



Methods of Enforcement of Revenue Debts – Part II

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The following article originally appeared in the *Irish Tax Review*, over fifteen years ago, in May 1991. I was approached by the editor with a view to updating it and it has been a privilege to do so. The original article appeared in two parts, as it likewise has done here. It has been republished because it has remained, for some time, the most comprehensive article on this area and is still being referred to in textbooks today – a testimony to the work done by the original authors.

Dylan Macaulay & Lyndon MacCann July 1991

In Part 1 of this article we examined the various methods of debt collection available to the Revenue Commissioners. In this succeeding Part we will discuss one of those methods of execution, namely, the enforcement of debts by Sheriffs, Revenue Sheriffs and County Registrars.

Sheriffs, Revenue Sheriffs and County Registrars Historical developments

The office of the Sheriff originated from medieval England where the “Shire-reeve” was the person in charge of law and order in each shire or county. During the Norman era, the Sheriff was vested with judicial and quasi-judicial powers. The office of the Sheriff became divided, with the High

Sheriff having full powers, and the execution of warrants being dealt with by the Under-Sheriffs.

In Ireland, the Court Officers Act 1926, led to the County Registrar for each county being made responsible for the enforcement of court judgments, once the office of Under-Sheriff for each particular county had become vacant. In Dublin, the office of Under-Sheriff did not fall vacant until 1945. However, under section 12 of the Court Officers Act 1945, it was provided that the Minister for Justice – with the consent of the Minister for Finance – could withdraw from the County Registrar any or all of his/her powers and transfer them instead to a Sheriff. Accordingly, due to the considerable workload which was already on the County Registrars for Dublin and Cork, the Minister appointed Sheriffs for both

these counties and in these areas it is they, rather than the County Registrars, who are now responsible for the execution of judgments.

The County Registrar primarily deals with the organisation and administration of the Circuit Court in that particular county. His/her other functions include acting as a Returning Officer for Parliamentary and Presidential elections, as well as for Constitutional Referenda. By contrast, the Sheriffs in Dublin and Cork are not salaried civil servants, and are remunerated instead on a commission basis known as “poundage”.

They are also paid a sum to carry out their office and are entitled to some additional small fees. The Dublin and Cork Sheriffs also perform duties as Returning Officers in connection with elections other than local elections. The Sheriffs may appoint their own court messengers with the Minister of Justice’s approval.

Section 962 certificates and the Revenue Sheriff

For many years, the County Registrar, or Sheriff, as the case may be, was responsible for the enforcement not only of court judgments but also of s962 certificates. However, because of the workload already on County Registrars, the Government appointed new Revenue Sheriffs, pursuant to the Court Officers Act 1945, who took over responsibility for the enforcement of s962 certificates. These Revenue Sheriffs have no function in relation to the enforcement of judgments of the court even if those judgments relate to Revenue debt. No Revenue Sheriffs were appointed for Dublin or Cork and, accordingly, in these areas, the ordinary Sheriff still has responsibility for both the enforcement of Revenue judgments and s962 certificates.

In counties outside Dublin and Cork, however, there are two collection agents for Revenue debts: the County Registrar for judgments, and the Revenue Sheriff for s962 certificates.

Execution under s480 Income Tax Act 1967

One of the most notable changes that has occurred since this article was first published nearly twenty years ago is the repeal of s480 of the Income Tax Act (“ITA”) 1967 by Finance Act 1996 (as part of the consolidation process).

This section that purported to give the Revenue Commissioners similar powers to those of the Sheriff to distrain (i.e., seize) goods for the purpose of execution of revenue debts. This non-judicial power of seizure is analogous to that given to a landlord in order to discharge arrears of rent. The original version of this article commented that “this power of distraint is seldom, if ever, used due to doubts about the constitutionality of the section” and although this was never tested by the courts, the section has now been repealed.

How do powers of execution arise?

The powers of seizure vested in Sheriffs, County Registrars and Revenue Sheriffs are the same, and, accordingly, references throughout the rest of this article to the Sheriff should also be read as referring to Revenue Sheriffs and County Registrars.

