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## Execution Against Co-Tenants of Real Property

*Jewel Hammond Mack\**

**E**XECUTION<sup>1</sup> ON A JUDGMENT DEBT is the last and most important step in a creditor's successful legal efforts. Execution often is the ultimate procedural objective of the litigant, as well as of the attorney who represents him throughout the entire action for the debt.<sup>2</sup>

Let us assume for our purposes here that P (the plaintiff) and A (the attorney) are leaving the courtroom just after P has been awarded a final<sup>3</sup> money judgment against X (the defendant) which upon filing, docketing and indexing, and return of certificate<sup>4</sup> creates "a lien<sup>5</sup> on all lands and tenements of each judgment debtor within any county<sup>6</sup> of this state." A remarks to P, "I am glad we won." P answers, "I am glad we won, too, even though our victory in effect is only a 'moral victory' because X hasn't got a nickel." P rarely will be satisfied with a moral victory. He wants payment, and it is up to A to get it.

Let us suppose that the only non-exempt<sup>7</sup> property which X owns is a remainderman's interest in his family home after the life estate of his aunt expires. X holds this interest with his brother's assignee. At this point, A is faced with the problem of

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<sup>1</sup> As defined by the Ohio Code is a "process of a court issued by its clerk and directed to the sheriff of the county." Ohio R. C. §2327.01.

<sup>2</sup> Execution is "the end of the law": *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 23 C. J. p. 305 n. 8, 33 C. J. S. p. 133 n. 4 (1904); cited in: *Daniels v. Yelverton*, 239 N. C. 54, 79 S. E. 2d 311 (1954); *Millard v. Millard*, 102 Calif. App. 2d 249, 227 P. 2d 477 (1951). See also: *Kelley v. Vincent*, 8 Ohio St. 416, 23 C. J. p. 306 n. 16 (1858); *Shields v. Stark*, 51 S. W. 540 (Tex. Civ. App. 1899).

<sup>3</sup> Only final judgments are liens: *Linsley v. Logan*, 33 Ohio St. 380 (1878); *McMillan v. McMillan*, 67 S. W. 2d 342 (Tex. Civ. App.). See also: 23 C. J. p. 316 n. 34.

<sup>4</sup> Ohio R. C., §2329.03.

<sup>5</sup> The only decrees which give liens under the statutes are decrees for money generally: *Myers v. Hewitt*, 16 Ohio St. 449 (1847).

<sup>6</sup> Judgment liens of Cinnc. Superior Court are liens on all the judgment debtor's land in Hamilton County: *Kilbreth v. Dess*, 24 Ohio St. 379 (1873); judgments rendered in U. S. Courts are liens on all lands in the district; *Lawrence v. Belger*, 31 Ohio St. 175 (1877); *Sellers v. Corwin*, 5 Ohio 399 (1832).

<sup>7</sup> Cf. section on exemptions, *infra*.

execution<sup>8</sup> on a co-owned<sup>9</sup> vested interest in a remainder in fee.

Many unanswered questions arise in the mind of the client, and as the process of execution proceeds, A explains to P in detail what is done, in order to effect the desired outcome.

### The Writ of Execution in Ohio

The writ of execution<sup>10</sup> is a judicial writ issued by the clerk of courts (in Ohio procedure) authorizing the official designated by statute<sup>11</sup> to seize or appropriate the property of the judgment debtor.<sup>12</sup>

The issuance of a writ of execution should be obtained within a year<sup>13</sup> after judgment, or the judgment creditor's lien against the debtors' property is lost; or, death of a joint tenant may affect the rights of the judgment creditor.<sup>14</sup> By statute, however, Ohio provides also for revivor,<sup>15</sup> whereby a dormant judgment may be revived and subsequent execution may be issued.

The validity of an execution sale depends upon issuance of execution<sup>16</sup>—an "essential step to acquisition of title"<sup>17</sup> by a purchaser at an execution sale.

<sup>8</sup> A judgment creditor has the right to consummate his judgment by execution: *Credlebaugh v. Pritchett*, 8 Ohio St. 646, 72 Am. Dec. 610 (1858).

<sup>9</sup> The remedy of a judgment creditor of co-owned property is to levy on the interest of his debtor: *Ray v. Abraham*, 207 Ala. 400, 92 So. 792, 25 A. L. R. 101 (1922).

