EXPLORING THE MYSTERIES OF THE SALE OF LAND UNDER EXECUTION
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The Sale of Land Under Execution Act (the Act) is a Statute which provides for the sale of land to satisfy a judgment debt where the proper **requirements are** met. I have appended a copy of the Sale of Land Under Execution Act R.S.N.S. 1967, Chapter 275 for your reference. Also included are precedents to which I will make reference and which I hope will be of some use to those of you who have not yet, but may someday, come into contact with the Act.

For a variety of reasons, the Act is seldom used. Firstly, the Act provides (s.3) for a minimum delay of one year after registration of the judgment before the sale provisions of the Act can be utilized. Many judgments are paid out of the seizure and sale of personal property or through garnishment or other means within that one year period. In other instances, I suspect, the creditor or the solicitor for the judgment creditor loses interest in the execution over the period of that year and the possibility of the sale of real property is never pursued. If the creditor is a large institution and the account has been written off, there may be no incentive for those who run the relevant department to attempt to breathe life into an old account when there are so many fresh ones to pursue. Secondly, the procedure for the sale under the Act is quite costly, particularly in the view of the fact that it requires five insertions in a newspaper. The cost of this alone may be prohibitive in many instances. Thirdly, it is usually the case that if there is any appreciable amount of equity in the real property in question, the debtor will pay if he is threatened with the sale of land under execution. It would probably be fair to say that the Act is used quite frequently as a threat though rarely as a procedure. Fourthly, and finally, questions seem to remain as to just what the purchaser gets on a sale of land under execution and as we will see, he may get obligations as well as rights therefore creating all the more reason why the Act is avoided except as a last resort.

Sale of Land Under Execution
Generally

Unlike a foreclosure sale, the sale of land under execution is not governed by any very specific statutorily or judicially prescribed rules or a consistent established practice.

Every real estate practitioner has at least some vague notion that if there is a recorded judgment and an execution order and the debtor owns real property then something can be done. Few of us, including the writer, are entirely clear on exactly what is required before action can be taken under the Act and just how to go about it.

The judgment

The Act provides: 10 (1) Where a judgment has been **registered for one year** the Sheriff, on receipt of an execution issued **on the judgment**, without appraisement, shall proceed to sell the land bound thereby, or the portion thereof so directed to be sold.

The Registry Act R.S.N.S., 1967, Chap. 265, as amended, provides ...

_18 A judgment, a certificate of which is registered in the manner b y this Act provided in the registry of any district, shall, from the date of such registry, bind and be a charge upon any land within the district of any person against whom the judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment.

_19 (1) An undischarged judgment shall not bind or be a charge upon any land in the district in which it is registered after the expiration of twenty years from the date of the judgment, or in the case of a judgment ordering periodic payments from the date of accrual of any payment, but nothing in this Section shall prejudice or affect the validity of any title acquired in the meantime by sale under the said judgment.

(2) A certificate of judgment obtained in an action on an undischarged judgment,

registered within twenty years of the date of the undischarged judgment, and in the same registration district, shall, for purposes of determining priority among persons claiming any interest in or charge upon any land of the judgment debtor within the district, be deemed to have been registered on the date of registration of the undischarged judgment.

Accordingly, once a judgment has been recorded for one year action can be taken under the Act. Once a judgment has been recorded for more than twenty years, unless it has been renewed (see Sec. 19 (2) of the Registry Act) and the renewal registered, no action can be taken under the Sale of Land Under Execution Act, thus the practice in real estate transactions to search judgments for twenty years prior to the closing date. It should be noted that this practice is probably not as safe as it is thought to be; it is possible for the sale of land under execution to take place subsequent to the twentieth anniversary of the recording of the judgment, even if it has not been renewed, as long as the Execution Order issued within the twenty year period and the land was advertised for sale within that period. (Rateau v. Ball (1914), 47 N.S.R. 488). Thus, one cannot be certain that land subject to a recently expired judgment is safe from sale under execution unless the Sheriff's records are checked for outstanding Execution Orders. 1 do note that the practice of checking for outstanding executions is **becoming more and** more common. It would be still more common if one could obtain a certificate from the Sheriff's office on the date of closing.