Outside Dublin and Cork the County Registrar’s powers of execution arise in the case of High Court proceedings on foot of an order of *feri facias* (“*fi fa*”). In Circuit Court proceedings the relevant document is referred to as an “Execution Order”, and in the District Court the relevant document is the District Court Decree itself. (These documents have been discussed in Part 1 of this article.)

For the Revenue Sheriff, his or her powers of execution arise only on foot of a section 962 certificate. As mentioned in Part 1 of this article, a s962 certificate may be issued in respect of arrears of income tax, VAT, CAT, stamp duty and corporation tax (income tax would include arrears of PAYE and PRSI, and levies). In respect of Sheriffs in Dublin and Cork, their powers of execution arise not only in relation to judgments of the court, but also in respect of s962 certificates.

Time limits on execution by Sheriff

Under order 42 rule 23 of the Rules of the Superior Courts, an order of *feri facias* may issue at any time within six years from the date of the judgment upon which it is based. Once six years or more have elapsed since the date of the judgment, then, according to order 42 rule 24, an order of *feri facias* may only be issued with the leave of the court. Under order 42 rule 20, an

order of *fi fa* will remain in force for one year from the date of its issue.

However, it may be renewed before the date of its expiration by application to the Master of the High Court. Under order 36 rule 12 of the Circuit Court, an execution order will also remain in force for one year from the date of issue. However, the practice in the District Court diverges since order 48 rule 4 of the District Court Rules provides that a District Court Decree will remain in force for twelve years but shall not be executed after the expiration of six years without leave of the court.

As regards the time limits applicable in respect of a section 962 certificate, s962(2) makes it clear that the certificate is to be treated as if it were an order of *feri facias*.

In *6 Arlington Street Investments Limited v Persons Unknown* [1987] 1 All ER 474, it was held that once an execution order has been served on the Sheriff, he/she is under a duty to execute it as soon as is reasonably practicable thereafter. With regards to what constitutes reasonable speed by the Sheriff, this depends on the facts of the case, although in *Hodgson v Lynch* (1871) IR 5 Cl 353, Lawson J felt that a delay of five days was not unreasonable even though this enabled the commencement of bankruptcy proceedings by another creditor.

As regards execution of s962 certificates, s962(2) provides that “immediately upon receipt of the certificate” the Sheriff “shall proceed” to levy execution.

In *Weekes v Revenue Commissioners* [1989] ILRM 265, the question was raised as to what constitutes “immediate” execution of a s962 certificate (or s485 ITA 1967 as it then was). In that case there had been a delay of up to five months in the execution of the certificate. The taxpayer claimed that the delay in execution invalidated the s485 certificate, or at least invalidated the power of execution on foot of the certificate.

Lardner J held that a literal interpretation of s485(2) would lead to an extraordinary result in that the Sheriff’s power under s485(2) would no longer exist if execution on foot of the certificate did not take place within a very short time

after receipt. He felt instead that a practical interpretation of the section was that the Sheriff was under a duty to act with reasonable speed, having regard to the acts to be done. In any case the duty to act with reasonable speed was owed to the Revenue Commissioners and not to the taxpayer.

Accordingly, it was not open to the taxpayer to plead lack of due haste as a ground for trying to invalidate the execution. Furthermore, Lardner J held that, looking at the exact wording of s485(2) itself, “shall proceed” to levy execution means “shall start going about” levying the tax.

The learned Judge stated that in levying the tax, the Sheriff has to take certain steps before actual seizure:

- › He must first find the taxpayer and conduct an investigation into his or her circumstances and find out if any goods are to be seized.
- › He then has to make arrangements for the actual seizure, by getting people and transport, etc.
- › Under the circumstances, therefore, although the goods in question had not actually been seized for a period of up to five months, the Sheriff had at least taken preliminary steps with a view to seizure and, accordingly, Lardner J dismissed the applicant’s claim.

