Benjamin N. Cardozo School of Law
Jacob Burns Institute for Advanced Legal Studies
2007
Working Paper No. 199

Solemn and Ancient Farce: New York Judicial Liens on Personal Property

David Gray Carlson
Professor of Law
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, NY 10003
United States
(212) 790-0210 (Phone)
(212) 790-0205 (Fax)
dcarlson@yu.edu

Solemn and Ancient Farce: New York Judicial Liens on Personal Property

by David Gray Carlson
Professor of Law
Benjamin N. Cardozo School of Law

Introduction

The judicial lien, in New York and elsewhere, is the very *telos* of *in personam* liability in private law. *In personam* liability stands for the noble proposition that debtors ought to pay. When they don't, the law stands to ready, in its fashion, to award a creditor with a judicial lien. Its creation is the transubstantive miracle by which the *in personam* right becomes a right in the debtor's property.

As important as the judicial lien is,[1] the law surrounding it is in bad repair. The reason for this is obvious. Federal bankruptcy law has proved a fearsome competitor to the enforcement of money judgments outside of bankruptcy. When Wall Street can't pay, it files for chapter 11 protection, usually as a prelude to complete liquidation under chapter 7. It doesn't wait for the sheriff to levy a bank account. Ironically, the bankruptcy trustee *is* a judicial lien creditor on the day of the bankruptcy petition.[2] This has been called the very organizing principle of federal bankruptcy law.[3] Yet the law of the judicial lien is ignored and under-developed all the same.

As attractive a competitor as federal bankruptcy law is, it still basically requires the *debtor* to commence the proceeding. Involuntary bankruptcies exist, but they are rare[4] and dangerous for creditors.[5] So if a creditor faces a vicious, contumacious debtor who simply declines to pay (common enough in divorce cases), recourse must often be had to the ugly mechanisms by which courts liquidate assets of the debtor in order to "make" the judgment.[6] Hence the necessity of this study of the New York judicial lien, the first ever since New York's enacted the Civil Practice Law and Rules (CPLR), that Herculean effort that was to have scrubbed clean the Augean stables of local civil procedure.

In contemplating this mechanism as it exists in New York, one cannot but react with horror and disgust, not to mention bafflement that New York dares to flatter itself the premier venue of commercial litigation.[7] Just prior to the enactment of the CPLR, two authors wrote:

> It is doubtful whether any area of the law is as complex, confused, uncertain and devoid of rational justification as that which relates to the priorities and liens on personal property that are acquired by procedures to enforce money judgments.[8]

Yet, based on my study of 45 years of jurisprudence, it is my sad duty to report that the introduction of new Articles 52 and 62 in 1963[9] has done little, perhaps nothing, to simplify or rationalize the law in this area. Mostly, the CPLR simply repeats the absurdities of prior law. When it innovates, it compounds the absurdity.

---

[1] *See* Lynn LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 4 (1996) ("Unless that [money] judgment can be enforced, liability is merely symbolic").

[2] 11 U.S.C. § 544(a).

[3] David Gray Carlson, *Bankruptcy's Organizing Principle*, 26 FLA. STATE UNIV. L. REV. 549 (1999).

[4] *See generally* Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 BROOKLYN L. REV. 803 (1991).

[5] If the petition is rejected, the wronged debtor gets attorneys' fees, compensatory damages and punitive damages. 11 U.S.C. § 303(i). Isabella C. Lacayo, *After the Dismissal of an Involuntary Bankruptcy Petition: Attorney's Fees Awards to Alleged Debtors*, 27 CARDOZO L. REV. 1949 (2006).

[6] Lawyers used to speak of "'mak[ing]' the judgment out of the debtor's personal property . . . ." Isadore H. Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 COLUM. L. REV. 1007, 1010 (1935) [hereinafter cited as Cohen, *Supplementary Proceedings*].The phrase relates to the ancient name for the writ of execution--*fieri facis* or *fi. fa.*, so named because the writ's opening words were "quod fieri facias de bonis et catallis" (that you cause to be made of the goods and chattels). American Fin. Corp. v. Webster, 1982 Del. C.P. LEXIS 3 (Ct. Common Please 1982).

[7] Ehrlich-Bober & Co., Inc. v. University of Houston, 49 N.Y.2d 574, 581, 404 N.E.2d 726, 730, 427 N.Y.S.2d 604, 608 (1980) (referring to New York's "undisputed status as the preeminent commercial and financial nerve center of the Nation and the world").

[8] Daniel H. Distler & Milton J. Schubin, *Enforcement Priorities and Liens: The New York Judgment Creditor's Rights in Personal Property*, 60 COLUM. L. REV. 458, 458 (1960); *see also* Jack B. Weinstein, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50, 89 (1960) ("Most law offices have thousand of dollars in unpaid judgments in their files . . . this is the worst offender in failing to keep up with the facts of modern life") (remarks of Daniel H. Distler).

[9] L. 1962 ch. 308, effective September 1, 1963.

This Article, an installment of an unpleasant but necessary in-depth study of New York judicial liens, focuses on the encumbrance of personal property with judicial liens arising from Articles 52 and 62 of the CPLR.[10] The focus is on the judicial lien as a property interest. Procedural niceties unconnected to judicial liens are largely neglected, in the interest of space and personal inclination.[11] My analysis divides judicial liens into two types. Part I discusses the execution lien and the closely analogous pre-judgment attachment lien.[12] The execution lien is the "legal" remedy for the disease of money judgment. In Part II, I discuss "equity" liens–liens associated with injunctive turnover orders and the appointment of receivers. In Part III, I discuss personal property that is so highly esteemed as to be exempt from encumbrance by the judicial lien. Here we shall read of oxen, church pews and watches worth less than $35. The legislation on exemptions serves a dual purpose. First, it immunizes certain property against judicial liens. Second, thanks to federal law, it authorizes bankrupt debtors to remove exempt property from the bankruptcy estate. At all points of the analysis, the interaction of federal bankruptcy law and state law will be thoroughly examined.

I. The Execution Lien

A. Creation

The execution lien, that "solemn and ancient farce,"[13] is conjured into existence by CPLR § 5202(a):

> Where a judgment creditor has delivered an execution to a sheriff, the judgment creditor's rights in a debt owed to the judgment debtor or in an interest of the judgment debtor in personal property. . . are superior to the extent of the amount of the execution to the rights of any trustee of the debt or property. . . [14]

This peculiar sentence struggles to say that the lien is created the moment that a judgment creditor serves an execution on the sheriff.[15] Notice that the above sentence omits to use the word lien. It merely says that the rights of a creditor (whatever they may be) are good against subsequent transferees. From this we can infer that the creditor has a property interest–a *lien*!–in the debtor's personal property once the execution is delivered.[16]

And what is a lien? The CPLR never says. Apparently you're already supposed to know that in advance. Yet few lawyers, I suspect, can hazard a satisfactory definition.

In general, a lien is a property interest connected with a debt, so there is typically a debtor and a creditor. The property interest in question is a *power*–in Hohfeldian terms, the ability to change the

---

[10] *See also* David Gray Carlson, *Judicial Liens on New York Real Property* (2007) (forthcoming).

[11] Although I allude to many procedural aspects of the judicial lien, I do not deeply analyze the constitutionality of New York's legal regime. Various due process challenges have been mounted against this regime. When they succeed, the New York legislature dutifully amends the CPLR. My study assumes, perhaps wrongly, that the current regime is as constitutional as it is regrettable.

[12] Pre-judgment Attachment liens merge into execution liens, once the judgment is entered. Tenzer, Greenblatt, Fullon & Kaplan v. Abbruzzese, 57 Misc. 2d 783, 293 N.Y.S.2d 634 (S. Ct. Queens Co. 1968).

[13] Cohen, *Supplementary Proceedings*, *supra* note 6, at 1007.

[14] Although only a sheriff (an officer of the Supreme Court) is mentioned, delivery to marshals working for lesser or federal courts has like effect. First Westchester Nat'l Bank v. Lewis, 42 Misc. 2d 1007, 249 N.Y.S.2d 537 (S. Ct. Westchester Co. 1964); *see, e.g.*, N.Y. City Civ. Ct. Act § 701(b) ("The provisions of law applicable in supreme court practice, relating to the execution of mandates by a sheriff and the power and control of the court over the sheriff executing the same, shall apply to in this court; and they shall apply equally to both sheriffs and marshals"). The marshal, however, may not enforce a supreme court judgment; only the sheriff can. Yeh v. Seakan, 121 Misc. 2d 861, 464 N.Y.S.2d 627 (S. Ct. Oneida Co. 1983).

[15] Don King Prods., Inc. v. Thomas, 945 F.2d 529, 533 (2d Cir. 1991) ("Under New York law, a judgment creditor becomes a 'judgment lien creditor' as to personal property only after execution is delivered to the sheriff").

[16] The inability to utter the word lien in § 5202(a) may stem from two scholars, one of whom was an associate reporter for the committee that drafted Article 52. These two writers unjustifiably thought the word "lien" vague, and so § 5202(a) almost incomprehensibly dances around using the word. Distler & Schubin, *supra* note 8, at 459-65. Saying that the word "lien" is vague is like saying the phrase "security interest" is vague and then recommending that UCC Article 9 must never use it. Incidentally, the CPLR at least twice utters the profane word "lien." CPLR § 5203(b), 5236(a)

legal present, which the empowered person may or may not wish to exercise.[17]

The lien creditor's power is to *sell* the debtor's property. Classically, the lien creditor can sell what the debtor had at the time the lien was created. This formulation suggests that the power cannot be defeated by the debtor's subsequent transfers. This is a proposition the CPLR imperfectly articulates. According to CPLR § 5233(a)

> [t]he interest of the judgment debtor in personal property obtained by a sheriff pursuant to execution or order, other than legal tender of the United States, shall be sold by the sheriff at public auction . . .

This principle is incoherent as stated. What *is* the interest of the judgment debtor that the sheriff obtains? As of what time must this interest be judged? The answer is, at the time of the execution. This would mean that, by the time of the sale, a debtor might have *no* interest in property, yet the sheriff still has a power of sale, as the following scenario shows:

First Scenario

> *Monday*: The sheriff levies a thing from a judgment debtor (whom I will call *JD*) pursuant to a writ of execution obtained by judgment creditor (*JC*), so that *JC* has a lien.
> *Tuesday*: *JD*, who owns the equity interest in the levied thing, conveys all right, title and interest to *X*, so that *JD* has absolutely no connection to the thing.
> *Wednesday*: In a procedurally valid sale, the sheriff sells *X*'s thing to *Y*.

In the First Scenario, the sheriff had power to sell free of *X*, even though, on Wednesday, *JD* had *no interest at all*. *Y* obtains whatever interest *JD* had in the thing *on Monday*. Hence, the classic formulation is that a lien is the power of a creditor to sell whatever the debtor had at the moment the creditor's lien was created.

If the personal property is a debt that can be extinguished by payment, the creation of a judicial lien is the involuntary assignment of the debt, so that *JC* not only has a power of sale but also has a power to collect money from the debtor of the debtor (whom, in imitation of Article 9 of the Uniform Commercial Code, I shall call the account debtor, or *AD*).[18] In such cases, no sale is needed to liquidate the property into cash, the language in which debt is expressed. Once *JC* serves the execution on the sheriff and creates the lien, *AD*, who owes a debt to *JD* must pay the sheriff instead of *JD*.[19]

In making delivery of the execution the moment of lien creation, New York follows the noble reform of 1676 when the spirit of Cromwell temporarily stirred Parliament from its torpor to pass the famous Statute of Frauds.[20] Best known for making contracts unenforceable unless in writing and for requiring a signed and delivered deed as the mode of transferring real property, the Statute of Frauds also changed the moment when the writ of *fieri facias*–which today we call a writ of execution, or simply an execution–created a lien.

Prior to the Statute of Frauds, English law indulged in the extraordinary fiction that everything the courts did was accomplished on the first day of the term (the date of *teste*), including execution on property.[21] Hence, Shakespeare's comment about "lawyers in the vacation, for they sleep between term

---

[17] WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING 7, 55-60 (Walter Wheeler Cook ed. 1923).

[18] UCC § 9-102(1)(3) ("'Account debtor' means a person obligated on an account, chattel paper, or general intangible").

[19] CPLR § 5232(a) (fourth sentence). There is a superficial resemblance between *JC* claiming derivatively through *JD* and *JC* claiming that *AD* has made *JC* the third-party beneficiary of a contract. Where *JC* has a judgment and sues *JD* under a third-party beneficiary theory, the court may convert the breach-of-contract action to a proceeding supplementary to judgment pursuant to § 5225(b) or 5227. Port Chester Elec. Constr. Corp. v. Atlas, 40 N.Y.2d 652, 389 N.E.2d 327, 357 N.Y.S.2d 983 (1976).

[20] 29 Car. 2, c. 3, § 16 (1676); *see* Baker v. Hull, 250 N.Y. 484, 487, 166 N.E. 175, 176 (1929) (tracing New York rule to the Statute of Frauds).

[21] Erwin's Lessee v. Dundas, 45 U.S. 58, 75 (1846); Roth v. Wells, 29 N.Y. 471, 488 (1864).

and term, and then they perceive not how Time moves."[22] Imagine that the first day of term was January 10, 1600. On January 11, 1600, *JD* sells a cow to *X* for a few pence. *JC* files a complaint against *JD* in February and obtains a judgment in April. The court issues a writ of *fieri facias* to the sheriff on April 15. The sheriff was fully able to levy on *X*'s cow because the judgment bound *JD*'s property as of the first day of the term, the day before *X* bought the cow.[23] Obviously this played some havoc with *JD*'s general ability to sell cows.

In order to improve *JD*'s position, the Statute of Frauds deferred *JC*'s judicial lien until the moment the writ of execution was delivered to the sheriff. This solution, however, is subject to the criticism that delivery of the execution is largely an invisible event. If *X* wishes to buy *JD*'s cow, *X* can never be sure that the sheriff has not received a writ of execution which would encumber the cow with a lien. Because this is so, many jurisdictions in the United States have wisely deferred the moment of lien creation even further–to the time the sheriff actually levies (or takes custody of) the personal property of *JD*.[24]

New York takes a different and less satisfactory approach to the problem. Instead of abandoning the Statute of Frauds solution altogether, as it should have done, it sentimentally retains delivery as the moment of lien creation–New York's continuing tribute to the seventeenth century. To counteract the invisibility of this lien, New York creates two exceptions whereby transfers subsequent to the lien are free and clear of it. We consider each of these mystifying and unsatisfactory exceptions in turn.

1. Pre-Levy Transfers

According to CPLR § 5202(a)(1), the execution lien, created upon delivery of the execution to the sheriff, is no good against "a transferee who acquired the debt or property for fair consideration before it was levied upon." This is very broad protection indeed. CPLR § 5202(a)(2), governing the post-levy era, mentions absence of knowledge, but knowledge is not mentioned in § 5202(a)(1). Therefore, it must be concluded that a judgment debtor has power to give title free and clear of an execution lien to a bad faith transferee for a fair consideration. In exalting the bad faith transferee over diligent creditors who serve executions on sheriffs, New York unashamedly apes the bad example of Article 9 of the UCC, where bad faith secured parties can take priority over earlier unperfected security interests, even though they know they are harming the rights of a prior unperfected secured party.[25]

Section 5202(a)(1) requires that a transfer be "for fair consideration." At least one court has interpreted this language to exclude security interests under guaranty contracts, where *JD* is not the principal obligor.[26] The reasoning is that *JD* never received the loan proceeds; some third party did. This makes the guaranty obligation in the nature of a donative transfer–one for no fair consideration. This position, however, entirely overlooks the fact that, under the law of suretyship, *JD* always obtains subrogation rights against the principal obligor, in exchange for the suretyship promise.[27] Therefore, courts err if they think sureties receive nothing from the parties they assure. Properly, secured parties (whom I will call *SPs*) under suretyship contracts are properly transferees for fair consideration.

A lien even weaker than the execution lien is created in the pre-petition context when a plaintiff serves an order of attachment on a sheriff. According to CPLR § 6203, a lien is created when the order

---

[22] WILLIAM SHAKESPEARE, AS YOU LIKE IT Act 3 Sc. ii.

[23] Bond v. Willet, 29 How. Pr. 47, 50 (1864).

[24] *E.g.*, Mich Comp. Laws Ann. § 600.6012.

[25] UCC § 9-322(a). In the case of a fraudulent conveyance, New York law gives to a good faith transferee who gave *less* than a fair consideration a lien for the consideration actually given. N.Y. Debtor & Creditor Law § 278(2). But no such lien is provided as a partial defense to the judicial lien under CPLR § 5202(a)(1). 11 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE ¶¶ 5202.13 (2d ed.).

[26] Yellin, Kenner & Levy v. Simon, 1979 U.S. Dist. LEXIS 11373, at *22 (S.D.N.Y. 1979).

[27] Contrary to popular belief, upstream guaranties are usual for fair consideration because of subrogation. Kenneth J. Carl, *Fraudulent Transfer Attacks on Guaranties in Bankruptcy*, 60 AM. BANKR. L.J. 109, 113 (1986).

of attachment is delivered to the sheriff, but *D*[28] retains power to give better title to "a transferee who acquired the debt or property before it was levied upon for fair consideration *or* without knowledge of the order of attachment."[29] The disjunctive suggests that bad faith transferees for value are protected against the attachment lien (as is true with the execution lien),[30] but in addition good faith donees are protected. The only party defeated by the pre-levy attachment lien is the bad faith donee and *some* subsequent judgment creditors.[31] New York's feeble pre-levy attachment lien justifiably has been called "America's weakest lien."[32] Countermanding this weakness, at the same time the New York legislature enacted CPLR § 6203, it also spoiled the uniformity of the Uniform Fraudulent Conveyance Act[33] by adding Debtor & Creditor Law § 273-a:[34]

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

So even if the good faith donee takes free of the attachment lien, the same donee has received a fraudulent conveyance, since the order of attachment implies that the debtor-transferor is probably already a defendant within the meaning of the above-quoted provision.

It has tempted some to justify § 5202(a)(1) because the assignee (*X*) who receives a transfer free of the execution lien replaces the value lost to *JC* by paying *JD* the considera-tion.[35] But this is not so. Antecedent debt is included in the concept of fair consider-ation.[36] From *JD*'s standpoint, the property conveyed to *X* is a dead loss if *X* is paid on antecedent debt.[37] Justification for lien weakness will have to be found elsewhere. Further-more, *JC* at least had something–a lien. Once the lien disappears, *JC* has nothing–only the hope of getting a new judicial lien. Perhaps several justifications are needed. If *X* pays a fresh consideration, *X* deserves protection because the transaction is revenue-neutral for *JC*.[38] Where *X* takes a transfer in payment of or as security for antecedent debt in good faith, *X* prevails because *X* did no intentional wrong and, as a creditor, is the moral equal of *JC*. Where *X* is in bad faith for a fair consideration, perhaps we must simply admit that we don't want to encourage a law suit from *JC* regarding what *X* did or did not know. Per-haps the legislature doesn't really believe that *JC* has much of a property interest just because her lawyer has filled in a form and delivered it to the sheriff. The lien created by so scant an investment in diligence produces an invisible lien, threatening

---

[28] In attachment cases, I will refer to the defendant as *D*, since the plaintiff (*P*) does not and may never have a money judgment.

[29] Emphasis added.

[30] In Adan v. Abbott, 114 Misc. 2d 735, 452 N.Y.S.2d 476 (S. Ct. N.Y. Co. 1982), *D*'s lawyer on a murder rap claimed to take free of an attachment lien on book royalties, but the court held that *D* was no transferee. Presumably, the mouthpiece could have obtained a security interest for past and future services, and as bad faith transferee, beat the attachment lien after all. But, as we are about to learn, new Article 9 prevents subsequent *SPs* from taking free of judicial liens under the CPLR. *See infra* text accompanying notes 41-62.

[31] Actually, judgment creditors would seem to be eligible for protection under § 6203(1), but this wipes out the basic priority system of § 5234(b). So, by implication, subsequent judicial lien creditors can never claim protection under § 5202(a)(2) or § 6203(1). *See supra* text accompanying notes 83-85.

[32] David Gray Carlson & Paul M. Shupack, *Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code: Part I*, 5 CARDOZO L. REV. 287, 297 (1984).

[33] The *new* Uniform Fraudulent Transfer Act, however, adopts § 273-a as a good idea. UFTA § 4.

[34] L. 1962, ch. 310, § 103; See Advisory Comm. on Practice & Procedure, Third Preliminary Report, N.Y. Legis. Doc. 1959, No. 17, at 288.

[35] WEINSTEIN ET AL., *supra* note 25, at ¶¶ 5202.02, 5202.06. 5202.11, 5202.13.

[36] N.Y. Debtor & Creditor Law § 272. The CPLR intentionally adopts the language of the Uniform Fraudulent Conveyance Act, which is the basis of New York's law. *See infra* text accompanying notes 101-02.

[37] *See* WEINSTEIN ET AL., *supra* note 25, ¶ 5202.11 ("Because fair consideration may include discharge of an antecedent debt, however, there are clearly instances where the CPLR provisions are less advantageous to the judgment creditor than were the provisions of former law").

