

IN THE MATTER OF monies paid into Court under *The Exchequer Court Act*, R.S.C. 1952, c. 98, s. 24(2).

1960
 Sept. 26
 Oct. 26

AND

IN THE MATTER OF a Petition by HELEN SHAUL for payment out of Court pursuant to s. 24(3) of *The Exchequer Court Act*.

Crown—Practice—Property re-sold under Veterans' Land Act—Surplus proceeds paid into Court—Rights of creditors and veteran—The Veterans' Land Act, R.S.C. 1952, c. 280, ss. 2(1), 3(1)(2), 5(1)(2)(4), 10(4) and 21(1)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 24(2)(3)(4)(5)—The Execution Act, R.S.O. 1952, c. 120, ss. 20(2), 24(2)(3)(4) and (5).

By s. 21(1) of the *Veterans' Land Act*, R.S.C. 1952, c. 280, it is provided that

“Where a contract made by the Director with a veteran is rescinded or otherwise terminated and any property that was sold by the contract is re-sold by the Director for more than the amount owing under the contract, the surplus shall be paid by the Director to the veteran.”

In January, 1957, the Director, the *Veterans' Land Act*, re-sold a property which had been the subject matter of an agreement made pursuant to the statute between the Director and one H, a veteran, and on such re-sale realized a surplus of \$3,247.17. While this surplus was still in the Director's hands, notices purporting to seize H's right to this fund under a number of executions against him, including one issued by the Supreme Court of Ontario and held by the Sheriff of Carleton County in the Province of Ontario were received. By s. 20(2) of the *Execution Act*, R.S.O. 1950, c. 120, a sheriff holding a *feri facias* is authorized to seize any book debts and choses in action of the execution debtor and to sue in his own name for the recovery of the monies payable in respect thereto. Thereafter, the Attorney-General of Canada, being in doubt as to the proper party to whom the money should be paid, applied for and obtained an order pursuant to s. 24(2) of the *Exchequer Court Act*, permitting the payment of such sum into the Exchequer Court. In this order, it was expressly provided that the payment into Court should be without prejudice to the rights, if any, of H or of any party who had laid claim to the money.

In proceedings taken by a judgment creditor of H, asking for payment out of Court to her of the money or for determination of the party entitled thereto, claims were filed by H and by the Sheriff of Carleton County, as well as by several execution creditors, and on the trial it was contended on behalf of H that, since the Director is an agent of the Crown money in his hands is not subject to seizure under execution and that, accordingly, H was entitled to have the money paid out to him.

By s. 5 of the *Veterans' Land Act*, it is provided that

“Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Director on behalf of Her Majesty, whether in his name or in the name of Her Majesty,

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may be brought or taken by or against the Director in the name of the Director in any Court that would have jurisdiction if the Director were not an agent of Her Majesty.”

Held: That the right of a veteran under s. 21(1) of the *Veterans' Land Act* to the surplus proceeds arising on a re-sale is a personal right and there is neither any statutory provision nor any valid objection on grounds of public policy rendering such surplus proceeds unassignable by the veteran or unavailable to satisfy the claims of his creditors.

2. That the Sheriff of Carleton County, by giving to the Director at Ottawa notice of seizure under the execution held by him, had effected a valid seizure of H's right entitling him to sue for and recover money.
3. That the effect of s. 5(2) of the *Veterans' Land Act* is to remove the impediment which normally prevents the attachment of public moneys owing to a judgment debtor and that no valid objection of that kind could be raised by either the Director or the veteran to a suit or proceeding by the sheriff to recover in his own name under s. 20(2) of the *Execution Act*, money payable pursuant to the provisions of the *Veterans' Land Act* by the Director to the veteran, where the veteran's right to such money had been seized by the sheriff under an execution. *C.N.R. v. Croteau*, [1925] S.C.R. 384 at 388, referred to and followed.
4. That although no action or suit had in fact been brought while the money remained in the hands of the Director, what the sheriff had done was sufficient to give him an enforceable right to payment of it and that, accordingly, the money in Court should be paid out to him to be dealt with by him as money of H levied under execution against his property.

PETITION by a judgment creditor for payment out of Court pursuant to s. 24(3) of *The Exchequer Court Act*.

The petition was heard before the Honourable Mr. Justice Thurlow at Toronto.

Alfred Shifrin, Q.C. for petitioner.

James Stephenson for Trustees, Toronto General Hospital.

M. A. Brown for Antoinette Fedele.

B. C. Burden for Trull Funeral Homes.

K. G. Dawe for Jack R. Hewitt.

THURLOW J. now (October 26, 1960) delivered the following judgment:

This is a petition for determination of the right to a sum of \$3,247.17, which was paid into this Court by The Director, The Veterans' Land Act pursuant to an order of Cameron J.