A gentle reminder that judgments may continue to encumber property for a long time after the customary twenty year period of which we are all cognizant is Sec. 20 of the Registry Act which provides:

The registration of any judgment registered before the seventeenth day of April, 1889, shall, if otherwise regular, be valid and effectual notwithstanding the entry of such judgment does not contain the signature of a judge.

Clearly, the Registry Act contemplates that, if proper "re-registration" procedure is followed, a judgment may bind a property ad infinitum.

The rights of the judgment creditor under the Act are not restricted to the original judgment creditor but pass with assignment to subsequent holders of his rights.

Of course, it is a requirement of the Act that the judgment be recorded for one year in the registration district in which the land proposed to be sold is located. When recording a judgment, one is rarely certain whether or where the debtor may own land. The best rule of thumb if one hopes to avail oneself of the provisions of the Act is to record the judgment wherever the debtor may possibly own land. Remember that in Nova Scotia, some Counties have more than one registration district. If ever you forget and find that property which is situate in a part of the County which is not covered by the Registration District in which you recorded the judgment, you will have a very unhappy client. But you won't forget again!

An interesting aside to the question of what judgments will give the creditor rights under the Sale of Land Under Execution Act is the question of the effect of a judgment which, while recorded, does not comply with the requirements of the Registry Act with respect to recordable judgments. For example, the Registry Act provides that a judgment "shall" contain the name, address and description of the judgment debtor; few do. (s.36)

The Execution Order

Most jurisdictions in Canada do not have a separate statute dealing with the sale of real propety under execution, but rather deal with it within the framework of execution generally in much the same way as personal property is dealt with.

In this province, there is no execution act. Our judicature Act and Civil Procedure Rules are quite specific with respect to execution procedure for personal property, wages, etc. With respect to real property Rule 53.10 simply states that real property shall be sold pursuant to the Sale of Land Under Execution Act.

In many other jurisdictions it is necessary to have an execution order outstanding for a certain length of time before land can be executed upon. This is not the requirement here, although, as a practical matter, it is likely that all personal property remedies have been exhausted by the time of the expiry of the one year waiting period after the registration of the judgment.

Because Civil Procedure Rule 52.05 provides that an Execution Order is valid for only twelve months from date of issue, it probably should be renewed prior to the sale in order to eliminate the prospect of having it expire during the course of the sale procedure. If an execution order

I has not yet been issued, one must be obtained. Of course, if the execution **order is more** than six years old, the Civil Procedure Rules require that an application be made to the Court in order to renew it. 1 have **provided precedents** for this application.

**The Property**

The Act provides that the definition of land "includes the possessory right and right of entry of a judgment debtor, and also the interest of a mortgagor, or any equitable interest in land which may by this Act, be sold under execution;" This is a classic circular definition. Fortunately, sections 3 through 6 elaborate somewhat. (see attached copy of Act).

Though it does not appear to have been tested in this jurisdiction, there is case authority in Ontario for the proposition that the interest of one joint tenant may be sold under execution and the purchaser can apply to sever the tenancy. A British Columbia case has indicated that it is not even necessary for the other joint tenant to receive notice of the sale.

Our Act provides that beneficial interests may be sold under execution so that it is not possible to avoid the effect of the legislation by the debtor registering a deed in the name of an unindebted trustee.

The question of whether an interest under the Matrimonial Property Act is subject to the sale of land under execution has never been addressed by our Court. It is unlikely that such an interest could be subject to sale. The writer is aware, however, of at least one Statutory Declaration

on record at the Registry of Deeds which claims that such action is possible. Lt is to be hoped that this question will be litigated before long, removing any uncertainty which now exists.

Sale Procedure

Unlike a foreclosure sale, it is not necessary to obtain an order of the Court setting out the procedure on a sale under execution. Section 10 of the Act sets out the required procedure.