Priority of execution orders

Where the Sheriff has several writs of execution against the same debtor he/she must execute them according to the proper order of priorities, and this is determined according to the time of delivery of each writ to him/her. Since a Sheriff only has jurisdiction within his or her own county, a judgment creditor who is well down the list of priorities in one county, may be able to “leap-frog” the other judgment creditors by serving a writ of execution in another county where they are aware that the debtor has assets in that county and that no writ of execution has yet been served on the local Sheriff.

Priority between the Revenue Sheriff and County Registrar

Since, (in counties outside Dublin and Cork), both the Revenue Sheriff and County Registrar

operate, certain problems may arise with regard to the order of priority as against the debtor’s assets. If a writ of execution has been served on the County Registrar by one creditor in respect of a judgment obtained against the debtor, and a s962 certificate has been served on the Revenue Sheriff in respect of the debtor’s arrears of taxes, how is the order of priority to be determined? Does priority depend on the actual seizure of the goods or does it depend instead on the time at which the execution order, or s962 certificate, as the case may be, is served on the appropriate officer? The position is far from clear.

Section 971 priority

As regards priority of execution orders, the Revenue Commissioners are given particularly favourable status by section 971(1) TCA 1997, which provides as follows:

“No goods or chattels whatever belonging to any person at the time any income tax becomes in arrear, shall be liable to be taken by virtue of any execution or other process, warrant, or authority whatever, or by virtue of any assignment, or any account or pretence whatever, except at the suit of the landlord for rent, unless the person at whose suit the execution or seizure is made, or to whom the assignment was made, pays or causes to be paid to the Collector-General before the sale or removal of the goods or chattels all arrears of income tax due at the time of seizure, or payable for the year in which seizure is made.”

Subsection (2) provides as follows:

“Where income tax is claimed for more than one year, the person at whose instance the seizure has been made may, on paying the Collector-General the income tax which is due for one whole year, proceed in that person’s seizure in the like manner as if no tax had been claimed.”

This is a rather curious provision. It is not that the Revenue Commissioners have priority out of the proceeds of sale of any execution, but rather that the judgment creditor (except a landlord claiming for rent) is not entitled to even levy execution in the first place until such time as he or she has

paid to the Revenue Commissioners the debtor’s arrears of taxes. This section is rarely operated in practice due to the fact that there is no procedure available for making either the judgment creditor or the Sheriff aware of the fact that the debtor owes arrears of taxes.

Property of the debtor liable to seizure

As stated above, the Sheriff may only seize property of a debtor located in his/her county. Furthermore, even if the property of the debtor is found to be within his/her county, the Sheriff is limited as to the classes of assets which may be seized.

At common law, in determining what articles are liable to seizure, there were two rules which had to be borne in mind. Firstly, the assets had to be of such a kind as would go on the owner’s death to his/her executor and not to his/her heir; and, secondly, the debtor had to have a saleable interest in the assets in his/her own right.

Interests in land

The rule that property could only be seized if it would descend to the executor meant that freehold interests in land, together with fixtures on such land, were not liable to seizure by the Sheriff. However, leaseholds and moveable assets could be seized. As a result of the Administration of Estates Act 1959, and the Succession Act 1965, the same rules of devolution now apply to both leasehold and freehold interests, so that both types of property now devolve upon the executor. Accordingly, it would appear that freehold interests are now liable to seizure by the Sheriff as well as leasehold interests, although there is no reported decision to this effect as of yet. In practice, however, where interests in land are involved, the most common form of execution (at least in respect of judgments) is by way of judgment mortgage. As discussed in Part I of this article, Judgment mortgages are not among the methods of enforcement available in respect of s962 certificates.

Money, cheques and bills of exchange

Since under common law nothing could be taken in execution which could not be sold, the Sheriff could not therefore seize money. However, by virtue of s131 of the Common Law Procedure Act

1853, the Sheriff is now empowered to seize in execution, money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties and other securities belonging to the execution debtor, and to pay the money or bank notes to the execution creditor and to sue for the amount secured by the cheques, bills of exchange or securities as soon as the same become due.

However, the Sheriff is not obliged to sue on the security unless he/she is indemnified as to their costs by the execution creditor.