The money in question represents surplus proceeds arising upon a re-sale made by the Director on or about January 22, 1957, of land which had previously been the

subject of a contract of sale made (and later rescinded) under the provisions of the *Veterans' Land Act*, R.S.C. 1952, c. 280, between the Director and one Jack Reginald Hewitt, a veteran. By s. 21(1) of that Act, it is provided as follows:

21. (1) Where a contract made by the Director with a veteran is rescinded or otherwise terminated and any property that was sold by the contract is re-sold by the Director for more than the amount owing under the contract, the surplus shall be paid by the Director to the veteran.

The affidavit filed on the application for the order for leave to pay the sum in question into court shows that on December 11, 1957, a notice of seizure of all monies, cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money belonging to Jack R. Hewitt was directed to the Department of Veterans' Affairs at Toronto by the Sheriff of the County of Simcoe under a writ of *feri facias* issued out of the County Court of the County of York at the suit of the Robert Simpson Company Limited against Jack R. Hewitt. This notice was later withdrawn. On December 12, 1957, the Sheriff of the County of York "purported to direct" to the Department of Veterans' Affairs at Toronto a notice of seizure of, *inter alia*, all choses in action belonging to John Hewitt pursuant to two writs of *feri facias* issued out of the County Court of the County of York against John Hewitt, one at the suit of Trull Funeral Homes Limited and the other at the suit of The Trustees of the Toronto General Hospital. The affidavit further states that on June 3, 1958, the Sheriff of the County of Carleton directed a notice to The Director, The Veterans' Land Act, in Ottawa under a writ of *feri facias* in an action in the Supreme Court of Ontario between Antoinette Fedele and Jack R. Hewitt. By this notice, to which a copy of the writ was attached, the Sheriff purported to seize all deposits, credits, book debts, choses in action, and all cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities and equities therein belonging to Jack R. Hewitt up to the amount of \$17,707.32, and he demanded payment thereof forthwith. The affidavit, which was sworn on December 15, 1958, also shows that a number of persons, including the petitioner, Helen Shaul, claimed to have an interest in the surplus proceeds arising on the sale. Thereafter, on January 20, 1959, the Attorney-General of Canada

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applied for and obtained an order under s. 24(2) of the *Exchequer Court Act* under which the sum in question was paid into this Court. In this order, it was expressly provided that such payment into court should be without prejudice to the rights, if any, of the said Jack Reginald Hewitt and such rights, if any, of any claimant set forth in the notice of the application. By s. 24(2), (3), (4), and (5) of the *Exchequer Court Act*, it is provided as follows:

(2) The Court may, upon the application of the Attorney General of Canada, in any case in which the Crown finds itself in possession of any moneys belonging or payable to some one other than the Crown, and the Attorney General is in doubt as to the person or persons to or among whom such moneys should be paid or distributed, make an order permitting the payment of such moneys into Court.

(3) Upon payment of any such moneys into Court in accordance with any such order, the Crown is *ipso facto* released and discharged from any and every liability whatsoever regarding the moneys so paid into Court, and any person claiming to be entitled to the whole or any share of the moneys so paid in is at liberty to institute an action in the Exchequer Court by way of petition for the recovery of the same; and in any such action the Court has power to determine the rights of the claimant or of any other person to the fund in question, and may make such order or give such directions, and may make such regulations as will enable the Court to adjudicate upon the rights of all persons interested in the fund, and to order payment out to any person of any such moneys or portion thereof in accordance with the finding of the Court.

(4) In any such action the Court may give directions as to the parties to whom notice thereof shall be given, the time or times within which such parties shall be required to file their claims, and, generally, as to the procedure to be followed to enable the Court properly to adjudicate upon the rights of the parties and to give judgment upon any claim or claims against the fund in Court; and any claim that is not entered within the time limited by order of the Court shall be barred, and the Court may proceed to determine the other claims and distribute the moneys among the parties entitled thereto without reference to any claim so barred; and in any case where the moneys in Court are not sufficient to satisfy all claims the Court may order that the moneys be distributed *pro rata* among the parties entitled.

(5) The Court may also make such order as to costs as it may deem fit.

The present petition was brought by Helen Shaul, a judgment creditor of the veteran, Jack Reginald Hewitt. At the hearing, counsel on her behalf asked that the money be paid out to the creditors of Hewitt who have filed their claims pursuant to an order made in these proceedings, by which it had been directed that notice of the petition be

sent to the persons referred to in the affidavit already mentioned, requiring them to file their claims in this Court within a time limited by the order, failing which such claims would be barred.