[38] At least this would be so if *JD* receives the cash proceeds in trust for *JC*. Although this would make sense–*JC* has contributed property to *JD's* transferee–there is not yet any judicial precedent for a proceeds theory. But it would be easy for *JC* to make this claim. *JC* could simply ratify *JD*'s action and make *JD* the agent of *JC* for the purpose of the sale.

commerce. Yet in this last instance, a bad faith *X* faces the risk that the transfer to *X* was for the purpose of hindering or delaying creditors, making it a deliberate fraud on creditors like *JC*.[39] If so, *X* may have to bear *JC*'s legal fees under a non-uniform New York enactment.[40]

a. Subsequent Security Interests

Section 5202(a)(1) generates some merry confusion when read in conjunction with Article 9 of the Uniform Commercial Code. According to UCC § 9-317(b), a secured party is subordinate to a person who becomes a lien creditor while the security interest is unperfected. Yet according to § 5202(a)(1), a creditor whose unperfected security interest attaches after delivery of the execution but before the levy takes free of the execution lien. Whereas the CPLR points to the superior second-in-time rights of an unperfected *SP*, the UCC exalts the second-in-time rights of a person who becomes a lien creditor while a security interest is unperfected. The two provisions are in contradiction.[41]

To further complicate matters, the UCC defines "person who becomes a lien creditor" as a person whose lien arises from "attachment, levy or the like." In New York an execution lien arises from delivery of the execution to the sheriff, so presumably a judgment creditor who has delivered an execution to the sheriff falls under the awkward "and the like" catch-all phrase of the UCC.[42] Accordingly, the following anomalous priority is created:

Second Scenario

> *Monday: JC* serves a writ of execution on the sheriff, thereby creating a judicial lien.
> *Tuesday:* Pursuant to a security agreement, *SP* advances funds to *JD*, thereby creating a security interest in some thing. *SP* does not perfect.

In the Second Scenario, CPLR § 5202(a)(1) awards priority to *SP*, because *SP* is a transferee for a fair consideration on Tuesday. The UCC, however, can be read as awarding priority to *JC* because *JC* is "a person that becomes a lien creditor before . . . the security interest . . . is perfected."[43] If so, each statute gives a different answer.

In *Yellin, Kenner & Levy v. Simon*,[44] Judge Thomas Griesa ruled that, in the Second Scenario,

---

[39] N.Y. Debtor & Creditor Law § 276.

[40] *Id*. § 276-a.

[41] Peter F. Coogan, *Intangibles as Collateral Under the Uniform Commercial Code*, 77 HARV. L. REV. 997, 999 (1964) ("Surprisingly, neither the [UCC] nor the CPLR . . . seems to recognize the existence of the other").

[42] It has always struck me as lazy for the drafters of the UCC, and the New York legislature who enacted it, to define what it means to become a lien creditor in New York in terms as uninstructive as "and the like." Would it be so hard to look up what this means according to the CPLR?

[43] UCC § 9-317(b)(2). In Mantovani v. Fast Fuel Corp., 494 F. Supp. 72 (S.D.N.Y. 1980), a creditor claimed the exception in CPLR § 5202(a)(1) by virtue of an unperfected security interest. The claim was denied on the following ground:

> A reading of the purported "assignment of interest" is nothing more than an agreement under which [*JD*'s] interest in the proceeds of contract were to serve as collateral for [*JD*'s] debt to [*JC*]. To be sure, the "assignment of interest" possessed all the earmarks of a collateral agreement and none of the earmarks of a genuine transfer. . . It is evident that such a collateral agreement, although denominated as an assignment of interest, falls far short of the type of "perfected transaction" which marks a valid assignment.

Id. at 76 (citation omitted). If this passage states that the creation a of security interests is not a transfer of *JD*'s property, then it is of course quite benighted. If it says that *unperfected* security interests cannot qualify for the 5202(a)(1) exception, then it stands for the override by the UCC of § 5202(a)(1). *Mantovani* case is a masterpiece of confusion. In it, the IRS and *JC* competed for a general intangible owed by *AD*. The IRS had filed notice of its lien first and clearly had priority. *JC* argued that it had served an execution second in time, but that *JC* qualified for the protection of CPLR § 5202(a)(1). In other words, *JC* implied that the IRS was bound by the exception of § 5202(a)(1). The above-quoted mystifying passage responds to this "point" and can be dismissed, along with the argument, as absurd.

[44] 1979 U.S. Dist. LEXIS 11373 (S.D.N.Y. 1979).

SP loses.[45] According to the seldom cited UCC § 10-103, where the UCC conflicts with some non-uniform legislation, the UCC must triumph. Accordingly, Judge Griesa ignored the exception to § 5202(a) and decided the priority contest with reference to Article 9 only, according to which *SP* was the loser.

Judge Griesa's interpretation is correct as of 200, but was erroneous at the time it was decided. In *Yellin*, *JC* delivered an execution to the sheriff before *SP*'s security interest attached or was perfected. In Judge Griesa's view, *JC* was the winner under the terms of old UCC § 9-301–now unhappily renumbered as § 9-317(a)(2)[46]–because *JC* became a lien creditor before *SP* perfected. On this view, the UCC overrules § 5202(a)(1) and (2) in all cases; no secured party could *ever* take advantage of § 5202(a)(1), provided *JC* delivers an execution to the sheriff before *SP* files a financing statement or otherwise perfects.

In contrast, *SP* had argued that old § 9-301(b) applied only where *JC* became a lien creditor during an *unperfected gap* in *SP*'s security interest. On this view, entirely correct prior to 2001, old § 9-301(b) had nothing to say when a person became a lien creditor entirely before *SP*'s security interest attached. Rather, insofar as the UCC is concerned, *JC* was senior solely because *SP*'s security interest could only attach to *JD*'s rights in the collateral[47]–the equity left over in light of *JC*'s judicial lien.

To consider this correct argument more slowly, we start with the premise of UCC § 9-201–Article 9' so-called golden rule:

> *Except as otherwise provided by this Act* a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors.[48]

Old UCC § 9-301(b) was one of the exceptions to which the italicized language referred. It provided:

> Except as otherwise provided in subsection (2),[49] an *unperfected* security interest is subordinate to the rights of
>
> . . .
>
> (b) a person who becomes a lien creditor before the security interest is perfected . . .[50]

Notice that old § 9-301(b) regulated *unperfected security interests only*. Where an unperfected gap existed and a *subsequent JC* came into existence, *SP* was subordinated.[51] On the other hand, where *SP* perfected and attached at the same time, Article 9 could have no effect on the priority contest whatever. Old § 9-301(b) applied only if there was an unperfected gap.

If this argument was correct, as I believe it was, then the UCC did not apply in *Yellin* (even if *SP* never perfected). Accordingly, *SP* could indeed claim to fall under § 5202(a)(1). Meanwhile, *JC*

---

[45] To be precise, *SP* was a post-levy transferee. But *SP* was without knowledge of the levy and so potentially comported with the second exception to § 5202(a). Accordingly, the *Yellin* case is also good authority for the meaning of CPLR § 5202(a)(1), pertaining to pre-levy transfers.

[46] In the Golden Age of Article 9 (prior to 2000), § 9-317 bore the noble number § 9-301. Today, we petulantly suffer sixteen unedifying choice-of-law provisions before we encounter the all-important priority contest between secured creditors and judicial lien creditors--a contest most portentous for commercial law.

[47] UCC § 9-203(b)(2). The drafter of new Article 9 call this the "nemo dat concept," UCC § 9-317 Comment 4. Though redolent of James Mason's character in *Twenty Thousand Leagues Under the Sea*, it refers to the latin sentence, *nemo dat quod non habet*: no one giveth who hath not.

[48] Old UCC § 9-201 (emphasis added).

[49] Subsection (2) provided to purchase money *SPs* a grace period for perfecting commencing when *JD* receives delivery of the collateral and running for ten days.

[50] Emphasis added.

[51] Going back further in history, prior to the UCC, an unsecured creditor who advanced "gap" credit could later obtain a senior judicial lien, even if *SP* perfected its security interest before *JC* obtained a lien. Stephens v. Perrine, 143 N.Y. 476. 39 N.E. 11 (1894). Under the notorious case of Moore v. Bay, 284 U.S. 4 (1931), a bankruptcy trustee could subrogate herself to the avoidance rights of a unsecured gap creditor and avoid a security interest that was perfected years before the bankruptcy. One of the most important goals of Article 9 was to limit avoidance rights to creditors who obtained liens during the unperfected gap. Since a bankruptcy trustee was not subrogated to the rights of lien creditors, Article 9 effectively de-fanged the dragon of *Moore v. Bay*. Carlson & Shupack, *supra* note 32, at 319-20.

could not claim protection of old § 9-301(b). Hence, there was no conflict–only the CPLR applied. Under the CPLR, *SP* should have won, even if *SP* never perfected.[52]

Yellin was a misinterpretation of old § 9-301(b). Yet new UCC § 9-317(b)(2) basically adopts *Yellin*'s premise lock, stock and barrel. According to new § 9-317(b)(2):

> A security interest or agricultural lien is subordinate to the rights of:
> . . .
> (2) except as otherwise provided in subsection (e),[53] a person that becomes a lien creditor before the earlier of the time:
> (A) the security interest or agricultural lien is perfected; or
> (B) *one of the conditions specified in Section 9-203(b)(3)*[54] *is met and a financing statement covering the collateral is filed.*[55]

Section 9-317(a)(2) operates differently from old § 9-301(b). First, § 9-317(a)(2) makes no reference to unperfected security interests, as did old § 9-301(b). Rather, new § 9-317(a)(2) applies to perfected security interests, consistent with the *Yellin* premise. As a result, it now becomes plausible to contend that new § 9-317(a)(2) governs the Second Scenario. Ironically, this puts the UCC into conflict with the CPLR, which means that *SP* loses! Although new Article 9 was designed to reduce the power of *JCs* against *SPs*, here is one unintended consequence in which *JCs* were exalted over *SPs*.

New § 9-317(a)(2) therefore governs perfected security interests as well as unperfected ones. Consider the following chronology:

Third Scenario

> *Monday: SP* files a financing statement pursuant to a security agreement, specifying some thing is *SP*'s collateral. *SP* has made no commitment to lend.
> *Tuesday*: *JC* serves a writ of execution on the sheriff.
> *Wednesday: SP* advances funds to *JD*, thereby creating a *perfected* security interest on the thing.

In the Third Scenario, *JC* had a senior lien all day Tuesday but lost priority on Wednesday. In this case, both CPLR § 5202(a)(1) *and* new § 9-317(a)(2)(B) give *SP* the victory. Under the UCC, filing without more is not perfection. Filing *plus* attachment is perfection.[56] Prior to 2000, *JC* would have prevailed.[57]

---

[52] In the First Scenario, *SP* did not perfect and yet, on my reading of the pre-2000 UCC, still should have won under the exception in CPLR § 5202(a)(1). Can this be justified? The answer is yes, because old § 9-301(b) applied only in cases where a person became a lien creditor in the gap between attachment and perfection of a security interest. *JC* became a lien creditor before attachment, and so UCC § 9-301(b) simply did not apply. This is easy to see in a case where *SP*'s security interest attaches and is perfected simultaneously, as where *SP*'s financing statement was filed prior to Monday in First Scenario. But it is equally true if *SP* never perfected at all.

To see why, imagine that *JC* has a judgment for $100 and that *JD* has a thing worth $1000. On Monday, *JC* serves an execution to the sheriff, creating a defeasible lien on the thing. Suppose on Tuesday, *JD* sells the thing outright to *SP* for a fair consideration. Clearly, *JC* no longer has a judicial lien on the thing. *SP* owns it free and clear. But now suppose that *SP* takes an unperfected security interest in the thing in exchange for a $1000 loan. Since *SP*'s interest is less than absolute, *JC*'s lien is not entirely destroyed. Rather, it encumbers *JD*'s equity in the thing. Nevertheless, *JC*'s lien is still largely destroyed. *SP*'s unperfected security interest is senior to it. The destroyed part of *JC*'s lien can never come into conflict with *SP*'s unperfected security interest for the simple reason that *JC*'s judicial lien does not encumber that part of the collateral to which the unperfected security interest attached. *JC* merely has the right to receive any surplus. UCC § 9-615(a)(3). But all other aspects of *JC*'s lien is surely just as destroyed as is the case where *JC* conveys an absolute interest to *SP*.

In *Yellin*, we do not know whether *SP*'s security interest on Tuesday was perfected at birth or whether there was an unperfected gap. Either way, *SP* should have prevailed under CPLR § 5202(a)(1) because old § 9-301(b) applied only to persons who became lien creditors *after* attachment and *before* perfection.

[53] Subsection (e) provides to purchase money *SPs* a grace period for perfecting commencing when *JD* receives delivery of the collateral and running for twenty days.

[54] This section refers to the existence of a security agreement between *JD* and *SP*.

[55] N.Y.U.C.C. § 9-317(a)(2).

[56] UCC § 9-308.

[57] According to UCC § 9-317 Official Comment 4, this subparagraph was designed to make sure that an initial discretionary advance by *SP* would have priority over a prior judicial lien.

Now *SP* still wins because *JC* has *not* become a lien creditor before "one of the conditions specified in Section 9-203(b)(3)[58] is met and a financing statement covering the collateral is filed."[59] Here the *Yellin* premise, imported into new § 9-317(a)(2), does no harm to *SP*. But it still creates a bad result for *SPs* in the Second Scenario, in spite of new § 9-317(b)(2)(B).

Compare yet another chronology:

Fourth Scenario

Monday: JD and *SP* sign a security agreement with regard to a thing owned by *JD* and *SP* gives value. *SP* does not perfect.
Tuesday: JC serves a writ of execution on the sheriff.
Wednesday: *SP* perfects.
Thursday: The sheriff levies on behalf of *JC*

This time *JC* clearly wins under UCC § 9-317(a)(2). *JC* became a lien creditor before *SP* perfected. And *SP*'s unperfected security interest is prior to *JC*'s lien. *SP* cannot claim to be a post-lien transferee of *JD* under CPLR § 5202(a)(1). On these facts, there is no conflict between the UCC and § 5202(a)(2).[60] Nevertheless, in *Ruppert v. Community National Bank*,[61] the court, on the above facts, said in erroneous dictum that *SP* was entitled to protection under CPLR § 5202(a)(1) because *SP* obtained an unperfected security interest before the levy. *Ruppert* is therefore the converse of the *Yellin* error. It overlooks the fact that § 5202(a)(1) is an *exception* to the principle stated in the preamble. So, properly, § 5202(a)(1) is irrelevant; *SP* was first in time but subordinate to *JC* under UCC § 9-317(b)(2).[62] *SP* was not a post-execution transferee and had no right to huddle under the umbrella of § 5202(a)(1).

b. Future Advances

The prior section points out that new Article 9 changes the mode of governing the priority between *SP* and *JC*. There has also been a change in the way new Article 9 governs the priority of future advances made by *SP* after *JC* has become a lien creditor.

As originally enacted in 1962, the UCC had no future advance rule. So imagine the following scenario:

Fifth Scenario

Monday: JD conveys a security interest in goods to *SP*. *SP* perfects, which implies that *JD* has rights in the collateral, a security agreement exists, and *SP* has given value to *JD*. The security agreement authorizes but does not require *SP* to make discretionary future advances.
Tuesday: JC serves a writ of execution on the sheriff.
Wednesday: The sheriff levies goods on behalf of *JC*.
Thursday: *SP* makes a discretionary future advance.

---

[58] UCC § 9-203(b)(3) refers to the security agreement.
[59] *Id.* § 9-317(b)(2)(B).
[60] Citibank, N.A. v. Prime Motor Inn Ltd. Partnership, 98 N.Y.2d 743, 780 N.E.2d 503, 750 N.Y.S.2d 818 (2002); Package Mach. Co. v. Cosden Oil & Chem. Co., 51 A.D.2d 771, 380 N.Y.S.2d 248 (2d Dept. 1976); R & L Stationery Corp. v. 708 Dogwood Ave. Corp., 56 Misc. 2d 465, 288 N.Y.S.2d 653 (S.Ct. Nassau Co. 1968).
[61] 22 A.D.2d 165, 167, 254 N.Y.S.2d 341, 343 (1st Dept. 1964), *aff'd mem.*, 16 N.Y.2d 589, 261 N.E.2d 52, 209 N.Y.S.2d 100 (1965).
[62] The *Ruppert* court further erred in holding that, when the sheriff released the collateral directly to *SP*, *SP* was a transferee by virtue of obtaining possession. In fact, *SP*'s possession was a *perfecting* act. The *transfer* occurred much earlier, when *SP*'s security interest attached to the collateral. Nevertheless, the case was correctly decided; when the sheriff released the levied collateral to *SP*, *JC*'s execution lien died, leaving *SP*'s newly perfected security interest without a competing judicial lien against it. *See infra* text accompanying notes 155-65.

Prior to the 1972 amendments, *SP* was definitely senior for Monday's advance, but no one knew the status of Thursday's advance. According to the "unitary" theory of security interests, Thursday's advance was senior. According to the "multiple" theory, Thursday's advance was junior.[63]

The question became one of high moment in 1966, when Congress amended the tax lien statute to protect UCC floating liens from invalidity against tax liens under the inchoateness doctrine.[64] According to the 1966 amendments, *SP*'s future advance would be protected only if the advance were good against a judicial lien creditor under state law.[65] But this was precisely what no one knew. So the 1972 amendments added a rule that whittled down *JC* by the amount of Thursday's advance. According to § 9-301(4) (1972):

> A person who becomes a lien creditor *while a security interest is perfected* takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.[66]

This 1972 provision protected Thursday's advance, but only because there was already a security interest on Monday. In comparison, consider this:

Sixth Scenario

> *Monday: JD* signs a security agreement, which authorizes but does not require *SP* to make discretionary future advances. *SP* files a financing statement.
> *Tuesday: JC* serves an execution on the sheriff.
> *Wednesday*: *SP* makes a discretionary future advance.
> *Thursday*: The sheriff levies goods on behalf of *JC*.

In the Sixth Scenario, § 9-301(4) (1972) did not apply to protect the Thursday advance, because old § 9-301(4) required *SP* to have a perfected security interest before Tuesday, when *JC* first became a lien creditor. But, at least in New York, *SP* could rely on the protection of CPLR § 5202(a)(1) to take free of *JC*'s lien (provided it is agreed that *Yellin*[67] was a bad *Erie* guess at New York law).

New Article 9 changes the premise of future advance priorities. First, under § 9-317(a)(2)(B), *SP* wins in the Sixth Scenario without any help from the CPLR. Since *JC* did *not* become a lien creditor before a financing statement was filed pursuant to a security agreement, *JC* loses. Second, according to new § 9-323(b):

> [A] security interest is subordinate to the rights of a person that becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless the advance is made
> (1) without knowledge of the lien; or
> (2) pursuant to a commitment entered into without knowledge of the lien.

New § 9-323(b) no longer requires *SP* to have a perfected security interest before Tuesday in order to be senior for the Thursday advance.

One fly in the ointment of new Article 9 is presented by the following scenario:

Seventh Scenario

---

[63] David Gray Carlson, *Bankruptcy's Acephalous Moment: Postpetition Transfers Under the Bankruptcy Code*, 21 EMORY BANKR. DEV. J. 113, 150-51 (2004).
[64] *See* Carlson & Shupack, *supra* note 32, at 349-50. Inchoateness is described *infra* in the text accompanying notes 76-96.
[65] 26 U.S.C. § 6323(c)(1)(B), (d)(2).
[66] Emphasis added.
[67] *See supra* text accompanying notes 44-52.

Monday: JD signs a security agreement, which authorizes but does not require *SP* to make discretionary future advances. *SP* files a financing statement. No value has been given.
Tuesday: JC serves an execution on the sheriff.
Wednesday: The sheriff levies goods on behalf of *JC*.
Fifty days later: SP advances new funds with full knowledge of the levy.

Under § 9-323(b), *SP* should be junior since *SP* advanced more than 45 days after *JC* became a lien creditor. Yet *SP* can claim to be the winner under § 9-317(a)(2)(B), since *SP* filed a financing statement before *JC* became a lien creditor. Hence, there is a conflict within the UCC about *SP*'s priority. An Official Comment insists that § 9-323(b) overrides § 9-317(a)(2),[68] but, of course, the statute nowhere makes this explicit. Nevertheless, it is often said that the particular statute overrules a conflicting general statute,[69] and courts have learned to apply the Official Comments of the UCC as if they were really part of the statute.[70] On this basis, courts will surely subordinate *SP*'s advance in the Seventh Scenario.

c. Involuntary Transfers

Significantly, § 5202(a)(1) does not use the word "purchaser," which would connote a *voluntary* buyer of personal property.[71] Rather, the broader term of "transferee" is used. This is an unfortunate change from prior law. Former Civil Procedure Act § 683 protected pre-levy good faith *purchasers*, not transferees.

The expansion of post-lien protection from purchaser to transferee implies that a federal tax lien arising after delivery and before the levy primes the execution lien. This too gives rise to the same paradoxical priority between the execution lien and the tax lien that we witnessed with regard to Article 9 security interests. According to the Internal Revenue Code, a tax lien arises "upon all property and rights to property whether real or personal"[72] of the taxpayer "at the time the [tax] assessment is made. . . "[73] Yet the lien is unperfected as to any "judgment lien creditor"[74] until the IRS perfects (by filing notice of the tax lien in the local state UCC filing office).[75] So we get the following anomaly:

Eighth Scenario

Monday: JC serves an execution on the sheriff.
Tuesday: The IRS assesses a tax against *JD*., thereby creating a tax lien on *JD*'s property.
Wednesday: The IRS files notice of its tax lien.