Insurance Policies

In the cases of *Alleyne v. Darcy* 5 Ir Ch Rep 55 and *Re Sargeants Policy* 7 Lr Ir 66, it was held that a policy of insurance effected by the debtor on his/her own life on which annual premiums are payable is not a security for money which the Sheriff is empowered to seize under s131 of the Common Law Procedure Act 1853, nor does it constitute a moveable asset and therefore is totally exempt from seizure by the Sheriff. However, a policy due and payable at once may in fact be covered by the Statute.

Land and chattels subject to a security

Where land, whether freehold or leasehold, is subject to a mortgage, the Sheriff is not entitled to seize the judgment debtor's equity of redemption, e.g., *Healy v Perry* 2 LR Ir 268. This means that if the interest of a judgment debt were in lands against which a judgment mortgage has been registered, this cannot be seized by the Sheriff, e.g., *Re Gerrard* 14 Ir Ch Rep 466.

The prohibition against the seizure of mortgaged land arises in part because the Sheriff is not entitled to seize equitable interests, but also because of the fact that the execution debtor does not have a saleable interest in the property in his/her own right. This latter principle applies as much to moveable property as it does to land.

However, under order 57 rule 11 of the Rules of the Superior Courts, if goods or chattels have been seized in execution by the Sheriff and a third-party alleges that he/she is entitled by way of a bill of sale, charge or mortgage to an interest in the goods or chattels by way of security for a debt, the court may order the sale of the whole or part of the goods or chattels, and direct the application of the proceeds of sale in such manner and upon such terms as the court may consider just.

Property held in joint ownership

However, if the execution debtor is a co-owner of the property where there is a joint tenant or tenant in common, it has been held in *Mayhew v Herrick* (1849) 7 CB 229 that such property can be seized by the Sheriff since each co-owner is entitled to sell the property without the consent of the other. That case involved co-ownership of partnership property. The court made it

clear that the Sheriff, in seizing the goods, must account to the other co-owner in respect of such proportion of the proceeds of sale of the goods as represents his/her interest in them.

Property of third parties

(a) Generally

With the exception of cases of co-ownership, the Sheriff is not normally entitled to seize property which belongs in whole or in part to persons other than the execution debtor. Where property

is seized by the Sheriff, and it subsequently transpires that the property was owned by a third-party, the Sheriff may be liable in damages to that third-party for conversion, e.g., *Glasspoole v Young* 9 B & C 696.

A common situation in which the rights of third parties may arise is in relation to retention of title clauses. These are clauses inserted into contracts for the sale of goods whereby it is stipulated that ownership of the goods will not pass to the buyer until such time as they have been paid for in full. Such clauses pose a major problem for the Sheriff, who may be unaware of the terms on which the goods were originally sold, and who may therefore quite innocently sell them, thus exposing himself to a potential liability in damages. Alternatively, the seller, upon discovering that the goods have been seized by the Sheriff and are due to be sold, may seek an injunction restraining any such disposal and compelling the Sheriff to return the goods.

Another problem with which the Sheriff is faced is that assets which appear to belong to the debtor may in fact be subject to hire purchase or leasing agreements. In such a case the legal title to the goods will still be vested in the finance company and, accordingly, any sale of the goods themselves will not be permitted. However, the Sheriff may be entitled to assign the benefit of the agreements rather than the goods themselves. As against this, it is common that such agreements contain a covenant against assignment and may also provide that the agreements automatically terminate when any execution is levied against the debtor. It was held in *Jelks v Hayward* [1905] 2 KB 460, that in such an instance, the debtor has no saleable interest in the agreement for the Sheriff to seize.

(b) Family Property

Although the Sheriff is not generally entitled to interfere with the rights of ownership of third-parties, different considerations apply where the third-party is a member of the execution debtor's family. Where the Sheriff enters the debtor's house, he/she may find themselves faced with claims by members of the family that the goods in question belong to them rather than to the

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debtor. Predictably, many of these claims may be spurious or even fraudulent.