<sup>10</sup> Ohio R. C. §2327.01.

<sup>11</sup> If a judgment is secured by an action in a Federal Court, the laws of the state in which the court is held apply: *Custer v. McCutcheon*, 283 U. S. 514, 51 Sup. Ct. 530 (1931); *Cook v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209 (1893); *Lamaster v. Keeler*, 123 U. S. 376, 85 Sup. Ct. 197, 31 L. Ed. 238 (1887); *Canal and C. Streets R. Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 225 (1885); *Fink v. O'Neill*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196 (1882).

<sup>12</sup> *Jones v. Hall*, 177 Va. 658, 15 S. E. 2d 108 (1941).

<sup>13</sup> Ohio R. C. Sec. 2329.03.

<sup>14</sup> Death of a joint tenant as affecting the right of his judgment creditor under execution in respect of his interest in the joint property: 111 A.L.R. 171; Execution after death of the co-tenant: *Denny v. Ross*, 70 Kan. 720, 79 P. 502 (1905); Execution not void, but voidable: *Massie v. Long*, 2 Ohio 287, 15 Am. Dec. 547 (1826); *Spiller v. Hollinger*, 148 S. W. 338 (Tex. Civ. App. 1912); *Gottee v. Graves*, 153 Ky. 26, 154 S. W. 386 (1913); *Salmon v. Yates*, 1 Harr. J. 300 (5 Md. Rep.) (Md. 1804); *Smith v. White*, 63 Ga. 236, 30 Century Digest 1568, 33 C. J. S. p. 139 n. 23 (1879); Preventing dormancy of a judgment: *First Nat'l Bank v. McCaskill*, 27 Ga. App. 391, 108 S. E. 819 (1921).

<sup>15</sup> Ohio R. C., Sec. 2325.19.

<sup>16</sup> *Allen v. Parish*, 3 Ohio 187 (1827); *Armstrong v. McCoy*, 8 Ohio 128, 31 Am. Dec. 435 (1837); *Perkins v. Dibble*, 10 Ohio 433, 36 Am. Dec. 97 (1841).

<sup>17</sup> *Boal v. King*, 6 Ohio 11 (1833).

Writs of execution against real property<sup>18</sup> are issued to the person who is entitled, *i.e.*, the original judgment creditor or his assigns,<sup>19</sup> upon application by a praecipe;<sup>20</sup> however, the writ of execution is not invalidated by issuance without a praecipe.<sup>21</sup>

If issuance is refused, a motion may be made for execution in the court where the judgment was rendered,<sup>22</sup> or an action of mandamus may be brought against the clerk<sup>23</sup> (but not the court<sup>24</sup>), at which time the clerk must show cause why a writ of execution should not issue.

The court possesses supervisory control<sup>25</sup> over such process (issuance of writ of execution) and directs the clerk in the performance of his duty.<sup>26</sup>

Judgment in a Court of Common Pleas of one county may be enforced by execution directed to the sheriff of any other county in the state.<sup>27</sup> Execution also may be issued to sheriffs of different counties at the same time,<sup>28</sup> provided that sufficient fees accompany the demand for the writ.

Alias writs and pluries writs are obtainable where lands are not sold upon first or subsequent executions respectively.<sup>29</sup> Although alias writs should constitute a new process, alteration

<sup>18</sup> Ohio R. C. §2327.02(c).

A writ of execution, as distinguished from a mere levy on real property is a civil proceeding for the enforcement of a judgment against such property: *Lash v. Mann*, 26 Ohio Ops. 158, 141 Ohio St. 577, 49 N. E. 2d 689 (1943).

<sup>19</sup> 2 Ohio Jur. 2d Agency §46.

<sup>20</sup> Ohio R. C. §2303.11.

<sup>21</sup> *First Nat'l Bank v. Hassinger*, 129 Ohio St. 642, 30 Ohio Ops. 32, 196 N. E. 425 (1935).

<sup>22</sup> *Leeds v. Peaslee*, Ohio Nisi Prius 567, 10 Ohio Dec. 567 (1900).

<sup>23</sup> *State ex rel. Pacific Guano Co. v. Eager*, 3 Ohio Cir. Ct. 581, 2 Ohio Cir. Dec. 335 (1888).