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Pursuant to this order, claims had been filed by the Sheriff of the County of Carleton in respect of the execution already mentioned and by Antoinette Fedele, The Robert Simpson Company Limited, Trull Funeral Homes Limited, and The Trustees of the Toronto General Hospital, all as judgment creditors of Hewitt, and by the veteran, Jack Reginald Hewitt, as well, who claimed the full amount of \$3,247.17 in question and asked that it be paid to him. No claim was filed by the Sheriff of Simcoe or of York County.

It is, I think, clear that the right of a veteran under s. 21(1) of the *Veterans' Land Act* to surplus proceeds is a personal right which accrues to him upon the realization by the Director of such a surplus from the re-sale of property which had been the subject matter of a contract between him and the Director. *Vide The King v. McClellan*¹ and *Ponkka v. Butchart et al.*² While the contract of sale is in force, the veteran is prohibited as provided in s. 10(4) from assigning the subject matter of the contract, that is, the property, but I see no reason to think that the prohibition of s. 10(4) applies to the veteran's right under s. 21(1) to surplus proceeds on a re-sale of the property. Nor do I think there is any valid objection on grounds of public policy to the veteran's right to such a surplus being assigned. In my opinion, there was accordingly nothing to render the surplus proceeds from the re-sale in question unassignable (*vide The Queen v. Cowper*³ at p. 121 *et seq.*) or unavailable to satisfy the claims of Hewitt's creditors.

It does not, however, appear that Hewitt ever made any assignment of his right, and the mere recovery of a judgment against Hewitt would not have the effect of transferring his right to the judgment creditor. However, under s. 20(2) of the *Execution Act*, R.S.O. 1950, c. 120, a sheriff holding a *feri facias* is authorized to seize any book debts or other choses in action of the execution debtor and to sue in his own name for the recovery of the monies payable in respect thereto. In my opinion, the veteran's right to

¹[1932] S.C.R. 617.

²[1956] O.R. 837.

³[1953] Ex. C.R. 107.

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the money in question was a chose in action within the meaning of this clause, and but for the fact that the veteran's right was a right against The Director, The Veterans' Land Act (a matter to be dealt with later in this judgment) I can see no reason to think that such right was not liable to seizure under execution. I doubt that what was done by the Sheriffs of Simcoe and York Counties can be treated as a valid seizure of the veteran's right to the sum in question, since in each case the Sheriff's notice was directed to the Department of Veterans' Affairs at Toronto, rather than to the Director, The Veterans' Land Act, and there is nothing in the record to indicate that the chose in action in question was situate in either of their bailiwicks, but in any event, no claim was filed in these proceedings by either of such Sheriffs. On the other hand, the Sheriff of Carleton County directed his notice to the Director, The Veterans' Land Act, at Ottawa, which is in his bailiwick and where, I think, in the absence of any indication to the contrary, the situs of the chose in action may be presumed to be, and I therefore regard what was done by him as amounting to a valid seizure under execution of such right entitling him to sue for and recover the money. As he has also filed a claim in these proceedings, I am of the opinion that he would be the party now entitled to payment of the money in court unless the fact that, in the present case, the veteran's right was one against The Director, The Veterans' Land Act, makes a difference.

The appointment by the Governor in Council of an officer to be known as "The Director, The Veterans' Land Act" is provided for by s. 3(1) of the *Veterans' Land Act*, and by s-s. (2) of the same section it is provided that the Act is to be administered by the Minister of Veterans' Affairs and that the powers and duties conferred or imposed by the Act on the Director shall be exercised or performed subject to the direction of the Minister. Subsections (1), (2), and (4) of s. 5 are as follows:

5. (1) For the purposes of acquiring, holding, conveying and transferring and of agreeing to convey, acquire or transfer any of the property that he is by this Act authorized to acquire, hold, convey, transfer, agree to convey or agree to transfer, but for such purposes only, the Director is a corporation sole and he and his successors have perpetual succession, and as such is the agent of Her Majesty in right of Canada.

(2) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Director on behalf of Her Majesty, whether in his name or in the name of Her Majesty, may be brought or taken by or against the Director in the name of the Director in any court that would have jurisdiction if the Director were not an agent of Her Majesty.

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(4) All property acquired for any of the purposes of this Act shall vest in the Director as such corporation sole; but the provisions of this section do not in anywise restrict, impair or affect the powers conferred upon the Director generally by this Act nor subject him to the provisions of any enactment of the Dominion or of any province respecting corporations.