Here the CPLR awards priority to the tax lien. Yet the Internal Revenue Code says that "[t]he lien imposed by section 6321 shall not be valid as against any. . . judgment lien creditor" until the IRS

---

[68] UCC § 9-317 *Comment* 4 (third paragraph).
[69] Watt v. Alaska, 451 U.S. 259, 267 (1981); United States v. Chase, 135 U.S. 255, 260 (1890) ("where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment").
[70] Sean Michael Hannaway, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962 (1990); Robert Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597.
[71] *Compare* 11 U.S.C. § 101 ("The term 'purchaser' means transferee of a voluntary transfer"); N.Y. Real Prop. Law § 290(2) ("the term 'purchaser' includes every person to whom any estate or interest in real property conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate"); N.Y.U.C.C. § 1-201(32) ("'Purchase' include taking by sale . . . or any other voluntary transaction creating an interest in property").
[72] 26 U.S.C. § 6321.
[73] *Id*. § 6322.
[74] A judgment lien creditor is "a person who has obtained a valid judgment. . . for the recovery of. . . a certain sum of money. . . [and] a person who has perfected a lien under the judgment on the property involved. 26 C.F.R. 301.6323(h)-1(g).
[75] 26 U.S.C. § 6323(a), (f).

perfects. Since federal law overrides CPLR § 5202(a)(1), *JC* is senior. But suppose we reverse the chronology:

Ninth Scenario

Monday: The IRS assesses a tax against *JD*.
Tuesday: JC serves a writ of execution on the sheriff.
Wednesday: The IRS files notice of its tax lien.

Here the Internal Revenue Code points to *JC*'s priority, whereas the IRS cannot claim to be a transferee of *JD* in the gap between delivery of the execution and levy.

A strange line of cases holds that, where *JC*'s lien is "inchoate," the IRS always takes priority over it. "A choate lien is one in which the identity of the lienor, the property subject to the lien and the amount of the lien are established."[76] Execution liens in New York, at least prior to levy, are choate even though the execution lien covers all of *JD*'s personal property.[77] Perhaps *JD*'s power of sale free of *JC*'s lien points to inchoateness.[78] Nevertheless, in *American Express Travel Related Services Co. v. Kalish & Rice, Inc.*,[79], the court ruled that execution liens are choate as soon as the court officer (here a federal marshal) receives an execution.[80] The court noted that the marshal had already levied *AD* when *AD* commenced an interpleader action. So it is possible to read this case as saying that a *levied* execution lien is choate. In *Lerner v. United States*,[81] the court held that the execution lien was choate by virtue of delivery of the execution in 1981.[82] This delivery was still good enough to beat an IRS lien in 1985, even though there had never been a levy.[83]

Not only does word "transferee" include tax lien creditors. It also encompasses judicial lien creditors. Suppose JC_1 serves and execution on the sheriff and JC_2 serves an execution on the same sheriff. If we read the CPLR literally, JC_2 takes free and clear of JC_1. Yet we learn in CPLR § 5234(b) that JC_1 retains priority. Ergo, implicitly § 5202(a)(1) defines "transferee" to mean any transfer, voluntary or involuntary, *except* a judicial lien creditor. Otherwise, § 5234(b)'s priority rule is read out of existence.

New York's scheme for collecting state taxes half-incorporates executions under the CPLR. New York's lien for *income* tax is equated with an execution lien.[84] Ergo, it cannot fall under the exception of § 5202(a)(1), because of the aforementioned conflict with § 5234(b). New York's lien for *sales* tax does not equate with an execution.[85] Ergo, the sales tax lien *is* entitled to the exception of CPLR § 5202(a)(1).

For all state tax liens, upon assessing a tax, the State Tax Commission sends a warrant to the "sheriff of any county of the state, or to any officer or employee of the department, commanding him

---

[76] Don King Prods., Inc. v. Thomas, 945 F.2d 529 (2d Cir. 1991).

[77] United States v. Vermont, 377 U.S. 351, 355 (1964); *but see* New York City Transit Authority v. Paradise Guard Dogs, Inc., 565 F. Supp. 388 (E.D.N.Y. 1983) (dictum suggesting execution directed at bank account *A* could not choately encumber payment intangible *B*).

[78] United States v. Morrison, 247 F.2d 285 (5th Cir. 1957) (equitable lien inchoate in part because innocent lienors could later take priority over it).

[79] 693 F. Supp. 1436 (S.D.N.Y. 1988).

[80] Under Federal Rules of Civil Procedure 64, the federal marshal is subject to the CPLR in any matter pertaining to a writ of execution.

[81] 637 F. Supp. 679 (S.D.N.Y. 1986).

[82] In Corrigan v. United States Fire Insurance Co., 427 F. Supp. 940 (S.D.N.Y. 1977), we are not told the sequence between delivery of the execution and assessment of the tax. It appears as if the New York state tax warrant (which equates with an execution) was served before the IRS filed notice of its tax lien. So the case at least stands for the proposition that execution liens, prior to levy, are choate.

[83] One problem with *Lerner* is that execution liens supposedly die when returned at the end of sixty days. *See infra* text accompanying notes 155-65. The court fails to explain how the execution could have survived for four years *sans levée*.

[84] N.Y. Tax Law § 692(d).

[85] *Id.* § 1141(b).

to levy upon and sell such person's real and personal property . . . "[86] The sheriff must file the warrant with the clerk of the Supreme Court for the county wherein the taxpayer resides. Once docketed, the warrant becomes the equivalent of a judgment.[87] The warrant itself is the equivalent of an execution. The sheriff is authorized to levy, and the State Tax Commission has an execution lien (at least once the warrant is a judgment).[88] The warrant, however, is not limited to a sixty-day life, as executions are.[89] Rather, the sheriff may levy at any time.[90]

Yet there is a difference between the state income tax lien under § 692(d) for income tax and the sales tax lien under § 1141(b). The income tax lien statute simply states that the tax commission has whatever rights a judgment would give as to personal property. In addition, the warrant itself is the execution. This means that, when it comes to *income* tax liens, the tax warrant is the same as an execution. Not so with regard to the *sales* tax lien under § 1141(d), which creates a lien quite independently of the CPLR's governance of executions. In *Craner v. Marine Midland Bank (In re Craner)*,[91] the state filed its warrant for sales tax moments before the bankruptcy. Under § 1141(d) it was *per se* senior to a subsequent hypothetical lien creditor.[92] If the lien had been for income tax under § 692(d), the trustee's hypothetical judicial lien status would have trumped the tax commission.[93] Unless there is a genius in this legislation that I have proved unable to discern, these results raise the suspicion of unintended caprice.

The Second Circuit has *Erie*-guessed that New York City tax liens arise when its warrant is docketed; delivery of the warrant was not necessary to encumber the taxpayer's property.[94] Accordingly, the city is not vulnerable to the exception in CPLR § 5202(a)(1) or (2). The commissioner of labor also can issue warrants for unpaid unemployment insurance obligations.[95] But New York Labor Law § 573(2) states that docketing the warrant creates a lien on real property only. As to personal property, one court has ruled that the Commissioner of Labor has no lien until the sheriff levies.[96]

d. Assignments for the Benefit of Creditors

Prior to the permanent institution of federal bankruptcy in 1898, debtors could institute a voluntary collective proceeding by making an assignment for the benefit of creditors. Although initially contractual in nature, a history of private abuses led the New York legislature to govern the proceedings by statute.[97] Federal bankruptcy law has largely eclipsed the assignment for the benefit of creditors, but the procedure still exists and is even occasionally used.[98]

According to the Court of Appeals in *International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.*,[99] an assignment for the benefit of creditors is not a transfer for a fair consideration. But this overlooks the fact that the assignment is for the benefit of *creditors*.[100] Consideration for the transfer is the

---

[86] N.Y. Tax Law § 692(c).
[87] *ID.* § 692(d) & (e) (state income tax), § 1141(b) (state sales tax).
[88] Corrigan v. United States Fire Ins. Co., *supra*; United States v. J.H.W & Gitlitz Deli & Bar, Inc., 499 F. Supp. 1010, 1016 (S.D.N.Y. 1980) (lien dates from docketing the warrant).
[89] This is discussed *infra* in the text accompanying notes 155-65.
[90] Marine Midland Bank-Central v. Gleason, 47 N.Y.2d 758, 391 N.E.2d 294, 417 N.Y.S.2d 458 (1979); United States v. Fleming, 474 F. Supp. 904, 907 (S.D.N.Y. 1979).
[91] 110 B.R. 111 (Bankr. N.D.N.Y. 1988), *rev'd on other grounds*, 110 B.R. 124 (N.D.N.Y 1989).
[92] It was also not a voidable preference because it was a statutory lien. 11 U.S.C. § 547(c)(6).
[93] This is because mere delivery of an execution does not make a *JC* senior to every conceivable subsequent *JC*. Because this is so, the trustee's strong arm power prevails. *See supra* text accompanying notes 443-47.
[94] United States v. Herzog (In re Thriftway Auto Rental Corp.), 457 F.2d 409 (2d Cir. 1972).
[95] Commissioner of Labor v. Chudzik, 123 Misc. 2d 959, 474 N.Y.S.2d 920 (S.Ct. Cattaraugus Co. 1984).
[96] Reiber's Inn of Westchester, Inc., 1 B.R. 304 (Bankr. S.D.N.Y. 1979).
[97] N.Y. Debtor & Creditor Law §§ 3-24; L. 1909 ch. 17.
[98] Conrad B. Duberstein, *Out-of-Court Workouts*, 1 AM. BANKR. L. REV. 347, 358 (1993).
[99] 36 N.Y.2d 121, 125-26, 325 N.E.2d 137, 139, 365 N.Y.S.2d 808, 811 (1975).
[100] *See* Century Factors v. Everything New, Inc., 122 Misc. 2d 89, 90, 468 N.Y.S.2d 987, 989 (Civ Ct. City of New York 1983) (assignee is a trustee for creditors).

assignee's obligation to transfer proceeds of the debtor's property to the creditors. This should have been enough for the assignee to take free of the execution lien under § 5202(a)(1). Venerable case law says otherwise, however.[101] Prior to the CPLR, the difficulty was that old Civil Practice Act § 683 protected "purchasers," which was construed to mean purchaser for a *fresh* consideration.[102] The CPLR, however, protects transferees for a *fair* consideration. These words are intended to incorporate by reference the definition of the Uniform Fraudulent Conveyance Act.[103] This implies that antecedent debt is fair consideration. So assignees for the benefit of creditors should certainly be viewed as transferees for a fair consideration, since they take on behalf of creditors with antecedent debts.

The court in *International Ribbon Mills* admitted that *satisfaction* of antecedent debt is fair consideration, but it doubted whether *securing* antecedent debt is.[104] The *International Ribbon* court cites to the definition of "fair consideration" in New York Debtor & Creditor Law § 272(a),[105] which requires *satisfaction* of debt, but it overlooks § 272(b), which does indeed refers to the securing of antecedent debt.[106] The better view is that assignees for the benefit of creditors take a debtor's property for a fair consideration as *purchasers for value*. So viewed, they take free of execution liens before the sheriff levies.

Complicating this view is that Article 9 of the UCC defines a lien creditor as, among other things, an assignment for the benefit of creditors.[107] This implies that general assignees take free of unperfected security interests.[108] If they take free of these, why shouldn't they also take free of unlevied execution liens? Yet, if assignees really are lien creditors, it is still true that they have no priority under CPLR § 5234. The conflict between § 5234 and § 5202(a)(1) led us to suggest that the class of post-delivery transferees implicitly excludes the subsequent *JC*s. Assignees for the benefit of creditors do not appear in § 5234. So they should be fully eligible for § 5202(a)(1) protection, even if the UCC generally names them to be judicial lien creditors.

2. Post-Levy transfers

Not only is *JC*'s execution lien vulnerable to pre-levy transfers but it is also vulnerable to some post-levy transfers. According to the second exception to § 5202(a), *JC*'s execution lien is no good against

---

[101] In re Betty Barton Frozen Food Corp., 35 Misc. 2d 1057, 231 N.Y.S.2d 969 (S. Ct. Kings Co. 1962), *mod. on other grounds*, 20 A.D.2d 708, 247 N.Y.S.2d 247 (2d Dept. 1964). At one moment in *International Ribbon Mills*, Judge Breitel seemed to indicate that the assignee had merely waived the claim of fair consideration by not raising it: "The assignee, however, neither alleged nor contended, as indeed would be most unlikely, that the assignment was in satisfaction of any of the assignor's debts." 36 N.Y.2d at 124, 325 N.E.2d at 138, 365 N.Y.S.2d at 810. So perhaps the status of the assignee is still open. In Alcor, Inc. v. Balanoff, 45 A.D.2d 795, 357 N.Y.S.2d 160 (3d Dept. 1974), the court seemed prepared to find that an assignee for the benefit of creditors is superior to an execution lien if the sheriff has not levied. It found, however, that a levy of property not capable of delivery had occurred before the assignment for the benefit of creditors had been effectuated.

[102] Distler & Shubin, *supra* note 8, at 477 n.94.

[103] Debtor & Creditor Law § 272. 5 N.Y. Adv. Comm. Rep. A-187 (Advance Draft 1961).

[104] 36 N.Y.2d 121, 125-26, 325 N.E.2d 137, 139, 365 N.Y.S.2d 808, 811 (1975)

[105] According to this provision:

> Fair consideration is given for property, or obligation.
>
> a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied . . .

[106] According to this provision:

> Fair consideration is given for property, or obligation.
>
> . . .
>
> b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

[107] UCC § 9-102(a)(52)(B).

[108] *Id*. § 9-317(b)(2).

> a transferee who acquired a debt or personal property not capable of delivery for fair consideration after it was levied upon without knowledge of the levy.[109]

This exception introduces us to a new term: property "capable of delivery." The phrase, undefined in the CPLR, captures the idea of *tangible* property–property that can be picked up and carried off.[110] Thus, where *JD* has property capable of delivery, the sheriff must levy on it "by taking the property into custody. . . "[111] In contrast, property *not* capable of delivery is intangible in nature. There is nothing physical for the sheriff to hold onto, no handle by which the object can be reduced to manucaption. In such cases, the sheriff levies "by serving a copy of the execution upon the garnishee. . . "[112]

Where property is capable of delivery, the sheriff levies it by taking custody. In such cases, *JD* has no power to convey free and clear of *JC*. The premise is that *JD*'s lack of possession is a warning to the world that *JD*'s title to the goods is defective. On this very principle, creditor possession under UCC Article 9 is notice to the world that the secured party has a security interest in the item that the debtor does not possess.[113]

The sheriff who has levied property not capable of delivery has accomplished this by delivering the execution to *AD*.[114] Now *JD* has power to convey to bona fide transferees without knowledge. The levy of such property is not exactly invisible. Buyers could consult with *AD* before buying a claim against her. But entities in the business of buying general intangibles apparently will not be put to this trouble.[115] The slight convenience of buyers outweighs the property rights of a *JC* who has goaded the sheriff into a diligent levy. Accordingly, *JD* has a post-levy power to sell free and clear of the levy, if the transferee paid a "fair consideration after it was levied upon without knowledge of the levy."[116]

Ironically, new UCC reverses the result for the buyer of any payment intangible.[117] This results follows because the revision to UCC § 9-317(a) accidentally deprives any secured party of the CPLR protections.[118]

To make this point a little more slowly, Article 9 covers security interests in general intangible property,[119] and it traditionally covered those who bought outright accounts or chattel paper.[120] Buyers of general intangibles were not under the UCC and, prior to 2000, such buyers were eligible to take free

---

[109] CPLR § 5202(a)(2).

[110] Prior to the CPLR, the phrase was used by courts to negate intangibility. New York Trust Co. v. Island Oil and Transport Co., 33 F.2d 104 (2d Cir. 1929). The phrase appeared in New York Civil Practice Act § 976 and § 978, which governed turnover orders. Intra-Mar Shipping (Cuba) A.S. v. John S. Emery & Co., 11 F.R.D. 284 (S.D.N.Y. 1951); Meth v. Greenspan, 169 Misc. 378, 7 N.Y.S.2d (S. Ct. Kings Co. 1938). It also appeared in New York Civil Practice Act § 973, involving the right of a receiver to receive property from third parties. Rockwood & Co. v. Trop, 211 A.D. 421, 207 N.Y.S. 507 (2d Dept. 1925). Oddly, Article 8 of the UCC defines delivery of investment securities in a way to encompass the transfer of uncertificated securities. UCC § 8-301(b).

[111] CPLR § 5232(b). The sheriff must also serve a copy of the execution upon the dispossessed party. *Id*. Furthermore, where the execution does not state that debtor has received a restraining order, together with its constitutionally required warning that certain property may be exempt from legal process, the sheriff must mail to *JD* the warning described in § 5222(e). CPLR § 5232(c). *See* Cais v. Pichler, 123 Misc. 2d 275, 473 N.Y.S.2d 719 (Civ. Ct. N.Y. Co. 1984) (sheriff's mailing to Connecticut DMV adequate mailing to debtor). Failure of the sheriff to mail the notice within the four-day period following the levy renders the levy ineffective, even if *JD* knew of the levy. Federal Deposit Insurance Corp. v. Wirth, 1991 Dist LEXIS 13706 (S.D.N.Y. 1991); Kitson & Kitson v. City of Yonkers, 40 A.D.3d 758, 835 N.Y.S.2d 670 (2d Dept. 2007).

[112] CPLR § 5232(a); *see also* CPLR § 105(i) ("A 'garnishee' is a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest"). Prior to 1952, the execution lien could not reach intangible property. In re Chelsea Pure Food Corp., 18 F.2d 112 (S.D.N.Y. 1926); Distler & Shubin, *supra* note 8, at 470.

[113] UCC § 9-313(a).

[114] CPLR § 5232(a).

[115] For example, without a financing statement on file, a security interest in a payment intangible is unperfected under the UCC even if a secured party has notified *AD*. The secured party can perfect only by filing a financing statement. UCC § 9-310(a). This is easier for competing secured parties to find.

[116] CPLR § 5202(a)(2).

[117] UCC § 9-102(a)(61) ("'Payment intangible' means a general intangible under which the account debtor's principal obligation is a monetary obligation").

[118] *See supra* text accompanying notes 44-62.

[119] *Id*. § 9-109(a)(1).

[120] Old UCC § 9-102(b).

of execution liens under CPLR § 5202(a)(2). New Article 9, however, has expanded its scope to cover sales of payment intangibles or promissory notes.[121] Accordingly, these buyers are denied protection under CPLR § 5202(a)(2). Only buyers of general intangibles that are not payment intangibles can take free of a post-levy execution lien.

The post-levy attachment lien has greater weakness than the post-levy execution. According to CPLR § 6214(a), all levies are paper levies. Under CPLR § 6203(2), once the sheriff levies, the debtor may transfer better title to a transferee for fair consideration without knowledge of the levy . . . ." In general, Article 62 avoids the Article 52 distinction between property capable or not capable of delivery. A paper levy under § 6214(a) is supposed to culminate in payment or delivery of personal property to the sheriff.[122] Accordingly, the debtor's power to give better title to a bona fide transferee for value ends when property is "in the possession of the sheriff."[123]

Although the attachment lien is even feebler than the execution lien, new UCC deprives any buyer of or lender on a payment intangible of CPLR protections. Virtually any other buyer need hardly fear the attachment lien, but, thanks to new Article 9, any voluntary transferee of a payment intangible is absolutely subordinate to an attachment lien, once a plaintiff has served the order of attachment on the sheriff.

3. Defeasibility and the Bankruptcy Estate

We have seen that New York makes most of its judicial liens defeasible. Prior to levy, both the execution and attachment liens can be defeated by transfers to bad faith transferees, if they have given fair consideration.[124] After the levy, transfers can defeat the execution lien if the property is not capable of delivery and the transferee is in good faith and for a fair consideration.[125] The attachment lien after levy is also likewise vulnerable until the garnishee pays or gives up property to the sheriff. Finally, although we have not yet examined equity liens,[126] equity liens are likewise defeasible. For example, if *JC* acquires a turnover order, *JC* has a lien on personal property under CPLR § 5202(b), but *JD* retains power to convey better title to "a transferee who acquired the debt or property for fair consideration and without notice of the such order."

Do these disabilities adversely affect the bankruptcy estate? After all the bankruptcy trustee is a hypothetical judicial lien creditor as of the time of the bankruptcy petition.[127] Suppose a bankrupt debtor conveys property to a bona fide transferee after the bankruptcy petition. Does § 5202(a)(1) or § 5202(b) imply that the transferee takes free of the bankruptcy trustee?

Let me rehearse some bankruptcy basics in light of a very simple hypothetical fact situation:

Tenth Scenario

Monday: *D*, who owns a Renoir painting, files for bankruptcy.

---

[121] UCC § 9-102(a)(2).

[122] According to CPLR § 6214(c):

> Where property or debts have been levied upon by service of an order of attachment, the sheriff shall take into his actual custody all such property capable of delivery and shall collect and receive all such debts.

Taking custody, however, is not the levy. Nevertheless, the levy dies after ninety days, except as to property or debts delivered or paid during the 90 day period (allowing for court extensions). CPLR § 6214(e).

A plaintiff may also insist that the sheriff seize property right off the bat. But the plaintiff must furnish a satisfactory indemnity. CPLR § 6215. Also, an order of attachment "granted without notice may provide that the sheriff refrain from taking any property levied upon into his actual custody, pending further order of the court." CPLR § 6211(b) (last sentence).

[123] CPLR § 6203(2).

[124] CPLR §§ 5202(a)(1), 6203(1).

[125] CPLR § 5202(a)(2).

[126] The nature of these liens is discussed *infra* in the text accompanying notes 581-621.

[127] 11 U.S.C. § 544(a).

> *Tuesday*: Without court or trustee approval, *D* conveys the Renoir painting to *X*, a good faith purchaser for value with no knowledge of the bankruptcy.

May the trustee retrieve the painting from *X*? If the trustee is deemed to be a judicial lien creditor on Monday, and if New York law applies, the answer would be no. Under CPLR § 5202(a)(1) or § 5202(b), *X* takes free and clear of the judicial lien. Is this also the bankruptcy result? If so, § 5202(a)(1) and § 5202(b) wreak havoc in any bankruptcy where personal property is located in New York.