<sup>24</sup> *State ex rel. Maginnis v. Pike*, 17 Ohio Cir. Ct. 624, 9 Ohio Cir. Dec. 299 (1898).

<sup>25</sup> *Elliott v. Elmore*, 16 Ohio 27 (1847).

<sup>26</sup> Ohio R. C. §2303.26.

<sup>27</sup> Ohio R. C. §§2327.01, 2329.57, 2707.03; *Duncan v. Drakeley*, 10 Ohio 45 (1840); *Wilcox v. May*, 19 Ohio 408 (1850); *Union Bank v. Union Bank*, 6 Ohio St. 254 (1856); *Langdon v. Summers*, 10 Ohio St. 77 (1859); *Moore v. Rittenhouse*, 15 Ohio St. 310 (1864); *Riblet v. Davis*, 24 Ohio St. 114 (1873); *Tucker v. Shade*, 25 Ohio St. 114 (1874); *Morgan v. Kinney*, 38 Ohio St. 610 (1883); *Dorst v. Phillips*, 41 Ohio St. 514 (1885); *Wheeling L. E. & P. Coal Co. v. First Nat'l Bank*, 55 Ohio St. 233, 45 N. E. 630 (1896); *Mason v. Hull*, 55 Ohio St. 256, 45 N. E. 632 (1891); *Geo. W. McAlpin Co. v. Finsterwald*, 57 Ohio St. 524, 41 N. E. 784 (1898); *Eshelman v. Van Nover*, 89 Ohio St. 48, 105 N. E. 70 (1913).

<sup>28</sup> Ohio R. C. §2303.16.

<sup>29</sup> Ohio R. C. §2329.40.

(i.e., change of date, etc.) of the original writ does not invalidate the writ even though such an alteration would be considered to be highly irregular.

If real property is not sold (for want of a buyer) at the time of the execution sale, the Ohio Code provides for re-appraisal and the award of a new execution.<sup>30</sup>

If there is sufficient cause, the judgment creditor himself may have the writ set aside, and may secure another.<sup>31</sup>

If property seized is insufficient to satisfy the judgment debt, resort to other property may be had<sup>31a</sup> and an alias writ must be obtained.<sup>32</sup>

The writ must show the time of, and the place where, judgment was rendered.<sup>33</sup> It also must contain the names of the parties.<sup>34</sup> It may be considered irregular but not void in case of a mistake in the name of the plaintiff, or in case the plaintiff's name is omitted.

Writs of execution must conform to the judgment, especially as to the amount of the judgment entered thereon.<sup>35</sup>

A direction to the proper officer must be stated in a writ of execution,<sup>36</sup> and it must contain the date issued, the signature of the clerk of court or his deputy (the latter usually signs the name of the clerk, although it is not improper if he signs his own name), and the seal.<sup>37</sup>

A writ of execution may be general or special.<sup>38</sup> "Execution

<sup>30</sup> Ohio R. C. §2329.51.

<sup>31</sup> Burnet, J. in *Arnold v. Fuller*, 1 Ohio 458 (1824): It has been held that a plaintiff may have a new writ of execution when a satisfaction of the judgment would involve great disadvantages and risks because of clouds on the title, difficulty of making a fair sale, or the probability of not realizing money from it (the sale) because of earlier encumbrances. See also: *Commercial Bank v. Western Reserve Bank*, 11 Ohio 445, 38 Am. Dec. 739 (1842).

<sup>31a</sup> Ohio R. C. § 2329.16; *Hubble v. Perrin*, 3 Ohio 287 (1827).

<sup>32</sup> *Douglas v. McCoy*, 5 Ohio 522 (1832).

<sup>33</sup> Ohio R. C. § 917.19.

<sup>34</sup> *Humbert v. Methodist Episcopal Church*, *Wright* 213 (1843), *Moore v. McClief*, 16 Ohio St. 50—where the amount on the writ was substantially greater than the judgment. See also: *Dunn & Co. v. Springmeir*, 7 Ohio Dec. Rep. 339, *Aff'd* 8 Bull. 236 (1877).

<sup>35</sup> See note 34 *supra*.

<sup>36</sup> *Rhonemus v. Corwin*, 9 Ohio St. 366 (1859), Ohio R. C. §2101.35—Probate Court, Sheriff or coroner; Ohio R. C. §2501.19—Court of Appeals: Sheriff or other officer; Ohio R. C. §311.08—Court of Common Pleas: Sheriff.