At the hearing, counsel for Hewitt contended that, since the Director is an agent of the Crown, money in his hands is not subject to seizure under execution, and in support of his contention he pointed out that garnishee proceedings will not generally lie against the Crown or its agents. The nature of this objection is stated as follows by Duff J. in *Canadian National Railways v. Croteau*¹ at p. 388:

The real difficulty in attaching moneys payable by the Crown to a third person lies in the inability of the courts to make an order against the Crown. Generally speaking, moneys payable by the Crown are subject to equitable execution, the appointment of a receiver operating as an injunction prohibiting the judgment debtor from receiving the fund attached. The process involves no order against the Crown. Only by leave of the court and, of course, after fiat granted, can the judgment creditor proceed to enforce the judgment debtor's claim by petition of right. The position may be illustrated by reference to sequestration. Sequestration will lie to attach moneys payable by the Crown, subject to this, that no order against the Crown can be made. *Willcock v. Terrell*, [1878] 3 Ex. D. 323. Here, again, the process operates only indirectly, by precluding the judgment debtor from receiving payment.

In the *Croteau* case, the Court upheld a garnishee order made against the Canadian National Railway Company, attaching the pay of a railway employee, and besides the particular provisions of the *Canadian National Railways Act* the Court invoked the provisions of the *Interpretation Act* in support of their conclusions. In the present case, s. 5(4) of the *Veterans' Land Act*, in my opinion, excludes the application of s. 30 of the *Interpretation Act*, leaving the matter to be determined solely by reference to subsections (1) and (2) of s. 5. There is also the further difference that, in the *Croteau* case, the objection was

¹[1925] S.C.R. 384.

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taken by the Canadian National Railway Company, where-
 as in the present case neither the Director nor the Crown
 has taken the objection, the matter being raised only on
 behalf of the veteran.

Referring to the particular provisions of the *Canadian National Railway Act* authorizing "actions, suits or other proceedings" to be brought by and against the Canadian National Railway Company, Duff J. said at p. 388:

Now s. 15, whatever its limitations, does contemplate judgments against the company for the payment of money in actions arising out of the operation and management of the Government Railways, as well as in other cases. Moreover, the use of the word "suits" in addition to "actions" indicates that equitable proceedings—proceedings of that class which normally culminate in a judgment *in personam*—are contemplated by the section. The necessary effect of s. 15 would, therefore, appear to be that it removes the impediment which normally prevents the attachment of public moneys owing to a judgment debtor; and it would therefore appear to be in harmony with the principle and policy of the section to attribute to the word "proceedings" a scope which would bring within the ambit of the section the kind of proceeding that is in question here.

This reasoning appears to me to be equally applicable in the present case. By various sections of the *Veterans' Land Act*, the Director is empowered to acquire real and personal property and to contract with a veteran for the sale to him of such property upon the terms prescribed by the Act. Obviously, the exercise of these powers would in the ordinary course raise contractual obligations between the Crown, represented by the Director, on the one hand and vendors of land or veterans on the other, the existence of which could be expected to give rise to disputes from time to time. In this situation s. 5(2) provides that "Actions, suits and other legal proceedings" in respect of such obligations may be brought by or against the Director in his name in any court that would have jurisdiction if the Director were not an agent of Her Majesty. Like the section considered in the *Croteau* case, s. 5(2) appears to me to contemplate judgments against the Director in actions pertaining to obligations lawfully incurred by the Director on behalf of Her Majesty, and the word "suits" in addition to "actions" indicates that judgments against the Director *in personam* are also contemplated. The effect would, therefore, appear to be the same as in the *Croteau* case; that is, to remove the impediment which normally

prevents the attachment of public moneys owing to a judgment debtor and thus to permit garnishee proceedings against the Director at the suit of a creditor of a veteran. If, as I think, this is the effect of s. 5(2), I can see no valid objection either by the Director or the veteran to a suit or proceeding by the sheriff to recover in his own name under s. 20(2) of *The Execution Act* money payable pursuant to the provisions of the *Veterans' Land Act* by the Director to the veteran, where the veteran's right to such money has been seized by the sheriff under an execution. Here no action or suit was in fact brought while the money remained in the hands of the Director, but the fact that what the sheriff had done was sufficient to give him an enforceable right to payment of the money was, in my view, all that was required to entitle him to payment of it. The objection taken on behalf of the veteran accordingly fails.

It follows that, subject to payment which I order to be made therefrom of the costs of the petitioning creditor up to the time of the trial herein, the Sheriff of Carleton County is entitled to the sum in court by virtue of his having seized the veteran's right thereto under the execution held by him, and the said sum will be paid out to him to be dealt with by him as money of the veteran levied under execution against his property. The money will, however, remain in court pending expiry of the time for appealing from this judgment and thereafter, if an appeal has been taken, until the disposition of such appeal.

Judgment accordingly.

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