particularly, those involving farm property where, for example, a judgment sale of farm land, including the farm house and its surrounding grounds or enclosure is

required. We think the better approach would be to vest a discretion in the court to determine in each case what an appropriate limit would be and we so recommend. There may be special considerations of particular importance in the case of rural property.

If a judge's discretion is to be completely unfettered and the ends of our recommendations achieved, we believe that it will also be necessary to make it clear that an order for sale under *"The Judgments Act"* is not subject to *"The Planning Act"*.[32] Section 60(1) of that Act provides that:

> Except as provided in subsection (3), a District Registrar shall not accept for registration an instrument that has the effect or that may have the effect of subdividing a parcel unless a subdivision has been approved by the approving authority.

This section appears to be broad enough to cover an order for sale under *"The Judgments Act"*. In fact, in the Alberta case of *Wensel v. Wensel*[33] the court held that a similar provision in *"The Planning Act"* of Alberta covered a court order for partition. Hence, it would seem that a creditor might be prevented from selling even that portion of a debtor's land which did not comprise the residence if the effect of the order of sale would be to create a subdivision which did not meet the requirements of the relevant planning authority. A debtor might also be denied a postponement on similar grounds.

We therefore recommend that appropriate amendments be made to the relevant legislation so as to permit a sale of property pursuant to *"The Judgments Act"* notwithstanding the provisions of *"The Planning Act"*.

MISCELLANEOUS

Section 3(1) of *"The Judgments Act"* forbids the registration of a certificate of judgment for a sum not exceeding $40. Since registration of this certificate is a prerequisite to the institution of sale proceedings, this provision operates to prevent proceedings against the land to enforce a judgment for less than that amount and in effect is a form of exemption for the benefit of the debtor. The section was first enacted in substantially its present form in 1929 and has remained at $40 since.

Like the monetary exemption under section 13, we believe that the sum of $40 is far too low in light of increased property values which we earlier documented. Although we know of no cases where real property has been sold pursuant to judgment sale for such a small sum, nevertheless the Act would clearly allow for such a possibility. Therefore, in keeping with our recommendations regarding minimum monetary limitations for statutory liens in previous reports,[34] we recommend that only certificates of judgment for sums in excess of $300 be registered pursuant to the Act.

In light of our previous recommendations, sections 14, 15 and 18(1) should be amended to reflect the existence of a postponement provision and section 16 should be repealed.

SUMMARY OF RECOMMENDATIONS

For ease of reference our recommendations are summarized as follows:

1. The residence exemption for judgment debtors other than farmers, contained in section 13(1)(c) and (d) and (3) and (4) of *"The Judgments Act"* should be repealed. (pp. 11-14)

2. On the application of a judgment creditor for an order to sell the debtor's actual residence or interest in it, the judge should, in granting such order, have a discretion to postpone the sale, if he is persuaded by the judgment debtor that the residence is necessary for the maintenance and support of the debtor and/or his family and that they would suffer substantial hardship from such a sale. (p. 14)

3. The judge should have discretionary power to impose such terms and conditions as to payment of the judgment debt as he deems fit. (p. 14)

4. The judge, in exercising his discretion, should consider all relevant facts, including:

   (a) the relative hardship as between the creditor and the debtor;

   (b) any other person's legal obligation and ability to support and maintain the debtor and/or his family;

   (c) the cost and availability of suitable alternate accommodation, including rented premises;

   (d) the likelihood and reasonableness of satisfaction of the creditor's claim by other enforcement proceedings;

   (e) the value of the residence;

   (f) the amount of the judgment;

   (g) the special requirements of the debtor and/or his family; and

   (h) the value of the debtor's and any other person's interest in the property. (p. 14)

5. The debtor may, at the time the creditor seeks to have the property sold, make application for a postponement of sale before a judge of the Court of Queen's Bench in the form of a concurrent application. The onus should be on the debtor to show cause why the property should not be sold. (p. 15)

6. The postponement provisions should be available for the benefit of the judgment debtor's family and they should be subject to the same onus of proof as the judgment debtor. (p. 15)

7. The judge should have wide powers to make such disposition with respect to the duration of the postponement period as he deems proper. (p. 15)

8. A provision should be enacted allowing the judgment creditor or the judgment debtor to make an application to the Court of Queen's Bench for a review of the postponement period in light of changed circumstances. (p. 15)

9. When a postponement is granted and until ultimate satisfaction is had, the priority position of the creditor's claim in respect of the property should be determined as of the date of the registration of his certificate of judgment. (p. 16)

10. Where an order for sale, subject to a postponements has been granted, a provision should be enacted allowing registration of that order against the specific piece of property and such order of sale would operate as a lien and charge without the need for further registration. (pp. 17-18)

11. Suitable provisions should be enacted to deal with vacating or discharging such order in the event that the judgment creditor's debt is satisfied or forgiven. (p. 18)

12. The commencement of proceedings for sale of property, title to which is held in joint tenancy, should have the effect of severing the joint tenancy. (pp. 18-27)

13. The judge should have the power to impose such terms and conditions as he deems just and equitable respecting the custody and care of the property which is the subject of a postponement. (pp. 27-29)

14. "*The Insurance Act*" should be amended so as to allow a judgment creditor whose right to sell his debtor's residence has been postponed pursuant to the Judgment Act the right to insure the subject property. (pp.27-29)

15. Representation should be made to the Government of Canada to enact a provision in the *Bankruptcy Act* which would provide for a suitable monetary exemption in respect of the residence which would adequately reflect today's escalated housing costs. (pp. 29-31)

16. The special exemption provisions for farmers contained in section 13(1)(a) and (b) and (2) should be repealed. (pp. 31-35)