<sup>37</sup> Ohio R. C. §7.01; See also sample form of a writ: *Nadler, Creditor-Debtor Relations* 55 (1st Ed. 1956).

<sup>38</sup> *Darby v. Carson*, 9 Ohio 149 (1839); 21 Am. Jur. Executions §17.

(general) is the putting into effect (of) the final judgment of a court and 'special execution' is putting into effect judgment against the particular property specified in the decree."<sup>39</sup>

After the delivery of the proper writ of execution to the levying officer, he may proceed immediately to levy on the interest of the debtor in the co-owned realty<sup>40</sup> by levying on the debtor's interest in the entire tract. However, it is unnecessary for the officer to enter the land in order to make a valid levy thereon.<sup>41</sup>

Most jurisdictions also require appraisal of realty—in Ohio by three disinterested freeholders of the county of the situs of the property levied upon;<sup>42</sup> and publication of notice of sale<sup>43</sup> and notice of time and place<sup>44</sup> of sale.

The return of the writ is an important and necessary duty<sup>45</sup> of the levying officer. Most statutes provide a specified time within which the writ must be returned.

Executions and proceedings thereunder are usually the subject of minute statutory regulation,<sup>46</sup> and must be strictly construed and followed.<sup>47</sup>

### Real Property Interests Subject to Execution

Generally, every kind of property or interest therein not otherwise exempt by statute may be reached by an execution issued on a judgment.<sup>48</sup> In most jurisdictions, real property or any interests in real property are subject to execution by statute<sup>49</sup>. Such a liability did not exist at common law. The Ohio statute<sup>50</sup>

<sup>39</sup> *Tice v. Tice*, 208 Ia. 145, 224 N. W. 571 (1929); *Farmers Grain & Mercantile Co. v. Benson*, 195 Ia. 695, 193 N. W. 14 (1923).

<sup>40</sup> Ohio R. C. § 2329.11.

<sup>41</sup> *Morgan v. Kinney*, 38 Ohio St. 610 (1883); *Coal Co. v. Bank*, 55 Ohio St. 233, 251, 45 N. E. 630 (1896).

<sup>42</sup> Ohio R. C. § 2329.17; Manner of appraisal varies.

<sup>43</sup> Ohio R. C. § 2329.23.

<sup>44</sup> Ohio R. C. § 2329.26; *Augustus v. Lynd*, 7 Ohio N. P. N. S. 473, 19 Ohio Dec. 143 (1908).

<sup>45</sup> Ohio R. C. § 2329.28; Sheriff is liable for failing to make return of an order of sale—*Sharp v. Ross*, 7 Ohio Cir. Ct. 55, 3 Ohio Cir. Dec. 457 (1893).

<sup>46</sup> *Sturgeon v. Hull*, 8 Ohio Cir. Ct. 269, 4 Ohio Cir. Dec. 457, rev'd on other grounds in 55 Ohio St. 233, 45 N. E. 632 (1894).

<sup>47</sup> *Roach v. Roach*, 164 Ohio St. 587, 590 Ohio Op. 1, 132 N. E. 2d 742 (1956).

<sup>48</sup> 33 C. J. S. §18, p. 152.

<sup>49</sup> Ohio R. C. § 2327.02 (c).

<sup>50</sup> Ohio R. C. § 2329.01.

authorizing levy and sale of realty specifically includes "vested legal interests in lands, and leaseholds renewable forever."

A few states, however, exempt all real property from execution,<sup>51</sup> or so large a portion<sup>52</sup> that execution against realty is futile. Some states (including Ohio) allow execution on realty only to the extent of any deficiency after the sale of the debtor's personalty.<sup>53</sup> Some states allow the judgment debtor the right to waive or forfeit execution on personalty.<sup>54</sup>

Sometimes a bill in equity, known as a creditor's bill<sup>55</sup> must be brought in order to reach intangible interests in property which cannot be reached at law.<sup>56</sup> Such would be the case, for example, when the property interest is that of a mortgagee of a future interest.

Tenancy in common is the holding of property by several persons each having distinct titles, there being unity of possession only. While, generally, definitions relate tenancy in common to real property, this tenancy can exist in personalty as well as in realty<sup>57</sup> and every species of property.<sup>58</sup> However, the rights of judgment creditors against one or more tenants in common of real property are our prime consideration.