The argument against this result is that the trustee is not *just* a judicial lien creditor subject to the disabilities of the CPLR. The trustee is also a successor to whatever rights *D* had. Accordingly, the Renoir is property of the bankruptcy estate on Monday under Bankruptcy Code § 541(a)(1). *X* is an "entity . . . in possession of property that the trustee may use sell, or lease under [Bankruptcy Code §] 363," within the meaning of § 542(a); accordingly, *X* must turn over the Renoir to the trustee.[128]

There is, however, another way of looking at the matter. According to this view, the trustee must bring an *avoidance* action against *X*, because *D* has made a post-petition transfer of estate property.[129] According to Bankruptcy Code § 549(a):

> the trustee may avoid a transfer of property of the estate–
> (1) that occurs after the commencement of the case; and
> (2) . . .
> (B) that is not authorized under this title or by the court.

Actions under § 549(a), if required, are subject to the defense of § 546(b)(1)(A), which provides:

> The rights and powers of a trustee under sections 544, 545, *and 549* of this title are subject to any generally applicable law–
> (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection . . .[130]

X could conceivably save the Renoir by invoking this defense. If a judicial lien creditor had a pre-levy execution lien on the Renoir, then § 5202(a)(1) is a generally applicable law that permits post-lien transfers to be effective against a judicial lien creditor who "acquired rights" in the Renoir before *X* perfected an interest in the Renoir. If so, then not only is the § 549(a) action defeated, but *X* is also immune from bankruptcy's automatic stay.[131]

Courts have attempted to restrict the use of § 546(b)(1) by conditioning the defense on premises not actually invoked in the statute. One court insists that § 546(b)(1) applies only if *X* has an unperfected lien prepetition which is perfected postpetition.[132] Another court required a state statute to have an overt "relation back" device on the face of the statute.[133] Still another required a prepetition unsecured claim before a § 546(b)(1) defense could be asserted.[134] These non-statutory criteria, if applied against the tradition of enforcing the statute as written, would be impediments to *X*'s defense. Yet does not the United States Supreme Court constantly admonish the lower courts not to add criteria to the statutes that Congress did not see fit to add?[135]

---

[128] *See generally* David Gray Carlson, *Bankruptcy's Acephalous Moment: Postpetition Transfers Under the Bankruptcy Code*, 21 EMORY BANKR. DEV. J. 113 (2004).

[129] Olsen v. Zerbst (In re Olsen), 36 F.3d 71 (9th Cir. 1994).

[130] Emphasis added.

[131] 11 U.S.C. § 362(b)(3).

[132] Lincoln Sav. Bank v. Suffolk Co. Treasurer (In re Parr Meadows Racing Ass'n), 880 F.2d 1540, 1546-47 (2d Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990).

[133] Makaroff v. City of Lockport, 916 F.2d 890, 892 & n.1 (3d Cir. 1990).

[134] In re AR Accessories Group, Inc., 345 F.2d 454 (7th Cir. 2003).

[135] Travelers Casualty & Surety Co. v. Pacific Gas & Elec. Co., 127 U.S. 1199, 2005 (2007) ("In rejecting Travelers' claim for contractual attorneys' fees, the Court of Appeals did not conclude that the claim was "unenforceable"under § 505(b)(1) as a matter of applicable nonbankruptcy law. Nor did it conclude that Travelers' claim was rendered unenforceable by any provision of the Bankruptcy Code . . . The court nevertheless rejected Travelers' claim based solely on a rule of that court's own creation . . . ").

The best way to view the Tenth Scenario is to recognize that the trustee does not need § 549(a) to recover the painting from *X*.[136] Rather, *D* simply has no power to convey free and clear of the bankruptcy estate. Although *D* purported to convey the Renoir to *X*, *D* is in effect a thief with void title. Rather than relying on avoidance under Bankruptcy Code § 549(a), the trustee can simply seek a turnover order against *X*, who is in possession of property of the bankruptcy estate.[137] If this follows, CPLR § 5202(a)(1) and like provisions do no damage to the administration of bankruptcy estates.

What does this say about the trustee's status as a hypothetical judicial lien creditor under state law? The above analysis assumes that it adds to, but does not detract from, the trustee's power. On the one hand, the trustee is simply the successor to *D* and therefore owns legal title to the Renoir for the benefit of creditors. On the other hand, the trustee has the additional powers of a hypothetical judicial lien creditor. For instance, if *D* had granted *SP* an unperfected security interest prior to bankruptcy, the trustee as mere successor takes subject to *SP*. But as a hypothetical judicial lien creditor, the trustee is senior to *SP*.[138]

4. Territorial and Temporal Limitations

Subject to the above-described exceptions, *JC* has a lien when she delivers an execution to the sheriff. But perhaps this principle has some inherent limitations not expressed in the statute.

The first is arguably territorial. Suppose the property in question is located in Erie County but the creditor serves an execution on the sheriff of Suffolk County. Does the creditor have a lien on the property in Erie County?

Prior to the enactment of the CPLR, the law was clear on this point. Former § 679(a) of the Civil Practice Act provided:

> goods and chattels of a judgment debtor . . . are bound by the execution, when situated within the jurisdiction of the officer to whom an execution against property is delivery, from the time of the delivery thereof to the proper officer to be executed, but not before.

The CPLR, however, makes few references to the jurisdiction of the sheriff. Nor is there any clear statutory impediment to prevent the sheriff in Nassau County to cross (many) county lines in order to levy the property in Erie County. For example, express territorial limits are imposed with regard to income executions, but this is designed to prevent national employers from being garnished for wages earned entirely outside New York.[139] Also, the CPLR sets forth a priority rule covering the circumstance in which officers for two different courts have both received executions. The priority rule holds that the first officer to levy has priority. This rule applies, however, only if the property is "levied upon within the jurisdiction of all the officers."[140] Article 62 requires that an order of attachment be

> directed to the sheriff or any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction . . .

Do these references this imply no limitations exist with regard to ordinary executions in all other circumstances? The answer is unknown.[141]

There is also a limit with regard to after-acquired property. An execution lien cannot attach to property unless the debtor has rights in the property. So if a judgment creditor serves an execution on

---

[136] Ironically, if *X*, without knowledge of the bankruptcy, gives the painting to a museum, then Bankruptcy Code § 542(c) validates the museum's property interest, requiring the trustee to bring the § 549(a) action, which can be brought notwithstanding § 542(c). Nevertheless, the museum plausibly has a § 546(b)(1) defense.

[137] 11 U.S.C. § 542(a).

[138] UCC § 9-317(a)(2).

[139] *See infra* text accompanying notes 489-94.

[140] *Id*.

[141] The leading treatise assumes that these territorial restrictions exist. WEINSTEIN ET AL., *supra* note 25, ¶¶ 5202.02, 5202.06.

the sheriff on Monday and the debtor buys a thing on Wednesday, the lien arises on Wednesday, not on Monday.[142]

As always, contingency baffles the courts. In *Corwin Consultants, Inc. v. Interpublic Group of Cos. Inc.*,[143] the IRS arguably filed notice of a tax lien[144] with regard to a non-compete contract *JD* had with a corporation. Thereafter, *JC* served an execution on the sheriff, The contract required that *JD* "earn" the payment by not competing. The court ruled that the IRS had a lien on the executory contract only when *JD* earned the money by not competing. It then held that the IRS was senior to *JC*.[145] But if it is true that the IRS had a lien only when *JD* earned an installment by non-competition, then the IRS should have been tied and hence *pro rata* with *JC*.[146] In fact (assuming the IRS properly filed), the IRS had priority because it is possible to encumber an executory contract even before payments are earned by *JD*'s performance.[147] This is a principle we revisit when we analyze whether garnishments can be voidable preferences in federal bankruptcy proceedings.[148]

B. Duration

CPLR § 5230 governs the formal aspects of the execution. The document itself must[149] rehearse the following information:

> (1) The date the judgment was entered, if entered in the supreme, county or family court.[150] If entered in some other state court or in federal court, the date on which a transcript of the judgment was filed with the county clerk.[151]
> (2) The court in which it was entered.[152]
> (3) The amount of the judgment.[153]
> (4) The names of the *JCs* and *JDs*.
> (5) A direction that only property or debts in which *JD* (not deceased) has an interest.
> (6) The last known address of *JD*.
> (7) Whether the property execution upon was subject to an earlier order of attachment in favor of *JC*.

The first item suggests that, where a judgment has been entered in New York supreme court, enforcement can begin even before the clerk dockets the judgment.[154]

---

[142] United States v. Fleming, 474 F. Supp. 904, 907 (S.D.N.Y. 1979) (city tax warrant, which is equated with an execution).

[143] 375 F. Supp. 186 (S.D.N.Y. 1974), *rev'd on other grounds*, 512 F.2d 605 (2d Cir. 1975).

[144] The case was reversed on the question of whether the IRS filed its notice in the proper location. 512 F.2d at 606.

[145] It is not clear from the case whether *JC* perpetuated the execution lien with a levy or by extending the 60-day life of the lien. A different judgment creditor who had levied was held to have no priority, so presumably *JC* did something to keep the execution lien alive for several years.

[146] United States v. Fleming, 474 F. Supp. 904, 907 (S.D.N.Y. 1979).

[147] *See* In re Owen, 1990 U.S. Dist. LEXIS 16384 (N.D.N.Y. 1990) (a pre-petition levy of an executory contract established a lien valid against a bankruptcy estate).

[148] *See infra* text accompanying notes 569-75.

[149] Failure to comply justifies the sheriff in refusing to levy under the execution. Freedom Discount Corp. v. McMahon, 38 A.D.2d 947, 331 N.Y.S.2d 489 (2d Dept. 1972) (income execution).

[150] There is a hint in Kitson & Kitson v. City of Yonkers, 40 A.D.3d 758, 835 N.Y.S.2d 670 (2d Dept. 2007), that an error in the date of judgment renders the execution and any levy thereunder void.

[151] Federal Rules of Civil Procedure 69 permits executions to be delivered to a federal marshal, but the rule also requires that New York state law govern the execution. That the execution must list the date that the federal judgment was filed with the county clerk suggests that no execution delivered to a federal marshal is valid until this transcript has been filed. No case has ever established this point, however, though it is routinely held that the federal marshal cannot levy on real estate, as the federal judgment must first be registered in state court. Carlson, *Real Property*, *supra* note 10.

[152] Where *JC* has a federal judgment docketed with the Supreme Court of New York, the execution to the state sheriff properly issues from the Supreme Court, not the federal court. Fireman's Fund Insurance Co. v. Plaza Oldsmobile, Ltd., 596 F. Supp. 657, 662-63 (E.D.N.Y. 1984), *rev'd on other grounds*, 766 F.2d 95 (2d Cir. 1985) (but upholding the execution nevertheless).

[153] The amount of interest need not be listed. This the sheriff must calculate. WEINSTEIN ET AL., *supra* note 25, ¶ 5230.11.

[154] Entry means that the clerk enters the judgment in a chronological judgment book. Docketing means listing the judgment in an alphabetical index. Docketing cannot occur until the winning side files the judgment role. Carlson, *Real Property*, *supra* note 10. Where an execution is served before proper entry, the execution becomes effective only when entry of the judgment is achieved.

An execution can be issued by an officer of the court, including a clerk "or the attorney for the judgment creditor as officer of the court."[155] Thus, as is true with restraining notices,[156] victorious plaintiff lawyers need no court involvement to ignite the clunky engine of judicial collection.

According to CPLR § 5230(c), an execution must be returned to the clerk of the court whence it issued sixty days after delivery[157] unless a levy of property not capable of delivery has occurred. (Oddly property capable of delivery not mentioned.) The time may be extended "in writing"[158] once by the judgment creditor's attorney (acting as officer of the court). It may be extended multiple times "unless another execution against the same judgment debtor . . . has been delivered to the same enforcement officer and has not been returned."[159]

Although the statute nowhere says so, courts assume that return of the execution (where no levy has occurred) terminates the execution lien on the debtor's personal property.[160] Early cases suggest the sixty day period is for the benefit of the creditor, who has the right to expect prompt enforcement,[161] but, of course, termination of the lien much benefits the debtor or perhaps junior *JC*s. Another thought is that the short life of the execution is designed to prevent *JC* from using the execution lien as a security device; rather, the creditor is expected to encourage the quick liquidation of debtor assets. Two commentators remark:

> a wary creditor, discovering assets to levy on, would be well advised to withhold the information from the sheriff until any prior outstanding executions against the same debtor have been returned. Such strategy, however, makes a mockery of the implication in the decisions that delivery alone constitutes the "diligence" to be rewarded by priority.[162]

Yet counter-examples exist to suggest the execution lien survives return of the execution. In *International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.*,[163] *JC* delivered an execution to the sheriff. Soon thereafter *JD* made an assignment for the benefit of creditors. Judge Charles Breitel complained that the record was silent on whether the execution had been returned before or after the assignment.[164] Rather than remand, he found another way to award *JC* priority. But Judge Breitel was quite ready to find that *JC*'s execution created a priority so long as the return was *after* the assignment. Perhaps the

---

Hathaway v. Howell, 54 N.Y. 97 (1873).

[155] CPLR § 5230(b). A sheriff may issue an income execution, if designed to enforce an order for support in a matrimonial action. CPLR § 5241(b).

[156] CPLR § 5222.

[157] The sixty day period was introduced in 1840. Ansonia Brass & Copper Co. v. Conner, 103 N.Y. 502, 9 N.E. 238 (1886).

[158] CPLR § 5230(c). Presumably this means a writing delivered to the sheriff.

[159] In United States v. Abcon Assoc., 2006 U.S. Dist. LEXIS 92038 (E.D.N.Y. 2006), execution creditors were held entitled to a priority in an interpleader action. The opinion does not state when the interpleader action was filed or whether the lives of the executions were extended or not. Presumably, if the execution lapsed before the start of the interpleader action, the creditors would have no claim to the interpleaded fund. *See* International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc., 36 N.Y.2d 121, 124, 325 N.E.2d 137, 138, 365 N.Y.S.2d 808, 810 (1975) (if execution lapses before an assignment for benefit of creditors, the judgment creditor has no lien good against the assignee). If the executions were alive at the time the interpleader commenced, would this be enough to establish a valid lien in the interpleader? In American Express Travel Related Servs. Co. v. Kalish & Rice, Inc., 693 F. Supp. 1436 (S.D.N.Y. 1988), the court specifically ruled that the commencement of the interpleader extended the life of a levy. I can think of no reason why it should not also extend the life of the execution and the lien that accompanies it.

[160] New York City Transit Authority v. Paradise Guard Dogs, Inc., 565 F. Supp. 388 (E.D.N.Y. 1983); United States v. Fleming, 474 F. Supp. 904 (S.D.N.Y. 1979); Walker v. Henry, 85 N.Y. 130 (1881); Garro v. Republic Sheet Metal Works, Inc., 284 A.D. 660, 134 N.Y.S.2d 151 (4th Dept. 1954) (prior to the CPLR); Vance Boiler Works v. Co-operative Feed Dealers, Inc., 46 Misc. 2d 654, 260 N.Y.S.2d 303 (S. Ct. Wayne Co. 1965).

[161] Ansonia Brass Copper Co. v. Conner, 103 N.Y. 502, 507-08, 9 N.E.2d 238, 240 (1886); Excelsior Needle Co. v. Globe Cycle Works, 48 A.D. 304, 309, 76 N.Y.S.2d 538, 540 (4th Dept. 1900).

[162] Distler & Schubin, *supra* note 8, at 474. Ancient doctrine also stated that, if a creditor orders the sheriff to hold off on levying or sale, the execution lien becomes "dormant": that is, it can be primed by other liens. Peck v. Tiffany, 2 N.Y. 451, 456 (1849); Williams v. Standard Oil Co., 219 A.D. 193, 219 N.Y.S. 195 (4th Dept. 1927); Excelsior Needle Co. v. Globe Cycle Works, 48 A.D. 304, 309-10, 62 N.Y.S. 538, 540-41 (4th Dept. 1900). There is no hint that this continues to be the rule under the CPLR.

[163] 36 N.Y.2d 121, 325 N.E.2d 137, 365 N.Y.S.2d 808 (1975).

[164] The assignee did not take free of the execution lien because the court ruled that the assignment was not for a fair consideration, within the meaning of CPLR § 5202(a)(2). *See supra* text accompanying notes 99-108.

idea is that possession by the general assignee is possession by the sheriff and hence a levy in disguise. In effect, the assignee levies for the benefit of *JC*.[165] Another example is *In re City of New York*,[166] where the city had condemned *JD* land and owed just compensation. *JC* served an execution on the sheriff which was returned unsatisfied sixty days later. Subsequently, *JD* executed an assignment for the benefit of creditors. The court held that *JC* had priority. So obviously the execution lien did not die just because the sheriff returned the execution without levying upon the city. This case goes even further than *International Ribbon* to suggest that return of the execution does not terminate the execution lien, as the assignment was entirely after the return of the execution.

C. Levies

A levy can only occur during the life of an execution.[167] The execution constitutes a court order to the sheriff to levy. Without any such order, the sheriff is inert. The sheriff is strictly an officer of the court–a robot who moves only upon judicial command. Meanwhile, only the sheriff can levy.[168] Attorneys may not.[169] *JC* may, however, arrange to be appointed a receiver in which case *JC* would have the power to sell *JD*'s property.[170] *JC*, however, must waive receiver fees as a condition of her appointment.[171]

If a levy of property has occurred during the life of the execution, the lien continues so long as the levy does.[172] While the levy continues, the sheriff has no duty to return the execution.[173] Or if the execution is returned nevertheless, the levy sustains *JC*'s lien.[174] Although CPLR § 5230(c) suspends the sheriff's duty to return the execution only if the sheriff levies property *not* capable of delivery, no court has been tempted to announce a different rule for property capable of delivery.

1. Property Not Capable of Delivery

A levy of property not capable of delivery is accomplished by serving the execution on a third party who owes a debt or has control of property. I will call this a "paper levy." A levy is accomplished only if, at the time the third party is served, the third party actually owes a debt or controls property

> in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in a notice which shall be served with the execution that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property not capable of delivery in the possession

---

[165] A like result is appropriate for interpleader cases. *See supra* n. 140.

[166] 56 Misc. 2d 602, 289 N.Y.S.2d 680 (S. Ct. Queens Co. 1968).

[167] Ansonia Brass & Copper Co. v. Conner, 103 N.Y. 502, 510, 9 N.E. 238, 239 (1886); Vail v. Lewis, 4 Johns. 450, 455 (S. Ct. of Judicature 1808); Marine Midland Bank-Central v. Gleason, 62 A.D.2d 429, 405 N.Y.S.2d 334, 338 (4th Dept. 1978), *aff'd* 47 N.Y.2d 758, 417 N.E.2d 458, 391 N.Y.S.2d 294 (1979).

[168] Lopez v. New York, 152 Misc. 2d 817, 819, 578 N.Y.S.2d 101, 10153 (S. Ct. Bronx Co. 1991); Yeh v. Seakan, 119 Misc. 2d 681, 683, 464 N.Y.S.2d 627, 629 (S. Ct. Oneida Co. 1983).

[169] A counter-example exists in which an attorney's service of an execution counted as a levy. Neshewat v. Salem, 365 F. Supp. 2d 508, 523 & n.12 (S.D.N.Y. 2005).

[170] CPLR § 5228(a); Ernest Lawrence Group, Inc. v. Government Careers Center of Oakland, California, 2000 U.S. Dist. LEXIS 15988 (November 2, 2000); Vitale v. City of New York, 183 A.D.2d 502, 583 N.Y.S.2d 445 (1st Dept. 1992); Konvalin v. Tan Hai Ying, 13 Misc. 3d 287, 818 N.Y.S.2d 762 (S. Ct. Queens Co. 2006).

[171] Oppel v. Di Gangi, 84 A.D. 2d 549, 443 N.Y.S.2d 177 (2d Dept. 1981).

[172] Ruppert v. Community National Bank, 22 A.D.2d 165, 167, 254 N.Y.S.2d 341, 344 (1st Dept. 1964), *aff'd mem.*, 16 N.Y.2d 589, 261 N.E.2d 52, 209 N.Y.S.2d 100 (1965) (unperfected secured party prevailed over *JC* where the sheriff released the levy and killed the execution lien).

[173] Kennis v. Sherwood, 82 A.D.2d 847, 848, 439 N.Y.S.2d 962. 966 (2d Dept. 1981).

[174] American Express Travel Related Servs. Co. v. Kalish & Rice, Inc., 693 F. Supp. 1436 (S.D.N.Y. 1988). One court has suggested in dictum that, where levy is by seizure of property capable of delivery, the judgment creditor (through his attorney as an officer of the court) must extend the life of the execution itself; return of the execution implies that the sheriff must surrender the tangible property back to its owner. New York State Commission of Taxation & Fin. v. Bank of New York, 275 A.D.2d 287, 289, 712 N.Y.S.2d 543, 545 (1st Dept. 2000).

> or custody of the person served.[175]

The levy therefore has a knowledge requirement. Either *AD* must have reason to know of an obligation to *JD*, or *JC* must specify the debt owed or property possessed.[176] So, for example, in *State Tax Commission v. Blanchard Management Corp.*,[177] *JD*, itself a judgment creditor, had validly levied a debt owed by *AD* (a bank). *JC* then levied *AD* without informing *AD* that *AD*'s customer's bank account had been levied by *JD*. The court absolved *AD* of the duty to figure out the connection between the levied customer and *JD*. As a result the levy failed.