As a result, s13 of the Enforcement of Court Orders Act 1926 provides that:

“No action shall lie against any Under-Sheriff for or on account of his having taken in execution under any execution order, any goods, and all or any other chattels found in the house, or tenement of which the debtor is the occupier, either alone or jointly with another or others or on the lands of the debtor and claimed or alleged (whether such claim or allegation does or does not prove to have been well-founded), to have been in the property of the wife or husband of the debtor or to be the property of any parent or child of the debtor for the time being residing in the house or tenement of which the debtor is the occupier either alone or jointly with another or others and in lieu of such action against the Sheriff the person to whom such goods, animals or other chattels should prove not to have been the property of the debtor, be entitled to recover from the debtor by action the value of such goods, animals and other chattels together with such damages as such person shall have suffered by reason of such goods, animals or other chattels having been so taken in execution.”

However, Article 40.3 of the Constitution provides as follows:

- “1. The State guarantees in its laws to respect and as far as practicable by its laws to defend and vindicate the personal rights of its citizens.*
- 2. The State shall in particular by its laws, protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property of every citizen.”*

It is arguable that s13 of the 1926 Act constitutes an unjust attack upon the property rights of the members of the debtor’s family, since the compensation available to them where their goods have been seized is of dubious value to say the least. The right to sue the debtor him or herself for compensation may be completely

worthless, since it is likely that by the time any execution is levied against him/her, then he/she will already be insolvent.

A challenge to the constitutionality of section 13 was made in the case of *Re Patrick Cusack: Evelyn O’Reilly v. Collector-General* [1988]. Mrs O’Reilly, who was the wife of a taxpayer, challenged s13 claiming that the compensation available to her under that section was valueless due to the insolvency of her husband. Her claim failed in front of the President of the Circuit Court, Mr. Justice Roe, but was subsequently settled on appeal to the High Court on terms whereby the Collector-General paid to Mrs O’Reilly the sum of £9,000 compensation and returned certain assets which belonged to her.

Property Exempt from Seizure

Under s7 of the Enforcement of Court Orders Act 1926 it is provided that:

“The necessary wearing apparel and bedding of a person against whom an execution order has been levied and the necessary wearing apparel and bedding of his family and the tools and implements of his trade, not exceeding in the whole the value of £15 shall be exempt from liability to seizure.”

The aim of this section is clearly to provide the debtor with the minimum necessities to clothe and bed his family and to earn a livelihood. However, although £15 may have been a realistic figure in 1926, it is totally meaningless by today’s standards. In this regard, a comparison may be made with s45 of the Bankruptcy Act 1988 (as amended

by the Bankruptcy Act 1988 (alteration of monetary limits) Order 2001), which provides that equivalent items to the value of up to €3,100 may be retained by a debtor in his bankruptcy. In some circumstances therefore, a bankruptcy may appear more favourable to the debtor rather than allowing his/her creditors to levy execution against them.

Forcible entry of premises

Under s12 of the Enforcement of Court Orders Act 1926, the Sheriff may enter a debtor’s premises for the purpose of seizing goods in execution and may do so forcibly. However, he/she must first make reasonable efforts to enter “peaceably and without undue violence”. The section also entitles him/her to forcibly enter the premises of a third-party where there are reasonable grounds for believing that there are goods of the execution debtor on the premises, or alternatively, where he/she actually finds the goods there. Once again he/she can only forcibly enter after having made reasonable attempts to enter peaceably.

Some doubts were cast as to the constitutionality of s12 by the Budd Committee in the Bankruptcy Law Committee Report.

The Committee’s worries were founded on Article 40.5 of the Constitution which provides that:

“The dwelling of every citizen is inviolable and shall not be

forcibly entered save in accordance with the law.”

However, the Law Reform Commission, in their Report on Debt Collection, felt that the section was constitutional, since the powers of the

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Sheriff only arise in the first place as a result of a judicial determination and the making of the appropriate order which led to the issuing of the execution order. In those circumstances the Law Reform Commission found it difficult to see why forcible entry should be treated as not having been made “in accordance with the law”.