In a tenancy in common, each owner is solely and severally seized of his share.<sup>59</sup> There may be entire disunion of time, interest or title;<sup>60</sup> different qualities of estates and modes of acquisition of title,<sup>61</sup> or different tenures.<sup>62</sup>

<sup>51</sup> *Dunn v. Baxter*, 30 W. Va. 672, 5 S. E. 214 (1888).

<sup>52</sup> Texas Homestead Exemption: \$10,000. Historical note: Reason attributed for the generous allowance is that Texas has always had a reputation for being a haven for debtors.

<sup>53</sup> Ohio R. C. §2329.09.

<sup>54</sup> 33 C. J. S. Sec. 100 p. 100, n. 6; *Schwann v. Sanders*, 121 La. 461, 46 So. 573 (1908); *Coal Co. v. Bank*, supra note 41.

<sup>55</sup> 15 Ohio Jur. 2d *Creditor's Suit* §20.

<sup>56</sup> *In re McGraw*, 254 F. 442 (D. C. West Va. 1918); *Jackson v. Parkersburg and O. V. Elec. R. Co.*, 233 F. 784 (D. C. West Va. 1916).

<sup>57</sup> *Kellum v. Williams*, 252 Ala. 71, 39 So. 2d 573, 574 (1949); *Krum v. Mal-lory*, 41 Calif. 2d 132, 137 P. 2d 18 (1943); *McLeod v. Andrews*, 303 Ky. 46, 196 S. W. 2d 473 (1946); *Badu v. Dezendorf*, 99 S. W. 2d 1049 (Tex. Civ. App. 1936). See also 62 C. J. 408 n. 2.

<sup>58</sup> *Warner v. Warner*, 248 Ala. 556, 28 So. 2d 701 (1946).

<sup>59</sup> *Skelley Oil Co. v. Wickham*, 202 F. 2d 442 (10th Cir. 1953).

<sup>60</sup> *Silloway v. Brown Mass.*, 12 Allen 30, 25 Am. Dig. Home 311 (1866); *Laughlin v. O'Reilley*, 92 Miss. 121, 45 So. 193 (1908); *Deslauriers v. Senesac*, 331 Ill. 437, 163 N. E. 327 (1928).

<sup>61</sup> *Appeal of Delashmutt*, 234 Ia. 1255, 15 N. W. 2d 619 (1944).

<sup>62</sup> *Putnam v. Ritchie*, 6 Paige 390 (N. Y.).

While it is true that a judgment creditor may levy on an undivided interest in property held by tenants in common,<sup>63</sup> and a tenancy in common thus may be created between the creditor or the purchaser and the remaining joint tenants,<sup>64</sup> it is helpful to know how such a relation arises. This is because in many cases the court is faced first with a need to determine the type of relation-interest before it can determine the validity of the levy and/or sale.<sup>65</sup>

Joint occupancy alone does not create a tenancy in common unless both occupants have an interest in the property jointly occupied. Ordinarily, a tenancy in common does not arise by descent or operation of law, but can be created only by grant or purchase or by the act of the parties.<sup>66</sup>

### Execution Against Common Property

A writ of execution may be levied on an undivided interest of a judgment debtor in land.<sup>67</sup> Usually this is done by levying on the entire tract (in the absence of partition before judgment<sup>68</sup>) joining all owners as parties defendant; and such a levy will be valid as to the debtors' portion.<sup>69</sup>

Many states, by statute, prescribe the method of levying execution on the interest of the debtor in co-owned realty, and specify that constructive seizure by service of *notice* of seizure is all that is necessary and proper.<sup>69</sup>

The abrogation, by statute, of the common law right of sur-

<sup>63</sup> *Stevahn v. Meidinger*, 79 N. D. 323, 57 N. W. 2d 1 (N. D. 1952).

<sup>64</sup> *Spear v. Hall*, 196 Ky. 597, 245 S. W. 282 (1922); *Hruby v. Steinman*, 374 Ill. App. 465, 24 N. E. 2d 175 aff'd. 30 N. E. 2d 7 (1940); *Williams v. Williams*, 25 Tenn. App. 290, 156 S. W. 2d 363 (1941); *Roxbury v. Nute*, 233 Mass. 112, 123 N. E. 391 (1919); *Mann Bros. v. Ball*, 230 Ky. 129, 18 S. W. 2d 946 (1929).