Sec. 10 (2) of the Act provides that the notice of sale (a suggested form is appended to these materials) must be published by five consecutive weekly insertions preceeding the day of the sale in a **newspaper** published in the County in which the land is situated. **However, section 10** (2) provides that if the proprietor of the newspaper would charge more than the Royal Gazette (and they all do) then the advertisement can be published in any newspaper that circulates in the County.

The Act requires that copies of the advertisement be "posted up in the most public places of the city, town or settlement in which the land lies". This would appear to be a mandatory requirement for a sale under execution although it is no longer the practice with foreclosure sales. It would appear that foreclosure practice has not suffered from removal of this requirement. Perhaps, if sale of land under execution were more common, the requirement would be removed from that procedure as well.

The Act further requires that copies of the advertisement be mailed to subsequent encumbrancers although not to prior encumbrancers. (Nevertheless it is probably a good idea to notify them anyway; the more interest on a sale, the better).

There is really nothing in the Act which sets out just what happens to subsequent encumbrancers if there is a sale of land under execution. So, obviously, this is a major problem. 1 have made enquires of many experienced practioners as well as at least one justice of our Trial Division. All feel that the sale would clear off subsequent encumbrancers, but none were able to refer me to any authority in support of the pros position. It appears to be generally accepted that the sale clears off any subsequent encumbrancers who had notice of the sale, but the Act does not say this. It may be that the purchaser only buys the title of the judgment debtor, which would be subject to recorded subsequent judgments which are not paid out at the time of the sale. One way to get around this uncertainty may be to obtain a "foreclosure-type" order from the Supreme Court prior to commencing the sale procedure, setting out that subsequent encumbrancers who receive notice of the sale will no longer have an interest in the land after the sale.

**The Act specifically** deals with certain types of prior encumbrancers. **A judgment creditor** can sell free and clear of a prior judgment if he gives the prior judgment creditor three months notice and the prior judgment creditor does not take effective steps to sell the land during that period. See sections 7 and 8 of the Act.

Sec. 15 of the Act deals with a prior mortgage. The purchaser's title is subject to any prior mortgage. He essentially assumes the mortgage without requiring the consent of the mortgagee (unless the mortgage is comprehensive enough to deem the entry of judgment to be a default.) If the original mortgagor is made to pay under the covenants of the mortgage, the purchaser at the Sheriff's sale must repay the debt and interest to the mortgagor and if he does not the mortgagor (judgment debtor) has a charge against the lands for the amount not paid. 1 can see some potential problems with this however. Consider the prospect of the Plaintiff selling the lands to a bonefide third party purchaser without notice and for value.

Note that S. 14 of. the Act provides for any lease agreement in force prior to the registration of the judgment to remain in force vis a vis the purchaser. One wonders whether one could frustrate one's creditors totally by creating a tenancy for life pertaining to a property and vesting it in some friend who doesn't mind a perpetual roomer. It may be that such an arrangement would be defeated if the "friend-tenant" could not establish that he or she was in "possession" as contemplated by the Act. Nevertheless,

the question is an interesting one to ponder.

Sec. 23 of the Act provides for the distribution of surplus proceeds, if any, to be determined "by an order of the Court or Judge". No doubt, the previously mentioned concern about the effect of remaining subsequent encumbrancers, if any, would be "discussed" at the time of the application for a n order re: distribution of surplus proceeds.

Conclusion

The sale of land under execution Act raises enough problems and questions that it is rarely used. Because it is rarely used, the problems and questions have never been specifically addressed. The only advice one can give with any confidence is that if you run into the Act, either acting for a judgment creditor who has tried **everything** else and is fortunate enough to be owed money by someone who owns real property, or if a Sheriff's deed pursuant to the Sale of Land Under Execution forms a link in a chain of title when you are acting for a purchaser of real estate, you should read the Act from beginning to end, form your own conclusion and tread carefully.

Respectfully submitted by,

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