17. Section 3(2) should continue to have equal application to all land, preventing its sale absolutely for a period of one year from the date of the registration of any certificate of judgment. (p. 35)

18. The expression "actual residence" should be retained in the legislation but should be defined to cover all types of urban and rural residences including the less traditional forms of home ownership such as condominiums and apartments. (pp. 35-36)

19. A judge should be given a discretion to determine the extent of the surrounding land which is to be included in the actual residence. (pp. 36-37)

20. Appropriate amendments should be made to the relevant legislation so as to permit a sale of property pursuant to *"The Judgments Act"* notwithstanding the provisions of *"The Planning Act"*. (p. 37)

21. Section 3(1) should be amended to provide that only certificates of judgment for sums in excess of $300 be registered. (p. 38)

22. Sections 14, 15 and 18(1) should be amended to reflect the existence of a postponement provision. (p. 38)

23. Section 16 should be repealed. (p. 38)

This is a Report pursuant to section 5(3) of

"The Law Reform Commission Act", dated this 21st day of April 1980.

Clifford H.C. Edwards, Chairman

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

A. Burton Bass, Commissioner

Beverly-Ann Scott, Commissioner

Knox B. Foster, Commissioner

FOOTNOTES

1. C.C.S.M. c. G20.

2. C.C.S.M. c. J10.

3. C.C.S.M. c. E160.

4. The Enforcement of Judgments, Part I: Exemptions under *"The Garnishment Act"*, Report #28, January 8, 1979.

5. Working Paper on Enforcement of Judgments, Part II: Exemptions under *"The Judgments Act"*, January 1978.

6. The Enforcement of Judgments, Part III: Exemptions under *"The Executions Act"*, Report #34, October 22, 1979.

7. Ontario Law Reform Commission, "The Execution Act: Exemption of Goods from Seizure", December 9, 1966.

8. "Homestead" as used here and throughout this Report, unless qualified, refers to those statutory provisions under section 13 of *"The Judgments Act"* and other provincial statutes which exempt from seizure under execution land on which the debtor resides.

9. R.S.A. 1970, c. 129 s. 2(k).

10. R.S.S. 1978, c. E-14 s. 2(1)11.

11. Vukowich, William T., "Debtors' Exemption Rights", 62 *Geo. L.J.* 779 [1974] at p. 802.

12. "Enforcement of Certain Creditors' Rights", *Isaac Pitblado Lectures on Continuing Legal Education*, (1974 Symposium on Commercial Law).

13. The Alberta Institute of Law Research and Reform is presently reviewing the $8,000 exemption which has been criticized as being insufficient to allow a debtor to purchase another house. *Infra* footnote 30.

14. It was in fact an earlier recommendation of this Commission that (with some exceptions) the marital home, regardless of title, should by operation of law, become the jointly owned property of spouses. *Reports on Family Law, Part I: Support Obligation; Part II: Property Dispositions*, #23 and #24, February 27, 1976, at pp. 46-48.

15. R.S.B.C. 1960 c. 135 as amended by S.B.C. 1970 c. 44 section 7.

16. In *Sunglo Lumber Ltd. v. McKenna* [1974] 5 W.W.R. 572 (B.C.S.C.) the court interpreted section 42(1) as permitting a judge to defer sale only if some arrangement is made with the judgment creditor. It is not the Commission's intention or desire that this be the effect of our recommendation.

17. A typical order provides *inter alia* "This Court doth order that subject to payment of the above-named Respondent, the Judgment Debtor, of the amount of the exemptions, if any, to which they may be entitled under the provisions of the Judgments Act, R.S.M. 1970, cap. 129 and amendments thereto, the interest of the said Respondent, Judgment Debtor, in the lands and premises hereinafter described, be sold . . . . And this Court doth further order that after payment to the above named Respondent, Judgment Debtor, of the amount of the exemptions aforesaid, the proceeds of such sale be applied in the following order in payment . . . .

18. *Gordon v. Murray*, [1944] 2 W.W.R. 557 (Man.).

19. *Gordon v. Murray, supra*, and *Mymryk v. Canada Permanent Trust Company*, (1968) 63 W.W.R. 313, 67 D.L.R. (2d) 159 (Man.)

20. Report #36, November 19, 1979, p. 15.

21. Working Paper #22, "The Enforcement of Judgments: Execution Against Land", (October 1976) pp. 42-44; Report on *"The Enforcement of Judgments: Execution Against Land"* 1978, LRC 40, pp. 22-26.

22. "Severance of Joint Tenancies", *Canadian Bar Review*, March 1979.

23. (1935) 3 W.W.R. 311 (Alta. C.A.)

24. *Supra* footnote #19.

25. E.R. Hardy Ivamy, *Fire and Motor Insurance*, Butterworths (2d) 1973; F.J. Laverty, K.C., *Insurance Law of Canada* (2d) 1936, p. 91.

26. R.S.C. 1970 c. B-3.

27. C.C.S.M. c. I40.

28. Similar legislation was passed in the prairie provinces, British Columbia and the western United States. As an additional incentive to individuals to settle in Manitoba, *"The Homestead Act"* of 1871 also prevented the enforcement of judgments or actions for debts contracted outside the province, other than those for goods purchased to be brought into Manitoba, against a Manitoba settler within a period of seven years of his arrival.

29. *Supra* footnote #6.

30. Working Paper on "Exemptions from Execution and Wage Garnishment, 1978.

31. *Bertrand v. Magnusson,* (1895) 10 Man. R. 490; *Canadian Credit Men's Trust Assn. v. Umbel and Gillespie Grain Co.Ltd.* [1931] 3 W.W.R. 145 (Alta.).

32. C.C.S.M. c. P80.

33. [1977] 1 W.W.R. 32 (App. Div.).