If indeed *AD* knows that it owes *JD* a debt or possesses her property capable of delivery at the time the execution is served, the levy encompasses both *that* debt-property *and* also subsequent debts or after-acquired property that *AD* owes or controls.[178] If knowledge of *present* property is absent, there is no levy and no duty on *AD* to refrain from paying or surrendering after-acquired property to the judgment debtor.

According to CPLR § 5232(a), the levy of property not capable of delivery constitutes an injunction against *AD*'s transferring property or paying debts to *JD*.[179] In short, the levy is the equivalent of a restraining notice under § 5222(b). The injunctive effect, however, lapses ninety days after the levy.[180] The injunctive effect can be further extended by motion beyond ninety days.[181] Indeed, the motion to extend can be made even after the levy has died.[182] Courts seem to assume that the lapse of the injunctive effect is the same thing as the lapse of the execution lien.[183] Indeed, it is fair on this basis to view garnishment as injunctive in nature, consistent with its history.[184]

The filing of a turnover action automatically extends the injunctive effect of the post-judgment levy so long as the turnover action continues.[185] It equally extends the life of the pre-judgment levy pursuant to an order of attachment.[186] Extension by commencement of a turnover proceeding is a key concept under the CPLR. Where *AD* refuses to pay or hand over property not capable of delivery, the sheriff does not intervene to enforce *AD*'s obligation. Rather, *JC* is expected to start a turnover

---

[175] CPLR § 5232(c) (third sentence).

[176] If *AD* has reason to know and lies about it, thereby causing the levy to die, *JC* has a tort cause of action against *AD* for damages caused. Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895 (2d Cir. 1985) (misrepresentation caused court to revoke order of attachment).

[177] 91 A.D.2d 501, 456 N.Y.S.2d 364 (1st Dept. 1982).

[178] CPLR § 5232(a) (fourth sentence) ("The person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff or to the support collection unity and execute any document necessary to effect the transfer or payment").

[179] *Id*. (fourth sentence). In Wordie v. Chase Manhattan Bank, 140 A.D.2d 435, 529 N.Y.S.2d 1 (2d Dept. 1988), *AD* responded to a levy by sending the sheriff a check. The sheriff lost the check, and *AD* sent paperwork for replacing it to *JC*'s attorney who never completed it. *AD* was held not to have violated the § 5232(a) injunction.

[180] CPLR § 5232(a) (eighth sentence) ("At the expiration of ninety days after the levy is made by service of the execution, or of such further time as the court, upon motion. . . has provided, the levy shall be void except as to. . . debts. . . paid to the sheriff. . . or as to which a proceeding under sections 5225 or 5227 has been brought").

[181] *Id*. (sixth sentence). A motion to extend need not be decided, only moved for, within the life of the levy. Knapp v. Barron, 83 F.R.D. 75 (S.D.N.Y. 1979) (pre-judgment attachment).

[182] Kitson & Kitson v. City of Yonkers, 10 A.D.3d 21, 778 N.Y.S.2d 503 (2d Dept. 2004); *see infra* text accompanying notes 199-221.

[183] In re Blatter, 16 B.R. 137, 139 (Bankr. S.D.N.Y. 1981). Pre-judgment attachment is on a different basis. Whereas ninety days is mentioned in connection with injunction against transfers, CPLR § 6214(a) (fourth sentence), CPLR § 6214(e) separately ends the levy in all aspects if there is no payment, delivery, extension, or turnover proceeding within the life of the levy.

[184] In the nineteen century, debt could be garnished only through a supplemental proceeding. Isadore H. Cohen, *Collection of Money Judgments in New York: Third Party Orders*, 35 COLUM. L. REV. 1196 (1935) [hereinafter cited as Cohen, *Third Party Orders*].

[185] In re Blatter, 16 B.R. 137, 139 (Bankr. S.D.N.Y. 1981); Kitson & Kitson v. City of Yonkers, 10 A.D.3d 21, 778 N.Y.S.2d 503 (2d Dept. 2004). Commencing a turnover proceeding means making the garnishee a party to the action within the life of the levy. Kennis v. Sherwood, 82 A.D.2d 847, 848, 439 N.Y.S.2d 962. 966 (2d Dept. 1981). One court has suggested that a restraining notice, without a turnover proceeding, extends a levy. Metro Burak, Inc. v. Rosenthal & Rosenthal, Inc., 83 Misc. 2d 637, 372 N.Y.S.2d 781 (S. Ct. Richmond Co. 1975), *mod. on other grounds*, 51 A.D.2d 1003, 380 N.Y.S.2d 758 (2d Dept. 1976).

[186] CPLR § 6214(e) (last clause). In the pre-judgment context the turnover proceeding is governed by § 6214(d). In federal court, a motion to the court can be substituted for the special proceeding required in § 6214(d). Foreign Exchange Trade Assocs. v. Oncetur, S.A., 591 F. Supp. 1496, 1501 n.9 (S.D.N.Y. 1984).

proceeding.

There is a story behind this aspect of the levy of property not capable of delivery. The story has to do with the fact that, in the nineteenth century, equity liens–those arising from receiverships of turnover orders–related back to the time the equity proceeding was commenced. In this era, the entire idea that levies might extend to intangible property was entirely rejected. Instead, *JC* was expected to bring a supplementary proceeding against third parties in order to collect debts.[187] In other words, all liens on property not capable of delivery were equity liens. Only in 1952 did New York permit levy of property not capable of delivery.[188] Later, the CPLR (regrettably) abandoned the idea that equity liens are created when the equity proceeding is commenced. Rather, the CPLR deferred the birth of the equity lien. Today, a turnover proceeding *without* a levy[189] creates a lien only when "a judgment creditor has secured an order for delivery or [or] payment of a debt. . . or personal property."[190] Compensating for this regrettable defer, the sheriff was permitted to levy intangibles. Yet, significantly, the sheriff plays no role in enforcing the paper levy. As in the old days, this is left to the supplementary proceeding against the garnishee. In other words, the levy of property not capable of delivery basically represents a way to obtain an earlier equity lien associated with the turnover order.

A paper levy dies in ninety days unless commencing a turnover proceeding extends the levy.[191] If commencement of the turnover proceeding precedes the levy, it will sustain the life of a *subsequent* levy. In *Clarkson Co. v. Sheehan*,[192] JC_1 commenced a turnover proceeding, which did *not* create a lien. Thereafter, JC_1 served an execution on the sheriff and obtained a levy. Following JC_1's levy, JC_2 obtained its own levy. Hoping for priority, JC_2 protested that a turnover proceeding commenced *before* a levy could not extend the life of JC_1*'s* execution lien. But the court ruled for JC_1 under CPLR § 5232(a)'s eighth sentence:

> At the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor. . . has provided, the levy shall be void except as to property. . . as to which a proceeding under sections 5225 or 5227 *has been brought*.[193]

The *Sheehan* court observed that this sentence did not require the turnover proceeding to be commenced *after* the levy. It was enough that, prior to lapse, a proceeding "has been brought."[194] The passive voice, so unpopular with law review editors, saved JC_1's priority.

An emerging rule from the case law is that, where the sheriff has levied property not capable of delivery, no second levy on behalf of the same *JC* is valid. In *New York State Commissioner of Taxation & Finance v. Bank of New York*,[195] *JC* served an execution and the sheriff levied *AD*. While the levy was still enjoying its ninety-day life, *JC* served a second execution on the sheriff, who purported to levy against *AD* a second time. *AD* waited until the first levy was dead and, even though the second levy was less than 90 days old, *AD* released the funds to *JD*. The court held that *AD* had behaved properly because the second levy was no levy at all. According to the court:

> The service of multiple, overlapping levies creates confusion and is contrary to the purpose of the statutory limitation "to minimize the burden on the garnishee." Even where an extension is granted on motion, "[t]he court must avoid permitting extensions that would harass the garnishee, unduly embarrass

---

[187] Cohen, *Third Party Orders*, *supra* note 184.
[188] N.Y. Sess. Laws 1952, ch. 835.
[189] There is no requirement that there be a levy before a turnover proceeding can be commenced. Garland D. Cox & Assocs. v. Koffman, 48 N.Y.2d 878, 400 N.E.2d 302, 424 N.Y.S.2d 360 (1979).
[190] CPLR § 5202(b).
[191] *Id*. § 5232(a) (eighth sentence).
[192] 540 F. Supp. 636 (S.D.N.Y. 1982), *aff'd*, 716 F.2d 126 (2d Cir. 1983).
[193] Emphasis added.
[194] 540 F. Supp. at 640 n.2.
[195] 275 A.D.2d 287, 712 N.Y.S.2d 543 (1st Dept. 2000).

the judgment debtor or prejudice other judgment creditors."[196]

The *Bank of New York* court would have allowed a second levy after the first levy was utterly dead.[197] But *Kitson & Kitson v. City of Yonkers*[198] does not even permit this. Rather, the execution creditor must move to revive the defunct levy *nunc pro tunc*.[199]

These *nunc pro tunc* motions were invented in the era of *Seider v. Roth*.[200] In *Seider*, the Court of Appeals scandalized the civil procedure professors by holding that a New York resident could sue a Montreal driver for an accident in Vermont by attaching the insurance company's obligation to defend the driver, where the insurance company was present and doing business in New York. A lapse of the ninety-day attachment levy, however, was thought to be a jurisdictional bar to the *Seider*-style *quasi in rem* action.[201] To preserve judicial business, courts permitted *nunc pro tunc* motions to extend the levy.[202] This *nunc pro tunc* practice could never have occurred under the statutes that preceded the CPLR.[203] The United States Supreme Court has since put a stiletto into the heart of *Seider*-style *quasi in rem* cases on the modern premise that *quasi in rem* jurisdiction requires the defendants to have some minimum contact with the forum state.[204] Nevertheless, the ghost of *Seider* lingers on in the form of *nunc pro tunc* practice to haunt New York civil procedure.

What of transferees between the death of the levy and its miraculous resurrection in a *nunc pro tunc* order? The *Kitson* court urged, "In determining an application for an extension the court should consider the intervening interests of third parties."[205]

An intervening interest of a third party did emerge in *Fireman's Fund Insurance Co. v. D'Ambra*,[206] which involved the following chronology:

---

[196] 275 A.D.2d at 289-90, 712 N.Y.S.2d at 545, *citing* WEINSTEIN ET AL., *supra* note 25, ¶¶ 5232.14, 5232.15.

[197] 275 A.D.2d at 289, 712 N.Y.S.2d at 545. *Accord*, Vance Boiler Works v. Co-operative Feed Dealers, Inc., 46 Misc. 2d 654, 260 N.Y.S.2d 303 (S. Ct. Wayne Co. 1965). In *Vance*, JC_1 delivered an execution on January 11, 1963, and JC_2 delivered the next day. On January 13, the sheriff levied by serving both executions on the debtor. The levy was therefore for the benefit of both JC_1 and JC_2. When the levy died after 90 days, JC_2 delivered another execution. This time, the levy netted some value. JC_2 was given all the proceeds, proving that new levies after the old one dies were permitted.

[198] 10 A.D.3d 21, 778 N.Y.S.2d 503 (2d Dept. 2004).

[199] *Kitson* overrules an early pronouncement by the Second Department in Freedom Discount Corp. v. Clune, 32 A.D.2d 833, 302 N.Y.S.2d 465 (2d Dept. 1979), where *JC* obtained a default judgment on July 8, 1966 against *JD*. *JD* sought relief from the judgment, but the court ambiguously gave *JD* the right to answer the complaint. The default judgment was not formally revoked until two years later. Meanwhile, thinking that the court's initial permission for *JD* to answer the complaint was tantamount to a vacation of the judgment, *JC* obtained an order of attachment, under which the sheriff levied some wages, itself an impropriety, as attachment liens cannot reach wages. Glassman v. Hyder, 23 N.Y.2d 354, 360, 244 N.E.2d 259, 262, 296 N.Y.S.2d 783, 296 (1968). The attachment levy then died. Inconsistently, *JC* insisted there *was* a judgment and so served an execution on the sheriff, who levied the same employer, who paid more wages to the sheriff, who paid them to *JC*. *JD* then obtained an order requiring the sheriff to repay the amount levied under the execution, since the judgment had been vacated. Before the sheriff could repay, *JC* re-delivered the old order of attachment on the sheriff, demanding that *JC*'s debt to *JD* for the refund be levied. The court smiled upon this "second" levy. *Cf.* Andrias v. National Surety Corp., 98 Misc. 2d 292, 413 N.Y.S.2d 820 (1st Dept. 1978) (disapproving as a "fraudulent trick" the attachment by *JD* of *JD*'s liability on a money judgment to *JC*, whom *JD* wished to sue quasi in rem).

[200] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[201] Cenkner v. Shafer, 61 Misc. 2d 807, 306 N.Y.S.2d 634 (S. Ct. Herkimer Co. 1970). In pre-judgment attachment cases, the question arises whether the levy is at all necessary for the court to issue a quasi in rem judgment. Under CPLR § 6203, the plaintiff has a lien on all personal property as soon as the order of attachment is delivered to the sheriff. Admittedly, this lien is extraordinarily weak. The defendant still has power to convey free and clear to just about anyone (except an Article 9 secured party). Why isn't this enough to justify a judgment quasi in rem?

[202] Kalman v. Neuman, 71 A.D.2d 996, 420 N.Y.S.2d 287 (2d Dept. 1979).

[203] Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 652 (2d Cir. 1979); Fishman v. Sanders, 18 A.D.2d 689, 237 N.Y.S.2d 861 (2d Dept. 1962).

[204] Rush v. Savchuk, 444 U.S. 320 (1980); *see* Gager v. White, 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1984) (throwing in the *Seider* towel).

[205] 10 A.D.3d at 26, 778 N.Y.S.2d at 507. In Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 652 (2d Cir. 1979) the court affirmed the power of the lower court to give a *nunc pro tunc* extension of the levy. But also in the case, the court had entered a default judgment against the defendant. Why couldn't the sheriff levy again under a writ of execution? The answer might be that under the *Kitson* rule, no new levies under the order of attachment *or* an execution are permitted. Only *nunc pro tunc* extensions are permitted, followed by turnover actions.

[206] 766 F.2d 95 (2d Cir. 1985).

March 19: JC_1 delivers an order of attachment to the sheriff.
June 19: JC_1's levy lapses.[207]
July 2: The sheriff purports to levy again for JC_1 under the March 19 order of attachment.
July 3: JC_2 delivers an execution to the Staten Island sheriff.
July 5: The Supreme Court in Manhattan extends JC_1's first levy *nunc pro tunc*.
July 6: The sheriff levies the bank on behalf of JC_2.

It should have been straightforward that JC_1 had priority to whatever the bank owed *JD*. According to CPLR § 5234(b):

> Where two or more executions or orders of attachment are issued against the same judgment debtor. . . and delivered to the same enforcement officer. . . they shall be satisfied out of the proceeds of personal property or debt levied upon by the officer. . . in the order in which they were delivered. . . An execution or order of attachment returned by an officer before a levy or delivered to him after the proceeds of the levy have been distributed shall not be satisfied out of those proceeds.

Under this distribution rule, the sheriff must prefer JC_1, even where its levy has lapsed and has never been renewed. Though the operative levy was pursuant to JC_2's subsequent execution, JC_1's priority under the order of attachment still perdured. JC_1 loses seniority under the last sentence of § 5234(b) only if the sheriff has returned the order of attachment prior to the operative levy on behalf of JC_2. This last sentence is odd. A sheriff has a duty to return *executions*.[208] But no duty exists to return *orders of attachment*. To the contrary, according to § 6211(a) final sentence:

> The order [of attachment] shall direct the sheriff to levy within his jurisdiction, at any time and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment.

So, unlike an execution which has a limited life of sixty days (unless extended),[209] an order of attachment endures until a money judgment is actually entered. Accordingly, even though the sheriff collected under JC_2's levy, priority went to JC_1, in spite of the lapsed levy.[210] Lapse meant only that, if *AD* had paid *JD*, *AD* could not be held liable for doing so.[211]

---

[207] CPLR § 6214(b) (fifth sentence) (emphasis added). The rule applies only to garnishees. Apparently, it does not apply when the sheriff levies the order of attachment against the defendant. Finance Inv. Co. (Bermuda) Ltd. v. Gossweiler, 145 A.D.2d 462, 535 N.Y.S.2d 633 (2d Dept. 1988). A curious omission in § 6214 is that none of its rules governs a levy of the defendant directly. *See infra* text accompanying notes 633-52.

[208] *Id.* § 5230(c).

[209] *Id.*

[210] *Contra*, Corwin Consultants, Inc. v. Interpublic Group of Cos., Inc., 375 F. Supp. 186 (S.D.N.Y. 1974), *rev'd on other grounds*, 512 F.2d 605 (2d Cir. 1975). In *Corwin*, JC_1 had served an order of attachment on the sheriff. Later JC_2 served an execution. The IRS also claimed a tax lien and was apparently the first to levy *AD*. Although the matter would seem to have been under the federal law of tax lien levies, JC_2 commenced an action in state court under CPLR § 5239 to determine priorities. Even though the IRS was the first to levy, the state court ordered *AD* to pay the disputed funds into the court. The matter and presumably the funds were removed to federal court by the IRS. Judge Morris Lasker ruled that JC_1 had forfeited its priority because the levy lapsed. The holding is odd because the sheriff never levied at all for JC_1 or anyone else. Nevertheless, Judge Lasker thought CPLR § 5234(b) decided the matter. Here we find no reference to lapsed levies in deciding priorities. So JC_1 properly should have had priority, if indeed CPLR § 5234(b) were relevant.

How should the case have been decided? Since this was a federal levy, 26 U.S.C. § 6342(a) requires that, after expense of sale, the money goes to the IRS for its tax sale. No reference here is made to senior liens. Yet the levy does not deprive senior lien creditors of their priority. United States v. National Bank, 472 U.S. 713, 721 (1985). In *Corwin*, it appears that the IRS did not file its notice in the right place. Therefore, judicial lien creditors would have priority over the IRS. 26 U.S.C. § 6323(a). The IRS was itself a post-lien pre-levy transferee within the meaning of CPLR § 5202(a)(1) and § 6203(1). But this we must ignore, as state law is preempted by 26 USC § 6323(a). *See supra* text accompanying notes 71-80. Therefore, JC_1 should have been first, as it served the order of attachment on the sheriff first. The failure to levy, or lapse of levy, is irrelevant. JC_2 is second by virtue of the subsequently served execution. CPLR § 5234 is itself irrelevant to these priorities, as the sheriff apparently never levied and never had funds.

[211] This precise answer was rejected by the District Court, on the ground that JC_1's priority lapsed when the levy lapsed. Fireman's Fund Insurance Co. v. Plaza Oldsmobile, Ltd., 596 F. Supp. 657, 662-63 (E.D.N.Y. 1984), *rev'd on other grounds*, 766 F.2d 95 (2d Cir. 1985). This ignores the direct command of § 5234(b)'s last sentence, which states that only if the sheriff has *returned* the order of attachment does JC_1's priority lapse. *See* Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 652, 653 (2d Cir. 1979) (where order of attachment pre-existed the Foreign Sovereign Immunities Act, 28 U.S.C. § 1609, and where

Overlooking this admittedly fine point, Judge Ellsworth Van Graafieland ruled that JC_1 had priority by virtue of the July 2 re-levy.[212] *Fireman's Fund*, therefore, contradicts the *Kitson* holding, and, in *Kitson*, Judge Goldstein punishes the Second Circuit with a withering "but see" citation–the prerogative that *Erie v. Thompkins* grants state judges at the expense of their federal betters. Given that the *Fireman's Fund* ruling was unnecessary to the result and a mere *Erie* guess, *Kitson* presumptively states the rule: subsequent levies are meaning-less. Only the first levy counts, and it must be extended on a *nunc pro tunc* basis.[213]

Meanwhile, another thing that extends the levy of property not capable of delivery is that *AD* actually pays or surrenders property. According to CPLR § 5232(a) (eighth sentence), the levy is void after ninety days "except as to property or debts which have been transferred or paid to the sheriff . . . " And CPLR § 6214(e) terminates a levy under an order of attachment "except as to property or debts which the sheriff has taken into his actual custody."[214] *JCs* therefore have had cause to expand the notion of what it means to pay the sheriff. In particular, several courts have found that *AD*'s attornment–acknowledgement of liability–to the sheriff is the same as paying her, for the purpose of perpetuating the levy.[215]

2. Banks

Much confusing the levy of property not capable of delivery is New York's rule, perhaps still valid, that, for garnishment purposes, every branch of a bank is a separate entity from every other branch.[216] So a garnishment on a Brooklyn branch fails to encumber a bank account opened in Manhattan.[217] The reason for this is as follows:

> Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by the depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon the branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce . . . [218]

At best, this rule should be limited to garnishing bank accounts. Arguably, it should be viewed as

---

the levy lapsed after the Act, the order of attachment was still valid; any other ruling "mistakes the levy for the order of attachment").

[212] *Accord*, *id*. ("but the order granting the attachment was never itself void. It subsisted so that a new levy. . . could be made under it").

[213] Suppose a levy of property not capable of delivery dies and, instead of moving to revive it *nunc pro tunc*, *JC* commences a turnover proceeding, which would have extended the levy if commenced during or before the life of the levy. Will the turnover proceeding revive the levy? Although this would make sense, there is no current case law to support it. In Kitson & Kitson v. City of Yonkers, 10 A.D.3d 21, 778 N.Y.S.2d 503 (2d Dept. 2004), JC_1's levy died. JC_2 then obtained an execution lien. JC_1 started a turnover proceeding in which JC_2 intervened. JC_1's turnover commencement did not revive his earlier levy–at least not at JC_2's expense. JC_2 was held to have the senior lien, but JC_2 was an intervening party between the death of JC_1's levy and the commencement of the turnover proceeding.