Effect of insolvency on execution

The ability of creditors to levy execution after a debtor – once he/she has gone into liquidation or bankruptcy, as the case may be – is severely curtailed.

Liquidation

In relation to companies, s219 of the Companies Act 1963 provides that any attachment, sequestration, distress, or execution put in force against the property of the company after the commencement of the winding-up is void to all intents.

Furthermore, under s291(1) of the 1963 Act, it is provided that where a creditor has issued execution against the goods or lands of a company, or has attached any debt due to the company and the company subsequently winds up, he/she is not entitled to retain the benefit of the execution or attachment against the liquidator in the winding-up of the company unless he/she has completed the execution or attachment before the commencement of the winding-up. Furthermore, where any creditor has notice of a meeting having been called at which a resolution for a voluntary winding-up is to be proposed, the creditor will not be entitled to retain the benefit of the execution unless the execution was complete before the date upon which he/she received notice of the proposed resolution.

The rights conferred by s291(1) on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

For the purposes of s291, an execution against goods is taken to be completed by seizure and sale; an attachment of a debt is deemed to be completed when the execution creditor is in actual receipt of the money; and an execution against land is deemed to be completed by

seizure and in the case of an equitable interest, by the appointment of a receiver.

Further duties are imposed upon the Sheriff by s292 of the 1963 Act. Subsection 1 provides that where any goods of a company are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the Sheriff that if a provisional liquidator has been appointed or that a winding-up order has been made, or that a resolution for voluntary winding-up has been passed, the Sheriff must, on being so required, deliver the goods and any monies seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution are to be a first charge on the goods or the money so delivered, and the liquidator may sell the goods or a sufficient part thereof for the purpose of satisfying that charge.

Furthermore, subsection 2 provides that where, under an execution in respect of a judgment for a sum exceeding €25.39, the goods of a company are sold or money is paid in order to avoid sale, the Sheriff must deduct the cost of the execution from the proceeds of the sale or the money paid and retain the balance for 14 days, and if, within that time, notice is served on him/her of a petition for the winding-up of the company having been presented or of a meeting having been called at which there is a resolution proposed for the voluntary winding-up, and an order is made or a resolution is passed, (as the case may be), for the winding-up, the Sheriff must pay the balance to the liquidator, who will be entitled to retain it as against the execution creditor.

Once again, the rights conferred on the liquidator by this section may be set aside by the court in favour of the creditor to such extent, and subject to such terms, as the court thinks fit.

Bankruptcy

Where the debtor is an individual, as opposed to a company, and goes into bankruptcy, the appropriate sections are s44 and s50 of the Bankruptcy Act 1988. Under s44, where a person is adjudicated bankrupt, his/her property

vests in the official assignee for the benefit of the creditors in the bankruptcy. Accordingly, execution after the date of adjudication is no longer possible.

Under s50, where goods or a leasehold interest in land belonging to a debtor have been seized under an execution order and are sold, or where money has been paid in part or full satisfaction of the execution either to the Sheriff or County Registrar, or to the execution creditor in order to avoid seizure or sale under such execution, the Sheriff, County Registrar or execution creditor must retain the proceeds of sale or the money so paid, for a period of 21 days. If, within that period, the Sheriff or County Registrar or execution creditor receive notice of the adjudication of the debtor, he/she must surrender the property or pay over the proceeds of sale thereof, or any money paid in satisfaction of the execution, to the official assignee who will be entitled to retain the property, proceeds or money, (as the case may be), as against the execution creditor.

Section 50(4) further provides that where a Sheriff or County Registrar, without notice of the adjudication of the debtor, pays the proceeds of sale or other money retained by him/her pursuant to section 50(1) to the execution creditor after the expiration of 21 days, he/she will not be liable to the official assignee in respect of the payment. On the other hand, if the property is surrendered or the proceeds of sale or other money are paid over to the official assignee, then under s50(5) the costs of the execution are to be a first charge thereon and the official assignee may sell the whole or part of the property for the purpose of satisfying the charge.

The editor wishes to acknowledge the misdescription of Lyndon MacCann, Senior Council, in Part I of this article.