<sup>65</sup> *Supra* note 64.

<sup>66</sup> *Deslauriers v. Senesac*, *Supra* note 60. The devisees and distributees of partners who die solvent hold the real estate as tenants in common. *Taylor v. Taylor*, 310 Mich. 541, 17 N. W. 2d 745 (1945); *Smith v. Burt*, 388 Ill. 162, 57 N. E. 2d 493 (1944). Where a devise that did not describe the *particular* property created a tenancy in common between the two devisees. See also: *Howard v. Manning*, 79 Okla. 165, 192 P. 358, 12 A. L. R. 819; *Earp v. Mid-Continent Petroleum Corp.*, 167 Okla. 86, 27 P. 2d 855 (1933), 91 A. L. R. 188.

<sup>67</sup> *Treon v. Emerick*, 6 Ohio 391 (1834)—where a levy on a specific portion of a larger tract held in common was upheld. See also: *Comer v. Dadson*, 22 Ohio St. 615 (1872); *Keenan v. Wilson*, 19 Ohio App. 499 (1925).

<sup>68</sup> *Argyle v. Dwinel*, 29 Me. 29 (1848).

<sup>69</sup> *Swanton v. Crooker*, 49 Me. 455, 21 Am. Dec. 314 (1862).



vivorship is determinative in some states of the judgment creditor's right to execute on common property.<sup>70</sup>

In some states, even title to property held by joint tenants has been deemed to be severed by the lien of a judgment, and thus made subject to execution.<sup>71</sup>

Since vested legal interests in lands and tenements are not exempt by law,<sup>72</sup> a vested remainder in fee may be subject to execution under a judgment against the remainderman during the *continuance* of the life estate.<sup>73</sup> And the life estate itself is subject to execution.<sup>74</sup>

### Debtor's Right to Exemption

Homestead exemption laws<sup>75</sup> are of great concern to a judgment creditor seeking execution. These laws attempt to give to the judgment debtor the privilege to retain the necessary comforts of a homestead, by exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability.

An examination of exemption statutes reveals that there is wide variance among the several states, especially as to the amount of the exemption, which in some instances is based upon the average needs of the inhabitants of the particular state.

Some states exempt \$1,000<sup>76</sup> of the value of a homestead, while others exempt as much as \$10,000.<sup>77</sup> Agricultural states

<sup>70</sup> Nadler, *supra* note 37, at 47 n. 49; *Williams v. Dovell*, 202 Md. 351, 96 A. 2d 484 (1953); *Van Antwerp v. Horan*, 390 Ill. 499, 61 N. E. 2d 358 (1945); *Hughes v. Fairfield Lumber Co.*, 19 Conn. Sup. 138, 110 A. 2d 499 (1954); and cases cited in 111 A. L. R. 171.

<sup>71</sup> See cases in 111 A. L. R. 172—Right of a judgment creditor of a joint tenant to levy. Also: *Raver's Collection Co. v. Higgins*, 87 Calif. App. 2d 248, 196 P. 2d 803 (1948); *Mangus v. Miller*, 63 Sup. Ct. 182, 317 U. S. 178, 87 L. Ed. 169 (1942)—Under common law, interest of one joint tenant may be alienated and is subject to execution and separate sale.

<sup>72</sup> Ohio R. C. §2329.01.

<sup>73</sup> *Rhea v. Dick*, 34 Ohio St. 420, 64 Ohio L. Abs. 116 (1878); *Myers v. Swagler*, 9 Ohio L. Abs. 156; *Crum v. Crum*, 65 Ohio App. 431, 19 Ohio Ops. 40, 31 Ohio L. Abs. 397, 30 N. E. 2d 448 (1940); *Lash v. Miller*, 16 Ohio Ops. 204, 30 Ohio L. Abs. 443 (1939). See also: 33 C. J. S. 168 n. 48, 49.

<sup>74</sup> *Canby v. Porter*, 12 Ohio 79 (1843); *Thompson v. Green*, 4 Ohio St. 216 (1854); *Baird v. Van Evra*, 8 Ohio Dec. Rep. 8, 5 Bull. 26 (1879). See also: 18 Ohio Jur. 2d Dower §122, as to tenancy in dower as subject to execution.