[214] Once the sheriff has the property, the sheriff must "hold and safely keep" it. CPLR § 6218(a). If urgency requires, the court may direct a sale. Only after the plaintiff has a money judgment will the plaintiff actually get the money.

[215] National American Corp. v. Federal Republic of Nigeria, 448 F. Supp. 662 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); Desert Palace, Inc. v. Rozenbaum, 192 A.D.2d 340, 595 N.Y.S.2d 798 (1st Dept. 1993); Kalman v. Neuman, 102 Misc. 2d 662, 424 N.Y.S.2d 649 (S. Ct. Queens Co. 1980).

[216] Motorola Credit Corp. v. Uzan, 288 F. Supp. 2d 588 (S.D.N.Y. 2003); National Union Fire Ins. Co. v. Advanced Employment Concepts, Inc., 269 A.D.2d 101, 703 N.Y.S.2d 3 (1st Dept. 2000).

[217] Det Bergenske Dampskibsselskav v. Sabre Shippig Corp., 341 F.2d 50 (2d Cir. 1965). An exception exists where the right branch is closed or refuses the demand for payment; then recourse may be had to the main office. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981); Soboloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924). *But see* Abuhamda v. Abuhamda, 236 A.D.2d 290, 654 N.Y.S.2d 11 (1977) (affirming injunction, per an order of attachment, directing bank present in New York, not to pay out funds from an account in Jordan). Another exception exists where the bank and its customer agree that a bank account is payable at locations other than the branch of deposit. Wells Fargo Asia Ltd. v. Citibank, N.A., 852 F.2d 657 (2d Cir. 1988), *rev'd on other grounds*, 495 U.S. 660 (1990). It has been held that a bank waives the branch rule if not properly raised in a turnover proceeding. Foreign Exchange Trade Assocs. v. Oncetur, S.A., 591 F. Supp. 1496, 1502 (S.D.N.Y. 1984).

[218] Cronan v. Schilling, 100 N.Y.S.2d 474, 476 (S. Ct. N.Y. Co. 1950).

outmoded with regard to branches located entirely within the United States.[219] In any case, the rule should never be applied with regard to discrete property a bank may hold.[220] Whereas a bank might erroneously honor a check at branch *A* even though branch *B* was levied, there is no similar danger if branch *B* receives an execution and branch *A* holds identifiable property capable of delivery.[221] The branch rule should be limited strictly to the phenomenon of check clearing.[222]

3. Debts v. Property

The CPLR draws unsatisfactory distinctions between debts and property and between property that is or is not capable of delivery. Each of these distinctions, arcane and old-fashioned, have proved dark pools of confusion and contradiction into which litigants might disappear, never to emerge again.

According to CPLR § 5201(a), not every debt can be levied. Rather, a money judgment may be enforced against "any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor. . . " Contingent debts cannot be garnished. Certitude is the key to the kingdom of debt.[223] This dread of contingency is entirely outmoded. Article 9 of the UCC sees no reason why contingent debts cannot be collateral.[224] Yet New York courts have a history of equating contingent debt with no debt at all.[225] This anxiety has been legislated into the CPLR to no good end.

Meanwhile, contingent property other than debts *can* be levied. According to § 5201(b), a judgment may be enforced "against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested. . . "Vested" typically

---

[219] Digitrex, Inc. v. Johnson, 491 F. Supp. 66 (1980) (upholding restraining order served in New York as affecting conduct of the bank outside the state). For branches existing abroad, where Full Faith and Credit does not reign, New York's "separate entity" rule is indeed useful. If ten different countries each insisted on the effectiveness of local garnishment with regard to a deposit elsewhere, a bank with foreign branches would have a tenfold liability for a single deposit. Joseph H. Sommer, *Where Is a Bank Account?*, 57 MD. L. REV. 1, 35-37 (1998); *see* McCloskey v. Chase Manhattan Bank, 11 N.Y.2d 936, 183 N.E.2d 227, 228 N.Y.S. 825 (1962) (German deposit could not be garnished in New York). Presumably, Full Faith and Credit prevents this from happening within the United States.

[220] Buy Fabrics, Inc. v. Ada Co., 76 Misc. 2d 607 (S. Ct. N.Y. Co. 1973). Courts are capable of confusing the bank's in personam obligation to a debtor for a deposit abroad with tangible property that could be brought to New York. Mones v. Commercial Bank, 399 F. Supp. 2d 310 (S.D.N.Y. 2005), *rev'd on other grounds*, 2006 U.S. App. LEXIS 28314 (November 13, 2006).

[221] The separate entity theory for banks has been rejected for various reasons not related to attachment of bank accounts. First National City Bank v. Internal Revenue Service, 271 F.2d 616 (2d Cir. 1959) (bank records); Yayasan Sabah Dua Shipping SDN BHD v. Scandinavian Liquid Carriers Ltc., 335 F. Supp. 2d 441 (S.D.N.Y. 2004) ("virtual" branch in Cayman Islands was physically located entirely in New York); Gavilanes v. Matavosian, 123 Misc. 2d 868, 475 N.Y.S.2d 987 (S. Ct. Queens Co. 1984) (subpoena of bank records).

[222] In ancient times, banks required passbooks from their customers as a condition for paying a bank account. Banks could not, however, resist a garnishment on the ground that they had no duty to pay without presentment of the passbook. Brezenoff v. Franklin Sav. Bank, 108 Misc. 2d 626, 438 N.Y.S.2d 171 (S.Ct. N.Y. Co. 1981); Dumpson v. Dume, 44 Misc. 2d 8, 252 N.Y.S.2d 811 (S.Ct. N.Y. Co. 1964); *see* Oppenheimer v. Dredner Bank A.G., 50 A.D.2d 434, 377 N.Y.S.2d 625 (2d Dept. 1975), *aff'd*, 41 N.Y.2d 949, 363 N.E.2d 358, 394 N.Y.S.2d 634 (1977) (*AD* could pay garnishment even if contractual language prohibited it). The matter is different if the bank has uttered a negotiable instrument, such as a certificate of deposit. Such property is "capable of delivery," and so the sheriff must levy by taking possession of it. CPLR §§ 5201(c)(4), 5232(b). *JC* could, however, pursue the bank in a turnover proceeding. CPLR § 5227; Kazanjian v. Jamaica Savs. Bank, 105 Misc. 2d 228, 432 N.Y.S.2d 62 (S. Ct. N.Y. Co. 1980). The bank is also susceptible to pre-judgment attachment, which makes no reference to property capable of delivery. If the bank actually pays, even though a negotiable instrument is outstanding, the bank is entitled to a discharge under CPLR § 5209 or § 6204. Presumably this holds even if the negotiable instrument ends up in the hands of a holder in due course.

[223] WABCO Trade Co. v. S.S. Inger Skou, 508 F. Supp. 94 (S.D.N.Y. 1980) (once casualty loss occurred, insurer's obligation to indemnify garnishable).

[224] UCC § 9-102(a)(2) (defining "account" as "right to payment of a monetary obligation, whether or not earned by performance").

[225] In City of New York v. Bedford Bar & Grill, Inc., 2 N.Y.2d 429, 141 N.E.2d 67, 161 N.Y.S.2d 67 (1957), *JD* assigned to *SP* its contingent right to a refund from the state comptroller if *JD* chose to cancel its liquor license. *JD* did cancel its license, so that the comptroller had a fixed obligation to pay. *JC* then obtained a lien on the comptroller's obligation. The Court of Appeals held that *JC* was the victor. *SP* had only an equitable lien on after-acquired property, which could not take priority over *JC*'s "legal" judicial lien. One would have thought that the equitable lien, arising when the comptroller's obligation to pay became vested, would have been completely good against a subsequent judicial lien. The whole point of the equitable lien is to foreclose subsequent creditors. Eisenberg v. Mercer Hicks Corp., 199 Misc. 52, 101 N.Y.S.2d 662 (S.Ct. New York Co. 1950), *aff'd mem.*, 278 A.D.2d 806, 104 N.Y.S.2d 804 (1st Dept. 1951). Nevertheless, *JC* prevailed, justly engendering the scorn of the great Grant Gilmore. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §§ 7.12, 12.9 (2000).

means subject to a condition precedent.[226]

CPLR § 5232(a) authorized garnishment–that is to say a "paper" levy pursuant to CPLR § 5232(a)–with regard to debts or property not capable of delivery. So CPLR § 5232(a) presupposes that intangible property might exist which is not a debt. Such property may be defined as *AD*'s obligation to pay which is not certain to become due.

Significantly, only third party garnishees can be the subject of a paper levy pursuant to § 5232(a). Where there *is* no third party to garnish, property not capable of delivery cannot be levied at all. Copyright is an example.[227] Any such property can be reached only by turnover order under CPLR § 5225(a)[228] where the debtor may order the debtor "to deliver any other personal property . . . to a designated sheriff." Oddly, the sheriff may not levy the copyright from *JD*, but *JD* may be ordered to turn the copyright over to the sheriff for sale, all the same. Yet CPLR § 5233 requires that "[t]he property shall be present and within the view of those attending the sale unless otherwise ordered by the court." Without a court order, the sheriff may not sell property not capable of delivery simply because such property is invisible.[229]

When it comes to pre-judgment attachment, the distinction between property capable and not capable of delivery falls away.[230] Article 62 assumes that all levies are be paper levies. Third parties can be served with the order of attachment with regard to debts or "any interest of the defendant in personal property."[231] A paper levy is also permitted against debtors in possession of any personal property. This is so whether it be capable or not capable of delivery. So, absurdly, a copyright may be levied prior to judgment but not after.

As commercial lawyers and speculative philosophers know,[232] all debts are property. But if this is so, then is not § 5201(a) swallowed whole by § 5201(b)? This is what the Court of Appeals seemed to hold in *ABKCO Industries, Inc. v. Apple Films, Inc*.[233] In *ABKCO*, a plaintiff (*P*) sued *D* for defaulting on a loan. Pursuant to this law suit, *P* obtained an order of attachment, which the sheriff served on *AD*. According to CPLR § 6202, "[a]ny debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment." *AD* had promised to remit profits to *D*, if any, from a film. That profits would accrue seemed a safe bet, as *D* was the Beatles, the fab four in the vanguard of the British invasion.[234] Yet the amount of the profit was as uncertain as it was substantial. The *ABKCO* court held that *D*'s right to a profit could not be levied as a debt. But it could be levied as *contingent property* within the meaning of § 5201(b).

It is still true, however, that § 5201(b) property must be "property which could be assigned or transferred." These are showings on which *JC* bears the burden of proof.[235] But if this can be shown, *JC* can garnish a renter's right to buy cooperative shares,[236] a divor-cing spouse's right to receive the

---

[226] Christian v. Ontario Co., 92 Misc. 2d 51, 53, 399 NY.S.2d 379, 381 (S. Ct. Ontario Co. 1977).

[227] Kingsrow Enterps., Inc. v. Metromedia, Inc., 397 F. Supp. 879 (S.D.N.Y. 1975) (ruling sheriff's sale of copyright ineffective to transfer title).

[228] *Id*. at 881.

[229] *But see* Fishgold v. C.O.F., Inc., 288 A.D.2d 827, 732 N.Y.S.2d 919 (4th Dept. 2001) (sheriff sold instead of collected payment intangibles).

[230] Property capable of delivery is mentioned in § 6214(c), which directs the sheriff to take custody after the levy. But seizure is *not* the levy. Delivery of paper is.

[231] CPLR § 6214(a).

[232] G.W.F. HEGEL, SCIENCE OF LOGIC 429 (A.V. Miller trans. 1966).

[233] 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976); *see* Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarollo, S.A., 190 F.3d 16, 23 (2d Cir. 1999) ("*ABKCO* virtually erases the distinction in § 5201 between 'debt' and 'property' by re-characterizing--as 'property against which a money judgment may be enforced'--debts that otherwise are placed out of reach by § 5201(a)'s requirement that the debt be either past due or certain to become due upon demand").

[234] The film was *Let It Be*, a back-stage documentary about the Beatles making a record album. The film was designed to soothe the disappointment of fans that the Beatles had disdained personal appearances some years before.

[235] Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarollo, S.A., 190 F.3d 16, 23-24 (2d Cir. 1999).

[236] In re Charney, 233 A.D.2d 147, 649 N.Y.S.2d 145 (1st Dept. 1996); *but see* Kashi v. Gratsos, 712 F. Supp. 23 (S.D.N.Y. 1989). In *Kashi*, *JD* was arguably the renter when he died. His estate purchased the cooperative shares pursuant to an insider right. The court ruled that the estate's interest in the insider rights was "too remote to be considered a property interest." *Id*. at 26. Clearly a better answer is that, where *JC* had no lien at the time of the death, nothing within the decedent's estate could be liened. CPLR § 5208.

proceeds of real estate in which he has no present inter-est,[237] his own obligation to pay the judgment debtor,[238] or a factor's obligation to remit proceeds from accounts receivable (even though a factor's right of charge-back existed).[239]

The Court of Appeals came to regret its *ABKCO* decision soon enough. In *Supreme Merchandise Co v. Chemical Bank*,[240] *P* sought to levy *AD*'s letter of credit to *D*. *AD*'s obligation to pay the letter of credit was contingent upon submission of conforming documents. Under *ABKCO*, the letter of credit should have been viewed as leviable contin-gent property of *D*. The trial court "understandably relied"[241] upon *ABKCO* and so held. But this result was deeply disturbing to the banking community jealous to protect the certitude of letter of credit payment (if conforming documents are presented). Accordingly, the New York Court of Appeals upheld the reversal of the Supreme Court's decision.

The facts of *Supreme Merchandise* are worth dwelling on:

> *Early March, 1984*: The sheriff serves *P*'s order of attachment on *AD*.[242]
>
> *April 17*: *D* having sold or perhaps pledged a draft on *AD* to B_1, B_1 presents the draft to *AD* and *AD* accepts it. B_1 had no knowledge of the order of attachment.
>
> *April 27*: *D* having sold or perhaps pledged a draft on *AD* to B_2, B_2 presents the draft to *AD* and *AD* accepts it. B_2 had no knowledge of the order of attachment. At this point the letter of credit is fully paid out.
>
> *May 30:* The sheriff serves *P*'s second order of attachment on *AD*.

Properly, even if the first levy had been valid, $B_{1\text{-}2}$ took free of it under CPLR § 6203(2), which holds that the attachment lien is no good against "a transferee who acquired the debt or property for fair consideration after it was levied upon without knowledge of the levy while it was not in the possession of the sheriff."[243] The *Supreme Merchandise* court, however, was not content to reverse on so narrow a ground. Rather, it wanted to make a grander point that letters of credit cannot be garnished so long as *AD*'s obligation to pay it is still contingent. It ruled that *AD*'s obligation to pay the letter of credit was a contingent *debt* which, under § 5201(a), could not be levied. As a result, the early March service of the order of attachment on the issuing bank was no levy.

How could this be reconciled with *ABKCO*? The court concluded:

> Such a mechanical application of *ABKCO* to all questions concerning attachable interests not only would swallow up CPLR 5201(a) in its entirety but also would require us to blind ourselves in every instance to the nature of the interest involved. We determine, therefore, that the mere assignability of [*D*'s] interest does not warrant the conclusion that it is "property" for purposes of CPLR 5201(b), and that in the circumstances the interest is not subject to attachment.[244]

Rather, *JC* was subject to the priority rules of N.Y. SPCA § 1811.

[237] United Pac. Ins. Co. v. Ackerman, 1980 U.S. Dist. LEX 9814, *8 (S.D.M.Y. 1980) (dictum).

[238] P & K Marble, Inc. v. La Paglia, 147 A.D.2d 804, 537 N.Y.S.2d 682 (3d Dept. 1989) (dictum). Presumably the judgment creditor would pay monthly installments on his mortgage to the sheriff instead of to the judgment debtor. Such a garnishment, then, would be a kind of rolling setoff month by month, with the sheriff as intermediary.

[239] Bata Shoe Co. v. Segarra, 58 A.D.2d 133, 396 N.Y.S.2d 369 (1st Dept. 1977).

[240] 70 N.Y.2d 344,514 N.E.2d 1358, 520 N.Y.S.2d 734 (1987).

[241] Supreme Merchandise Co. v. Chemical Bank, 117 A.D.2d 424, 425, 503 N.Y.S.2d 9 (1st Dept. 1986).

[242] *See id*.

[243] With regard to the second levy, the court held it no good because acceptance of $B_{1\text{-}2}$'s drafts constituted the extinguishment of *D*'s rights. This principle, no doubt right, would aid the bank where $B_{1\text{-}2}$ are bad faith post-levy transferees, but since the first levy was held no good, $B_{1\text{-}2}$ can only be pre-levy bad faith transferees. Such transferees take free of the lien created by the order of attachment. CPLR § 6203(1).

Letter of credit law distinguishes between a transfer of the letter and assignment of the proceeds of the letter. If the letter is transferred, only the transferee has the right to present documents. If the proceeds are assigned, only the original beneficiary may present documents. Algemene Bank Nederland, N.V. v. Soysen Tarim Urunleni Dis Ticaret Ve Sunayi, S.A., 748 F. Supp. 177, 181-82 (S.D.N.Y. 1990). In either case, whatever the transferee or assignee gets from the original beneficiary is free of the attachment lien. Ultimately, this distinction makes no difference in attachment cases.

[244] 70 N.Y.2d at 350, 514 N.E.2d at 1360, 520 N.Y.S.2d at 736.

The *Supreme Merchandise* court also stated that the letter of credit was subject to a "greater contingency" than was the case for the film royalties in *ABKCO*. In *ABKCO*, *D*'s right in the debt/property was "contingent solely as to value, which depended on events beyond its own control"[245]–*i.e.*, the popularity of the Beatles. But in *Supreme Merchandise*, *D*'s right was contingent on *D*'s own performance in presenting conforming documents. This conditionality, depending on *D*'s willful act, somehow meant that *D*'s right was not "property" within the meaning of § 5201(b).[246] As a later court put it, the rights to a letter of credit are "not the property of the beneficiary thereunder for the purposes of attachment."[247] But they are the property of the debtor for all other purposes. Thus, property is sometimes not property, depending on what suits the preconceived result the courts wish to reach.

These grounds–property for some purposes but not for others–will convince no one unwedded to the preconceived result. Indeed, it is not even an argument but rather the mere *announcement* of the result. Accordingly, the *Supreme Merchandise* court was reduced to confessing that letter of credit were just special–a kind of legal miracle:

> The more profound difference from *ABKCO*, however, lies in the fact that what is at issue here is [*D's*] interest in a negotiable letter of credit, an instrument extensively used in domestic and international trade, which because of its unique character typically implicates others than the immediate parties to the underlying transaction. The transaction before us, for example, involves not only [*D* and *P*], but also [*AD* and $B_{1\text{-}2}$]–none of whom had any part in the dispute between [*P*] and [*D*], yet whose interests could be affected by permitting attachment of [*D*'s] interest in the letter of credit.
>
> We are persuaded that, for policy reasons, the rationale of *ABKCO* does not extend this far, and that [*D*'s] interest for present purposes must be considered a contingent, nonattachable "debt" under CPLR 5201(a) rather than attachable "property" under CPLR 5201(b).[248]

For good measure, the court warned, "In view of the versatility of letters of credit, it bears emphasis that our disposition is limited by the facts before us."[249]

Supreme Merchandise holds open the possibility that, when debts are "too contingent," they are not property under § 5201(b). So post-*ABKCO* examples persist of courts disallowing levies of contingent debts. For example, choses in action might to too contingent to levy upon and sell.[250] A promise to hold *D* harmless from a harm not yet manifested is too contingent for a levy.[251] And a pension right that required the debtor's election could not be reached through a turnover order, where the debtor had not made the election.[252]

One probable achievement of *Supreme Merchandise* is the final overruling of *Seider v. Roth*,[253] that scandalous chapter in American jurisprudence reviewed earlier.[254] *Seider* virtually guaranteed any New Yorker a local forum for any cause of action, provided the defendant had insurance from a

---

[245] 70 N.Y.2d at 350, 514 N.E.2d at 1361, 520 N.Y.S.2d at 736.

[246] Thus, earlier *Erie* guesses by federal courts were vindicated. Diakan Love v. Al-Haddad Bros. Enterps., 584 F Supp 782 (S.D.N.Y. 1984).

[247] Brenntag Int'l Chemicals v. Bank of India, 175 F.3d 245 (2d Cir. 1999).

[248] 70 N.Y.2d at 351, 514 N.E.2d at 1361, 520 N.Y.S.2d at 737; *see also* ("central to the vacation of the attachment, however, were the importance of letters of credit to international trade and the uncertainties which would result if attachment of open letters of credit were permitted").

[249] 70 N.Y.2d at 352 n., 514 N.E.2d at 351--- n., 520 N.Y.S.2d at 1362 n.

[250] Fishgold v. C.O.F., Inc., 288 A.D.2d 827, 732 N.Y.S.2d 919 (4th Dept. 2001).

[251] Clarkson Co. v. Shaheen, 533 F. Supp. 905, 933 (S.D.N.Y. 1982).

[252] Sochor v. International Musiness Machines Corp., 60 N.Y.2d 254, 457 N.E.2d 696, 469 N.Y.S.2d 591 (1983). In *Sochor*, the possibility was left open that if the debtor had been joined as a party, the debtor might be ordered to elect early payout, in which case the debtor would have a vested right that the creditor could reach. Pre-*ABKCO* decisions proclaiming debts to be too contingent also exist, but it is unclear whether they survive as good authorities. Colonial Press of Miami, Inc. v. Bank of Commerce, 71 Misc. 2d 987, 337 N.Y.S. 817 (1st Dept. 1972) (*JC* could not reach *AD*'s liability for having converted to its own use *JD*'s property;"a greater degree of 'certainty' of the indebtedness is required than here demonstrated for this cause of action against the bank, which actually is a claim for facilitating an allegedly unauthorized diversion of corporate funds . . . ").