<sup>75</sup> Ohio R. C. §2329.73.

<sup>76</sup> *Ibid.*

<sup>77</sup> Texas.

may sometimes exempt large tracts of farm land. Wisconsin,<sup>78</sup> for example, exempts 40 acres of farm land, buildings and appurtenances thereto, as opposed to  $\frac{1}{4}$  acre of land held by non-farming residents.

The levy and sale of exempt property may be set aside,<sup>79</sup> as in the case of an order of court directing the sale of property properly assigned to a widow and children.<sup>80</sup>

Usually homestead exemption laws apply to property which is the place of residence of the debtor claiming the right. Here intent governs, even though the length of time during which the residence has been established is short.<sup>81</sup>

In Ohio, a non-resident can claim the exemption allowed to all persons who have families,<sup>82</sup> although he is barred from homestead exemption.<sup>83</sup>

The homestead exemption right is a personal privilege and can be lost by neglect to claim the right.<sup>84</sup>

Money consideration<sup>85</sup> in lieu of homestead exemption is given by most states where the debtor owns no property in which he can claim homestead rights. Usually this consideration applies to tangible personal property, and statutes specify various amounts which are exempt.<sup>86</sup>

A tenant in common may be allowed a homestead exemption out of his undivided interest in real estate owned by him and others in cotenancy.<sup>87</sup> Thus a homestead exemption may be claimed by either husband or wife in lands held by them as tenants in common.<sup>88</sup>

<sup>78</sup> Wisconsin Stat. §27220 (1947).

<sup>79</sup> *Cinn. v. Frost, S. & Co.*, 8 Ohio Dec. Rep. 107 (1880); *Allen v. Russel*, 59 Ohio St. 137, 52 N. E. 121 (1898).

<sup>80</sup> *Wehrle v. Wehrle*, 39 Ohio St. 365 (1883).

<sup>81</sup> *Ryan v. Miller*, 40 Ohio St. 232 (1883); *Colwell v. Corper*, 15 Ohio St. 279 (1864); *Cox v. Allen*, 91 Ia. 462, 59 N. W. 335 (1894).

<sup>82</sup> Ohio R. C. Sec. 2329.66; *Sproul v. McCoy*, 26 Ohio St. 577 (1875); *Jacoby Bros. v. Dotson*, 7 Ohio Nisi Prius 276, 7 Ohio Dec. 412 (1898).

<sup>83</sup> *Ryan v. Miller*, *supra* note 81.

<sup>84</sup> *McComb v. Thompson*, 42 Ohio St. 139 (1884).

<sup>85</sup> Ohio R. C. §2329.75.

<sup>86</sup> Ohio R. C. §2329.76—Amount specified: \$500.

<sup>87</sup> *Keys v. Young*, 2 Ohio Nisi Prius 39, 4 Ohio Dec. 113 (1895).

<sup>88</sup> *Prosek v. Kuchta*, 9 Ohio Dec. Rep. 129, 11 Bull. 65 (1883).

### Debtor's Right to Redeem

Redemption is the right of a judgment debtor, after levy and sale but before confirmation, to a compulsory resale. The right of redemption, though equitable in nature, is a "statutory right, insofar as debtor-creditor execution sale rights are concerned."<sup>89</sup>

Statutes<sup>90</sup> usually provide for a specified length of time within which the judgment debtor may exercise this right. These statutes, being in derogation of common law, must be strictly construed.<sup>91</sup>

### Conclusion

It would seem, from the various statutes of the several states and the case decisions which interpret them, that the judgment creditor is looked upon with great favor in all jurisdictions as regards execution against a tenant who holds property in common. The chief reservation, as to this conclusion, is found in the few statutory rights reserved to the judgment debtor, intended primarily to prevent the debtor from becoming a public charge.

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<sup>89</sup> Oleck, Debtor-Creditor Law 64 (with 1959 supp. by Samore). See also cases cited on p. 64 n. 100.

<sup>90</sup> Ohio R. C. §2329.33.

<sup>91</sup> Central National Bank of Cleveland v. Ely, 37 Ohio L. Abs. 18, 44 N. E. 2d 822 (1942).