[253] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[254] *See supra* text accompanying notes 200-05.

national company. It was not long, however, before the constitutional rug was yanked from beneath the jurisdictional feet of *Seider*. After *Shaffer v. Heitner*,[255] any defendant in a *quasi in rem* law suit must have the same minimum contacts with the forum state as would justify the assertion of personal jurisdiction.[256]

But does *Seider* live on as a valid collection principle? Imagine that JC_2 is injured in a car accident by *JD*. *AD* has promised to defend and, if necessary, to indemnify *JD*. Before JC_2 obtains a judgment, JC_1 dockets a judgment on some unrelated claim. JC_1 then induces the sheriff to garnish *AD*. According to *Seider*, the levy picks up the insurance policy. Does this mean that JC_1 can hijack insurance intended to protect JC_2?

For the most part, New York's direct action statute prevents this result.[257] The effect of this provision is to give a security interest in the insurance policy to JC_2 that is good against JC_1.[258] Yet this does not entirely solve the dilemma. *Seider* involved the garnish-ment of the insurance company's obligation to defend. Of what does this consist? *AD* typi-cally chooses the attorney that defends *D* and pays that attorney. Yet any fee payable by *AD* to the attorney is garnished in advance by JC_1. Indeed, under CPLR § 5232(a) (fifth sen-tence), "the garnishee is forbidden to . . . pay . . . any [garnished] debt." Knowing this, the attorney no doubt will refuse to perform the services that *AD* is obliged to finance. In short, not only is the debt contingent and not garnishable, it is likely *never* to arise.

This contingency closely resembles that in *Supreme Merchandise*, where an issuing bank's obligation to pay a letter of credit depended on *D*'s presentation of documents. *D*'s incentive to avoid presentment led the court to declare that *D*'s right was too contingent to be considered "property" in the *ABKCO* sense. The garnishment in *Seider* is no less contingent. So not only is *Seider* overruled on the jurisdiction side[259] but also on the collection side as well, by the *Supreme Merchandise* decision.

4. Property Capable of Delivery

Where property is capable of delivery, the sheriff must levy "by taking the property into custody without interfering with the lawful possession of pledgees and lessees."[260] The phrase "into custody" has been defined to include the sheriff padlocking a store and posting notice that its contents had been levied.[261] Posting without padlock[262] and padlock without posting[263] have sufficed. So has an oral declaration, coupled by an inventorying of the personal property levied.[264] According to an ancient case:

---

[255] 433 U.S. 186 (1977).

[256] The question arises, what is the point of *quasi in rem* jurisdiction after *Shaffer*? Perhaps none, but some states, including New York, have elected not to enact the maximum possible *in personam* "long arm" statute. Banco Ambrosiano v. Artoc Bank & Trust Co., 62 N.Y.2d 65, 71, 464 N.E.2d 432, 435, 476 N.Y.S.2d 64, 67 (1984). Hence, there is a statutory gap in which constitutionally permissible *quasi in rem* jurisdiction might supply jurisdiction where *in personam* jurisdiction is not statutorily permitted. Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOKLYN L. REV. 1059, 1089-99 (1990). Isn't it odd that plaintiffs can basically get pre-judgment security interests in the assets of foreign defendants, even though it no longer serves any jurisdictional purpose? With regard to domiciliaries, the plaintiff must first prove the defendant is a crook. CPLR § 6201 therefore equates crooks and foreigners.

[257] N.Y. Ins. Law § 3420.

[258] *American Bank & Trust Co. v. Davis (In re F.O. Baroff Co.)*, 555 F.2d 38 (2d Cir. 1977). For a description of the mechanics, see David Gray Carlson, *Indemnity, Liability, Insolvency*, 25 CARDOZO L. REV. 1951 (2004).

[259] Rush v. Savchuk, 444 U.S. 320, 328-30 (1980) (this "ingenious jurisdictional theory" unconstitutional because "the fictitious presence of the insurer's obligation in Minnesota does not, without more, provide a basis for concluding that there is any contact in the *International Shoe* sense between Minnesota and the insured").

[260] CPLR § 5232(b).

[261] Alcor, Inc. v. Balanoff, 45 A.D.2d 795, 357 N.Y.S.2d 160 (3d Dept. 1974); *see* Marrano v. State of New York, 80 Misc. 2d 768, 364 N.Y.S.2d 751 (Ct. Claims 1975) (no rent claims can arise from such a padlocking).

[262] In re General Assignment for the Benefit of Creditors of Ace Food Corp., 23 Misc. 2d 274, 200 N.Y.S.2d 891 (S. Ct. Queens Co. 1960); *contra*, Socony Mobil Oil Co. v. Wayne Co. Produce Co., 24 Misc. 519, 196 N.Y.S.2d 729 (S. Ct. Queens Co. 1959).

[263] Marine Midland Bank-Central v. Gleason, 62 A.D.2d 429, 405 N.Y.S.2d 334, 338 (4th Dept. 1978), *aff'd* 47 N.Y.2d 758, 417 N.E.2d 458, 391 N.Y.S.2d 294 (1979).

[264] Sheridan Farms, Inc. v. Federico, 48 Misc. 2d 599, 265 N.Y.S.2d 922 (App. Div. 3d Dept. 1965); In re Gilbert, 127 N.Y.S.2d 533 (City Ct. Utica Co. 1953).

> [T]here can be no difficulty in ascertaining what constitutes a valid levy either against the debt or against any persons claiming title through him to the property:
>
> First, the property must be in the view and under the control of the officer.
>
> Second, the officer must take possession of the property either by removing or by an oral declaration that a levy is intended, and that the officer claims to hold the goods under such levy.
>
> Third, an inventory, or, at least, a memorandum of the levy should be made at the time.
>
> Fourth, levying the goods in the possession of the debtor until the sale is at the risk of the officer, but does not invalidate the levy.[265]

An even simpler test is that a levy occurs when the sheriff intends to levy and does some overt act to express the intent.[266] A levy occurs if the sheriff (but for legal process) would be guilty of trespass upon the chattel.[267]

At least one court has stated that the sheriff (or, rather, marshal) must act reasonably and not take too much property; otherwise the levy will be undone.[268] Another court saw no problem in the levy of a luxury cooperative apartment to enforce a $350 judgment.[269]

a. Leased Property

A sheriff may not levy by seizure if it interferes with the possession of a lessee or a pledgee.[270] The reference to a lessee presumably assumes *JD* is the *lessor*, not the lessee.[271] Where *JD* is lessor, the reference could have been omitted, since *JD* has no present right of possession. So neither does the sheriff.[272] All *JD* has is the leasehold interest (that is, the right to receive rent during the lease)[273] and the lessor's "residual interest"[274] (*AD*'s obligation to return the leased property at the end of the lease).[275] Can these obligations be levied, on the theory that they are properties not capable of delivery? After all, the leased thing may be deliverable (that is tangible) when considered in the abstract, but perhaps *JD*'s purely future interest in the thing is not itself presently deliverable.[276] Separately, is not the rent obligation a debt or at least property not capable of delivery?

It would certainly not shock the conscience to say that each of these interests of *JD* were not capable of delivery, but there are doctrinal impediments. These impediments lead to the suspicion that courts may find that *JD*'s rights in leased personal property are reified into what Article 9 calls *chattel paper*.[277] The chattel paper would then be separate from the leased thing.

With regard to *JD*'s future right to possess the leased thing, *JD*'s future right of possessing the leased thing is property capable of delivery (*i.e.*, no paper levies), if we follow the classic, now outmoded, case of *Feldman v. First National City Bank (In re Leasing Consultants)*.[278] There, the Second Circuit *Erie*-guessed that a future possessory interest in a thing is *not* distinguishable from the deliverable thing under New York law. The decision is not based on some unique Article 9 principle

---

[265] Bond v. Willett, 1 Keyes, 377, 380-81 (1864).

[266] Stallknecht v. Gilbert Appliance Corp., 144 Misc. 626, 628, 259 N.Y.S.2d 189, 191 (S. Ct. Monroe Co. 1932).

[267] Rodgers v. Bonner, 45 N.Y. 379, 382 (1871).

[268] Yeh v. Seakan, 119 Misc. 2d 681, 683, 464 N.Y.S.2d 627, 629 (S. Ct. Oneida Co. 1983).

[269] House v. Lalor, 119 Misc. 2d 193, 668 N.Y.S.2d 402 (S. Ct. N.Y. Co. 1983).

[270] This reverses an ancient New York rule permitting levy of pledged material. Sief v. Hart, 1 N.Y. 20 (1847); Monitor Co. v. Confianza Furniture & Appliance Co., 142 N.Y.S.2d 140 (S. Ct. King's Co. 1955).

[271] Accord, Gleich v. Rose, 294 A.D.2d 177, 741 N.Y.S.2d 683 (1st Dept. 2002) (where *JD* is lessee, sheriff may levy by seizure).

[272] UCC § 2A-307(1) ("a creditor of a lessee takes subject to the lease contract").

[273] *Id.* § 2A-103(1)(m) ("'Leasehold interest' means the interest of the lessor or the lessee under a lease contract").

[274] *Id.* § 2A-103(1)(p) ("'Lessor's residual interest' means the lessor's interest in the goods after expiration, termination, or cancellation of the lease contract").

[275] *Id.* § 2A-525 (lessor's right of possession if lessee defaults).

[276] Two cases hold that property capable of delivery becomes undeliverable when in the hands of a third party. Michelsen v. Brush, 233 F. Supp. 868, 870 (E.D.N.Y. 1964) (suggesting that tangibles in the hands of a third party are property not capable of delivery); In re Flax, 179 B.R. 408, 411 (Bankr. E.D.N.Y. 1995) (same).

[277] Chattel paper is defined as "records that evidence . . . a lease of specific goods . . . " *Id.* § 9-102(a)(11).

[278] 486 F.2d 367 (2d Cir. 1973).

but relies on an underlying premise of New York property law that is neither codified nor countermanded in the UCC itself.

In *Leasing Consultants*, a New York debtor (*D*) leased equipment to *AD* in New Jersey. *D* granted a security interest in the chattel paper to *SP* and, separately, a security interest in the equipment leased. *SP* was unusually determined to perfect its security interest. It took possession of the chattel paper, which sufficed for perfection of its security interest in the rent stream.[279] To make assurance double sure, it filed a financing statement with both the New York secretary of state and the local UCC clerk in Queens. And by way of triple insurance, *D* even filed a cautionary financing statement in New Jersey where the leased equipment was located in the possession of *AD*. This would have protected *D* (and hence *SP*) if the lease were covertly a security interest in equipment that *AD* bought outright. Were it a true lease, the filing was useless. Yet, when *D* filed for bankruptcy in New York, this smorgasbord of perfection did not sate the appetite of the bankruptcy trustee, nor did it satisfy the Second Circuit's *Erie*-impaired intuitions. Since *SP* was claiming a security interest on goods in New Jersey, *SP* should have filed yet one more time–in New Jersey.[280] *SP* was therefore unperfected, at least as to the right to possess the equipment in the future.

New Article 9 has purged perfection of its adventurous spirit. It now requires but one filing where *D* is located.[281] As a result, *Leasing Consultants* is no longer good law on the question of how to perfect a security interest in *D*'s rights as a lessor. The New York filing alone would have sufficed to confound the modern bankruptcy trustee.[282] But the underlying property premise of *Leasing Consultants* still remains: a claim to a future possessory right of a thing is the same as claiming the thing-in-itself. Transporting this lesson to the CPLR, the only way to reach the future interest in property capable of delivery is for the sheriff to seize the underlying thing under § 5232(b). Yet the sheriff is not permitted to interfere with the rights of the lessee. Meanwhile, a paper levy under § 5232(a) is not permitted because *JD*'s right is in a thing capable of delivery. Section 5232(a) applies only if the property is not capable of delivery. In short, the Second Circuit's *Erie* guess as to the state of New York law is that New York is wedded to the principle that the thing and *JD*'s future interest in the thing are one and the same. This reasoning implies that future interests in personal property are quite immune from the New York execution lien.

Even so, is not the rent stream on a different basis? Can the sheriff levy the rent on the theory that it is a debt or property not capable of delivery? *Leasing Consultants* left this question open.[283]

Confusing the matter is *Glassman v. Hyder*,[284] no mere *Erie* guess. *Glassman* concerned levying rent from real property, and its applicability depends on whether leases of real and personal property operate on the same principle.

In *Glassman*, a non-domiciliary defendant (*D*) leased a New Mexico building to *AD*, who was present in New York. *JC* obtained an order of attachment under CPLR Article 62, and the sheriff tried to levy the rent stream by garnishing *AD* in New York. Peering deeply into New York's unsatisfactory distinction between debts and property, the Court of Appeals ruled that, as a debt, the rent was not leviable because it was not a debt certain to become due, within the meaning of CPLR § 5201(a). *AD* might be evicted, in which case the rent obligation would be canceled. The court conceded that the rent stream was also contingent property, leviable under § 5201(b). But, as the building was in New Mexico,

---

[279] UCC § 9-313(a).

[280] Why didn't *D*'s cautionary filing suffice? Because leases, then and now, require no perfection. The filing was a meaningless event. Ironically, had the lease been a disguised security interest. *D*'s filing would be perfection, and *D*'s assignment of the security interest to *SP* would have been unassailable.

[281] UCC §§ 9-201(1)(a), 9-501(a)(1); C. Scott Pryor, *How Revised Article 9 Will Turn the Trustee's Strong-arm Into a Weak Finger: A Potpourri of Cases*, 9 AM. BANKR. INST. L. REV. 209, 270-72 (2001).

[282] *Id*.

[283] The opinion is most confused on this point. The trustee and *SP* had joined to sell all their rights in the equipment to a third party for $60,000. The court remanded to determine whether this $60,000 represented solely *SP*'s perfected right or also *SP*s security interest on *D*'s future right of possession. The trustee argued that the $60,000 represented *only* the future right of possession. 486 F.2d at 373-74.

[284] 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968).

rent-as-property could only be reached by means of a New Mexico judicial lien. Translated to our present context, *rent cannot be distinguished from the thing*.[285] So conceived, rent of deliverable personal property is property capable of delivery. Yet the sheriff cannot take the thing away from *AD*, because this would interfere with *AD*'s right of possession.

There is reason, however, to find that leases of real and personal property are so different that *Glassman* is not authority for the personal property "bailment" lease. In real estate cases, New York views the rent stream so tied up with the thing that it gives no regard to assignments of real estate rents, separate and apart from a mortgage on the reversion. Rather, whomsoever possesses the reversion has the right to collect the rent.[286] The only way a secured creditor claiming the underlying real estate can capture the rent stream is to dispossess the debtor (by obtaining the appointment of a receiver).[287]

On the other hand, under the ancient common law of personal property leases, the lease was considered a bailment.[288] The obligation to pay for an irrevocable bailment was more like an account receivable in the nature of a promise to pay the price. That is to say, the "account" was unconnected to the thing purchased. True, the consequence of failing to pay permitted termination of the bailment, but there was no necessary connection between the rent stream and the thing rented.[289] If true, the way is open for a court to view the rent stream as property not capable of delivery, albeit not a debt certain to become due. As such, it can be levied by garnishing *AD*.

Article 9 points to another possibility. What signifies *JD*'s present possession of the rent stream is tangible chattel paper–that is, the lease agreement.[290] If *JD* borrows from *SP* and allows *SP* possession of the chattel paper, *SP* is perfected.[291] The UCC, however, innovated on this score. Prior to the UCC, possession of the lease was not essential to owning the rent stream.[292] If the UCC creates a different rule, it is very easy for a court to rule that this reification of rent stream into chattel paper exists only if Article 9 applies, because *SP* claims seniority over the sheriff. Whatever the UCC says about *SP* is useless unless *SP* (that is, either a buyer of or lender against chattel paper) is involved in the litigation.[293]

On the other hand, the UCC *does* govern if *SP* claims the rent income. Suppose *SP* possesses the chattel paper but has not filed a financing statement. *SP* is perfected, which means that the sheriff is obliged to view the chattel paper as embodying the rent stream. In other words, when *SP* claims the rent stream, the rent is chattel paper–property capable of delivery. Where no *SP* claims the rent, the rent stream is property not capable of delivery. Yet another strange encounter between the CPLR and the UCC!

b. Pledged Property

Pledges are not so very different from leases. A lessee is entitled to possession so long as she

---

[285] *Glassman* supports a further distinction: if *AD* is past due on rent, that past due rent is a chose in action that is *not* the same as the New Mexico real estate. Rather, the past due rent is a leviable debt. And if there is even a smidgen of overdue rent, the after-acquired property principle in § 5232(a)'s second sentence picks up all rent as *debt*, once the rent becomes unconditionally due and owing. Carlson, *Real Property*, *supra* note 10.

[286] In re Riverside Nursing Home, 100 B.R. 686 (S.D.N.Y. 1989); Poughkeepsie Sav. Bank v. R & G Sloane Mfg. Co. Inc., 84 A.D.2d 212, 445 N.Y.S.2d 560 (2d Dep't 1981); Witschger v. J.K. Marvin & Co., 255 A.D. 70, 5 N.Y.S.2d 910, 915 (2d Dep't 1938); Ireland v. United States Mortgage & Trust Co., 72 A.D. 95, 76 N.Y.S. 177 (1st Dep't 1902) ("the mere fact that the mortgagee receives the rents and proceeds does not constitute him chargeable as a mortgagee in possession").

[287] N.Y. Real Prop. Law 254(10).

[288] United States v. Wexler, 621 F.2d 1218, 1224-25 (2d Cir. 1980).

[289] Amelia H. Boss, *Lease Chattel Paper: Unitary Treatment of a "Special" Kind of Commercial Specialty*, 1983 DUKE L. J. 76, 82.

[290] Chattel paper does not, however, embody a future right to possess the thing leased. UCC § 9-330 Comment 11. If it did, then sale of chattel paper would actually be an Article 2 transaction (in part). Boss, *supra* note 288, at 107.

[291] UCC § 9-313(a).

[292] Boss, *supra* note 228, at 92, 103-06.

[293] Article 9 applies to sales of chattel paper as well as to security interests in it. UCC § 9-109(a)(3).

does not breach the lease. A pledgee is likewise entitled to possession until the property is redeemed.[294] Regardless of what § 5232(b) says, a sheriff may not levy property capable of delivery from a pledgee (*SP*) simply because *SP*'s right of possession is superior to that of *JD*. If *JD* has no right of possession, neither does the sheriff.

Leasing Consultants[295] is just as effective an *Erie* guess for pledges as for residual interests in leased property: a future right to possess a thing is the same as the thing. Therefore the sheriff cannot paper-levy *JD's* future right of possession following redemption.[296] Meanwhile, *JD*'s right to a surplus after a foreclosure sale[297] could be viewed as a contingent debt of *SP* to *JD*. As such, it is property *not* capable of delivery.

The interaction of CPLR § 5232(b) with pledges was addressed in *Knapp v. McFarland*.[298] In *Knapp, JD* and *X* owned a Maryland building and were involved in litigation. Pending the outcome, they sold the building for cash and put the funds in escrow with AD_1 in Maryland. AD_1 used the proceeds to buy a treasury bill for the benefit of the litigants. The treasury bill was purchased from AD_2 in New York.

In its analysis, the *Knapp* court made two fundamental errors. First, it imagined that AD_1 was a pledgee, not a bailee. Second, the court imagined that the treasury bill was a certificated security–that is, *JD* had pledged to AD_1 an identifiable piece of paper which AD_2 held in its vault as collateral agent for AD_1. In fact, AD_1 probably held only a security entitlement in AD_2's jumbo treasury bill or perhaps in AD_2's book-entry with the Federal Reserve Bank.[299] If so, the sheriff was levying property *not* capable of delivery. Let us continue to play along with the court's misconceptions, however.

Taken together, these two misconceptions implied that the sheriff could not grab the alleged certificate; CPLR § 5232(b) did not permit him to interfere "with the lawful possession of pledgees . . . ." Instead, the sheriff simply served the execution on AD_2 without taking possession of the allegedly certificated security.

Later, enforcement of *JC*'s judgment was suspended when *JD* posted a supersedeas bond pending appeal.[300] This was a happy news for *JC*, because it guaranteed a solvent surety to pay the judgment if *JC* survived appeal. The sheriff, however, protested against dissolving the levy altogether because the sheriff was entitled to an undetermined poundage fee for the levy. He therefore demanded that an execution lien for $11,0000 be sustained, notwithstanding the *supersedeas* bond.[301] *JD* countered that, since the sheriff had not seized the alleged certificate that AD_2 supposedly held, the sheriff had not levied and so was disentitled to any poundage. Judge Mansfield viewed this action as a valid levy:

> Under the circumstances we believe that the Sheriff's service of a copy of the execution upon [AD_2] was sufficient to constitute a valid levy entitling him to poundage. The effect of the service of a copy of the execution, coupled with issuance of the restraining notices, was to bar the bank as garnishee from making any transfer of the Treasury bills.[302]

Of course, service of the execution is the proper way to levy property *not* capable of delivery.[303] Yet

---

[294] A pledgee, however, may not use the collateral beneficially, as a lessor could, unless the parties agree otherwise. UCC § 9-207(b)(4).

[295] *See supra* text accompanying notes 277-82.

[296] UCC § 9-623.

[297] *Id*. § 9-615(d)(1).

[298] 462 F.2d 935 (2d Cir. 1972).

[299] Martin J. Aronstein, *The New/Old Law of Securities Transfer: Calling a "Spade" a "Heart, Diamond, Club or the Like"*, 12 CARDOZO L. REV. 429, 432 (1990).

[300] CPLR § 5204.

[301] It may be observed that $11,000 covers the time and expense of strolling from Courthouse Square in Manhattan some five blocks south to Pine Street, where AD_2 (Chemical Bank) was then located. Nice work if you can get it!

[302] 462 F.2d at 941.

[303] CPLR § 5232(a).

Judge Mansfield did not go so far to proclaim *JD*'s future interest in the alleged certificate to be property not capable of delivery.[304] Rather, he ruled that, while there was no levy of the certificate, somehow there was a levy sufficient to justify poundage. The levy was not a levy for the purpose of permitting the sheriff to sell. But it was a levy for the purpose of generating a poundage fee. Feeble reasoning indeed!

Entirely mysterious is Judge Mansfield's insistence that a restraining notice, served on AD_2 by *JC*'s attorney, somehow plays a role in establishing the levy. All a restraining notice does is to order AD_2 not to convey away the certificate.[305] Yet a paper levy under CPLR § 5232(a) (seventh sentence) has precisely this same injunctive effect. So Judge Mansfield idea seems to be that, where property capable of delivery is pledged and where AD_2 is enjoined against alienating the thing, somehow this all adds up to a paper levy for which the sheriff deserves compensation.

Continuing to play along with the court's two misconceptions, it was possible for Judge Mansfield to uphold the levy on another basis. The principle of *Leasing Consultants* prevents *JD*'s future interest in a certificate to be property not capable of delivery. A future interest in a thing *is* the thing, according to that opinion.[306] But if we really had a genuine pledge before us (which we do not), then AD_2 (as agent of AD_1) owed *JD* a contingent debt–*JD*'s right to a surplus in case of a foreclosure sale. As property not capable of delivery, it could be paper-levied under § 5232(a). On this basis, Judge Mansfield could have upheld the levy. He could then have dispensed with the restraining notice, the role of which is unexplained and mysterious in Judge Mansfield's analysis. On this view (and continuing with the misconception that AD_2 was a pledgee holding *JD*'s property capable of delivery), AD_2 had a contingent duty to pay a surplus to *JD*. But can the sheriff levy a sub-bailee once removed from *JD* for this surplus?[307] According to CPLR § 5232(a), "the sheriff shall levy upon any interest of the . . . judgment debtor in personal property not capable of delivery . . . by serving a copy of the execution upon the garnishee." A garnishee is defined as "a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest."[308] So, as long as *JD*'s right to the surplus is indeed property not capable of delivery, the levy of the remote bailee was proper. Of course, poundage would be determined on the value of this contingent right to a surplus, not on the value of the underlying certificated security, which is not leviable under the CPLR.[309] And, we should add, there *was* no possible surplus, since $AD_{1\text{-}2}$ were bailees, not pledgees.

Judge Mansfield thought the certificate, not the surplus, was the thing levied. Of course, there *was* no certificate. There was only AD_2 intangible obligation to obey the instructions of AD_1 as to a security entitlement, which means that Judge Mansfield was accidentally correct. There *was* a levy of the treasury bill, which was property not capable of delivery! Nevertheless, CPLR § 5201(c)(4), as it then existed, would still have not permitted the levy of AD_2. According to CPLR § 5201(c)(4) as it was then in effect:

> Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the

---

[304] Judge Dorothy Eisenberg interprets *Knapp* oddly when she cites it for the following proposition:

> New York courts have not held the Sheriff's failure to obtain possession of the property to be seized fatal to the lienor's interest in every case, but the courts have made an exception only where the failure is caused by a third party's failure to comply with the Sheriff's directives to turn over the property.

In re Flax, 179 B.R. 408, 412 (Bankr. E.D.N.Y. 1995) (citing *Knapp*). The sheriff had no power to direct a pledgee to surrender possession. A paper levy implies such a direction. CPLR § 5232(a) (fifth sentence). But *Knapp* holds that the levy did *not* involve property not capable of delivery.

[305] CPLR § 5222(b).

[306] *See supra* text accompanying notes 277-82.

[307] AD_1 could terminate AD_2's bailment at any time, in which case AD_2's obligation to pay the surplus to *JD* would disappear.

[308] CPLR § 105(i).

[309] Unless Article 8 overrules it in this regard. On this possibility, see *infra* text accompanying notes 326-35.

> garnishee; except that in the case of a security which is transferable in the manner set forth in section 8-320 of the uniform commercial code, the firm or corporation which carries on its books an account in the name of the judgment debtor in which is reflected such security, shall be the garnishee; provided, however, that if such security has been pledged, the pledgee shall be the garnishee.[310]

Old UCC § 8-320 governed ownership of pro rata interests as reflected in book entries of brokers. What old CPLR § 5201(c)(4) is saying is that AD_2 could not be the garnishee. Only AD_1 (in Maryland) was. Looking past the *Knapp* court's two misconceptions, we can see that the case was still wrongly decided.

The *Knapp* case was, to say the least, a weak *Erie* guess as to the state of New York law. In fact, AD_2 was no pledgee and so owed no contingent debt to pay a surplus. Rather, AD_2 was the bailee for *JD* (and AD_2 a sub-bailee). Furthermore, the so-called certificated security was no such thing. It was what new Article 8 calls a "security entitlement," which means that the property was not leviable at all, since AD_2 held no property traceable to *JD*. To understand this last claim we must delve into the law of Article 8 and the transfer of securities.

5. Article 8 securities

Levying securities that have been pledged as collateral poses special complexity because it is possible that Article 8 of the UCC overrules CPLR in the case of pledgees. Accordingly, we turn next to the interaction of judicial liens and Article 8 of the UCC.

a. Securities Entitlements

Over the past thirty-five years, the stock certificate, like the vinyl recording, has become passé. Instead, certificates issued by publicly traded companies have been *immobilized*. The issuer utters a jumbo certificate, which is held by the Depository Trust Company (DTC), a corporation organized under the banking laws of New York. The DTC then issues pro rata shares in the jumbo certificate to various brokers. The brokers then sell pro rata shares in their pro rata shares to customers or other brokers. The typical American shareholder is therefore many times removed from the jumbo certificate located in DTC's carefully guarded vault in New York City.[311]

Article 8, much revised in 1994,[312] calls the shareholder's remote interest in a jumbo certificate a security entitlement.[313] According to UCC § 8-112(c):

> The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

---

[310] For the text of old 5201(c)(4), see Koehler v. Bank of Bermuda, Ltd., 56 U.C.C. Rep. Serv. 2d (Callaghan) 782, 784 (S.D.N.Y. 2005).

[311] *See* Charles W. Mooney, *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 CARDOZO L. REV. 307, 317-21 (1990).

[312] Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time?: The Radical Reform of Secured Lending on Wall Street*, 1994 COLUM. BUS. L. REV. 291.

[313] UCC § 8-102(17) (defining security entitlement as "the rights and property of an entitlement holder with respect to a financial asset specified in Part 5"). Part 5 sets forth various rules of issuance and transfer with regard to security entitlements. A financial asset is defined as, among other things, a security. UCC § 8-101(9)(i).

To be distinguished from the security entitlement is the uncertificated security. The uncertificated security was invented in 1977 to solve the "paper crunch" of the 1960s, during which stock markets could not phsyically handle the transfer of certificated shares. It never caught on, however, because immobilizing jumbo certificates with the DTC proved popular and easy. Nevertheless, they are used by mutual funds, many of which will be located in New York. Jeanne L. Schroeder & David Gray Carlson, *Security Interests Under Article 8 of the Uniform Commercial Code*, 12 CARDOZO L. REV. 557, 614 (1990). Mutual fund shares might be held by a broker for the benefit of the customer, in which case the customer owns a security entitlement, not an uncertificated security. But mutual funds may register the ownership interests of customers directly. If so, the uncertificated security of a judgment debtor can be levied only "by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d)." UCC 8-112(b).

"Legal process" is not a term the UCC defines, but courts would be justified in interpreting it to mean either an execution followed by a paper levy, a turnover order or the appointment of a receiver. In New York, each of these establishes a judicial lien on personal property.[314] If a debtor has granted a security interest in the security entitlement, UCC § 8-112(d) provides a different rule:

> The interest of a debtor in. . . a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

This provision applies only where the securities intermediary (*i.e.*, the broker) has attorned to–that is, has agreed to follow only the instructions of–*SP*. The UCC calls attornment "control."[315] Control is a mode for perfecting Article 9 security interests.[316]

Section 8-112(c) requires that "legal process" be directed only to the broker with whom the debtor has dealt. In *Knapp v. McFarland*,[317] the sheriff levied AD_2 on the theory that AD_2 was supposedly holding paper for AD_1, which JC_1 in turn held for *JD*. In truth, AD_1 invested the cash in a pro rata share of AD_2's treasury bill and therefore had a security entitlement. Under modern § 8-112(c), enacted in 1984, only AD_1 could be garnished to reach this property–not AD_2. Nevertheless, even at the time *Knapp* was decided, we saw that the CPLR had a rule requiring that remote brokers could not be garnished, a rule the *Knapp* court overlooked.[318] Today, § 5201(c)(4) simply cross-references to Article 8, which now takes up the rule the CPLR had introduced.[319]

Suppose *JC* properly levies a broker with whom *JD* has dealt. The security entitlement is undoubtedly property not capable of delivery. According to CPLR § 5232(a), a garnishee must "pay all such debts [*i.e.*, debts owed to *JD*] and "transfer all such property [*i.e.*, *JD*'s property not capable of delivery in control of *JD*'s broker]."[320] The broker's obligation to *JD*–a securities account[321]–certainly cannot be called a debt. A debt is defined in New York as an amount due or certain to become due.[322] Therefore, the broker holds *property* (not debt) of the judgment debtor and so must transfer the property to the sheriff.

The transfer from broker to sheriff is accomplished under UCC § 8-501(b):

> [A] person acquires a security entitlement if a securities intermediary:
> (1) indicates by book entry that a financial asset has been credited to the person's securities account;. . . or
> (3) becomes obligated under other law. . . to credit a financial asset to the person's securities account.

Since the broker is obligated by law to credit the sheriff, § 8-501(b)(3) suggests that, at the moment of the levy, the sheriff instantly owns the security entitlement. If the broker resists, then, as with all paper levies, *JC* must bring a turnover proceeding against the broker. According to § 5225(c), "The court may order any person to execute and deliver any document necessary to effect payment or delivery."

What then can the sheriff do with the security entitlement now registered to her in her name?

---

[314] CPLR § 5202.

[315] UCC § 8-106(d) ("the securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder").

[316] UCC § 9-314(a).

[317] 462 F.2d 935 (2d Cir. 1972).

[318] *See supra* text accompanying notes 308-09.

[319] For a different result even before the enactment of UCC 8-112(c), see Fidelity Partners, Inc. v. First Trust Co. of New York, 58 F. Supp. 2d 55 (S.D.N.Y. 1999) (New York indenture trustee who issued a jumbo certificate to a broker who sold a pro rata share to a Philippine Bank who sold a pro rata share to a Philippine resident not a proper garnishee).

[320] CPLR § 5232(a) (fifth sentence).

[321] A securities account is defined as "an account to which a financial assets is or may be credited in accordance with an agreement under which the person is maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset." UCC § 80501(a).

[322] CPLR § 5201(a).

Unfortunately, the sales mechanism of the CPLR is quite inadequate to the modern Article 8 regime. According to CPLR § 5233(a):

> The interest of the judgment debtor in personal property, obtained by a sheriff pursuant to execution or order . . . shall be sold by the sheriff at public auction at such time and place and as a unit or in such lots, or combination thereof, as in his judgment will bring the highest price . . . . The property shall be present and within the view of those attending the sale unless otherwise ordered by the court.

This section requires that the sheriff must sell it at a public auction.[323] If the security entitlement is in shares trading on a stock exchange, certainly the stock exchange itself should be viewed as an auction. There is the difficulty that, at the auction, the property to be sold must be in the view of those attending the auction. A security entitlement, however, is quite invisible (though the broker's records could be viewed). Fortunately, pursuant to § 5233(a), the court can order a different sales procedure. But presumably this puts everyone to the trouble of a court hearing.

Section 5233(b) also imposes notice requirements with regard to the sale. Notice must be posted in three public places in the town in which then sale is to be held. Since the stock exchanges are typically in New York City, the sheriff will be able to substitute newspaper ads for public posters. Notice requirements with regard to publicly traded stock is a useless formality. Given the fact that the auction via the stock market is supposed to be highly efficient,[324] notice to potential buyers serves no role in increasing the amount bid. The court might as well waive notice pursuant to its discretion to change the rules under § 5240.[325] This too, however, will require a hearing.

Section 5233(c) indicates that "[t]he court may direct immediate sale or other disposition of property with or without notice if the urgency of the case requires." With stock, however, the case is rarely urgent. In any case a court order is required, slowing up and increasing the cost of the liquidation process. In truth, the CPLR is abysmally drafted with regard to securities, in light of the recent invention of the security entitlement.

b. Certificated Shares
(i) Post-Judgment Execution

While certificated shares no longer trade very often in the stock market, they are commonly used in closely held corporations. The CPLR is strangely contradictory with regard to levying these shares.

According to CPLR § 5201(c)(4):

> Where property or a debt is evidenced by a . . . certificate of stock of an association or corporation, the. . . certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8-112 of the Uniform Commercial Code shall govern the extent to which and the means by which any interest in a certificated security. . . may be reached by garnishment,

---

[323] Phansalkar v. Andersen Weinroth & Co., 211 F.R.D. 197, 202 (S.D.N.Y. 2002) (assuming levied securities must be sold pursuant to auction). The sale of stock is immune from federal and state securities laws. Kohl v. Arlen Realty, Inc., 120 A.D.2d 414, 465 N.Y.S.2d 681 (2d Dept. 1983).

[324] Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984).

[325] According to CPLR § 5240:

> The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. . . .

No similar provision exists in Article 62, governing prejudgment attachment. Nevertheless, at least on appellate panel has suggested that the court has discretion to release funds in hardship cases (though it declined to do so for the purpose of paying the defendant's attorneys, where millions of dollars were missing in a fraud). Corporacion Nacional del Cobre de Chile v. Hirsch, 242 A.D.2d 183, 673 N.Y.S.2d 681 (1st Dept. 1998). In comparison, the Second Circuit ruled that there is no discretion to deny attachment because the court doubts whether the levied asset is valuable. Capital Ventures v. Republic of Argentina, 443 F.3d 214 (2d Cir. 2006).

> attachment or other legal process.[326]

We may pause to consider some curiosities produced by § 5201(c)(4). First, garnishees are defined as *non-debtors* in possession of *debtor* property.[327] Yet § 5201(c)(4) says that *anyone* in possession (including *JD*) is to be the garnishee. But to what end? Paper levies of garnishees under § 5232(a) are limited to property not capable of delivery, yet § 5201(c)(4) insists that certificated securities are to be considered *capable* of delivery. Paper levies of property capable of delivery are permitted as part of pre-judgment attachment, however.[328] Here is makes sense to identify the defendant as a garnishee.

In addition, § 5201(c)(4) seems to be saying that UCC § 8-112 governs the extent to which certificated securities may be reached by judicial process. Yet CPLR § 5232(b) states:

> The sheriff. . . shall levy upon any interest of the judgment debtor in personal property capable of delivery by taking the property into custody *without interfering with the lawful possession of pledgees*. . .[329]

According to CPLR § 5232(b), the sheriff may *not* levy pledged shares, even if there is a valuable debtor equity in them.[330] Arguably the UCC imposes a different rule. According to § 8-112(a):

> The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the. . . levy, except as otherwise provided in subsection (d).

Does this section not authorize the sheriff to take possession even from a pledgee? If so, § 5232(b) is overruled, because, as we have seen, whenever the UCC conflicts with a non-UCC provision, the UCC prevails.[331] And, independently, CPLR § 5201(c)(4) specifically exalts Article 8 over the CPLR.

Complicating our analysis further is § 8-112(d):

> The interest of a debtor in a certificated security for which the certificate is in possession of a secured party. . . may be reached by a creditor by legal process upon the secured party.

The problem we now face is that CPLR § 5201(c)(4) subordinates the CPLR to the UCC. Yet at the crucial moment of governing the levy of pledged certificated securities, the UCC sends us right back to the CPLR for the definition of "legal process." There we learn that the sheriff may *not* seize pledged certificated securities under § 5232(b). Yet this is preempted by § 8-112(a), which permits seizure of *JD*'s interest in the certificate. We are thus caught in a *renvoi*.

The vicious circle just described was addressed obliquely in *Knapp v. McFarland*.[332] In *Knapp*, the court upheld the paper levy of what it took to be a pledged certificated security under New York law (though in truth *SP* had an intangible security entitlement).[333] Here is how Judge Mansfield described the relation is § 8-112(a) and CPLR § 5232(b)?

> [*D*] argues that the Sheriff's claim to poundage is defeated by § 8-317 [now numbered as § 8-112(a)], which provides that no levy upon an outstanding security shall be valid until it is actually seized by the

---

[326] This section overrules the view that certificated shares could not be reached by writ of execution. Ajax Craftsmen, Inc. v. Whinston, 269 N.Y. 7, 198 N.E. 611 (1935).

[327] CPLR § 105(i) ("A 'garnishee' is a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest").

[328] *Id*. § 6214(a).

[329] Emphasis added.

[330] In dictum, the court in Cohen v. First National City Bank, 49 Misc. 2d 141, 146, 267 N.Y.S.2d 146, 151 (Civ. Ct. N.Y. Co. 1966), says otherwise, but it assumes that the statute says sheriff may not interfere with the senior secured party's security interest. In fact, the statute says that the sheriff may not interfere with the *possession* of the senior secured party.

[331] UCC § 10-103; *see supra* text accompanying notes 44-45.

[332] 462 F.2d 935 (2d Cir. 1972).

[333] *See supra* text accompanying notes 297-98.

> officer. However, that statute was not enacted for the purpose of determining what levy would suffice to entitle a sheriff to poundage or to enforce a money judgment against a judgment debtor. Its purpose is to define the rights of third parties claiming an interest in attached personal property. More specifically its effect is to protect bona fide purchasers for value of property subject to a judgment creditor's lien by invalidating a levy as to such parties unless the sheriff has taken actual possession.[334]

In other words, Judge Mansfield holds that § 8-112(a) is compatible with CPLR § 5232. The meaning of § 8-112(a) is that, if the sheriff seizes the certificate, there can be no "protected purchaser" who takes free and clear of *JC*'s execution lien. But § 8-112(a) does not mean the sheriff *must* or even may levy by seizure.

Putting together the above thoughts, *Knapp* holds that Article 8 does not require levy by seizure of the certificate. But it is equally true that UCC § 8-112(a) authorizes it. True, § 8-112(d) covers pledged securities. So we may concede that the specific overrules the general[335]–in the case of pledges, only § 8-112(d) governs, not § 8-112(a). Yet § 8-112(d) requires us to know what "legal process" is. Well, legal process includes the levy pursuant to execution. And UCC § 8-112(a) defines levy as seizure of the certificate. So, at the end of the day, perhaps the sheriff may break into *SP*'s vault and take the certificate.

(ii) Pre-Judgment Attachment

Whatever may be the case for post-judgment judicial liens on certificated securities, the matter stands differently for pre-judgment orders of attachment. Pre-judgment attachment does not utilize the concept of property capable of delivery. Paper levies are authorized for any personal property, whether held by the debtor or a third party. So in *Proteus Food & Industries, Inc. v. Nippon Reizo Kabushiki Kaisha*,[336] *AD* held *JD*'s certificated security in New York as part of a voting trust. *AD* was therefore no pledgee. The sheriff served *AD* with an order of attachment under CPLR § 6214(a). But unlike post-judgment levy, pre-judgment paper levies are perfectly valid with regard to certificated securities. Among the things a § 6214(a) levy signifies is an injunction directed at the garnishee prohibiting disposition of the property the garnishee holds.[337] Whereas § 8-112(a) states that the "interest of a debtor in a certificated security may be reached by a creditor only by actual seizure," § 8-112(e) provides:

> A creditor whose debtor is the owner of a certificated security. . . is entitled to aid from a court. . . by injunction or otherwise, in reaching the certificated security. . .

On this basis, the *Proteus Food* court upheld the paper levy of shares held by the custodian.

Location of the certificate outside New York has proved an impediment to pre-judgment attachment. In *Koehler v. Bank of Bermuda, Ltd.*,[338] *P* obtained an order of attachment against *SP*, to whom *D* had pledged shares. *SP* kept the shares in Bermuda, but *SP* was also present in New York for *Shaffer v. Heitner* purposes. After judgment was entered against *D*, the *Koehler* court signed an *ex parte* order commanding *SP* to bring the shares from Bermuda to New York. Later the court regretted its action and rescinded it on two grounds. First, *D* and *P* had settled, which had the effect of dissolving the attachment. Second, as an alternative ground, the court ruled that it could not order a person present in New York to bring shares from outside the state into New York. the court reasoned that the situs of the stock was Bermuda. But so what? The levy of the order of attachment constituted a command to

---

[334] *Id.* at 942.
[335] *See supra* n.69.
[336] 4 UCC Rep. Serv. 961 (S. Ct. New York County 1968).
[337] CPLR § 6214(b) (fifth sentence) (Until such. . . delivery is made. . . the garnishee is forbidden to make or suffer any. . . transfer of, or any interference with any such property. . . to any other person other than the sheriff. . . ").
[338] 56 U.C.C. Rep. Serv. 2d (Callaghan) 782 (S.D.N.Y. 2005).

SP to "deliver all such property [*i.e.*, personal property of *D* in the possession of *P*]. . . to the sheriff."[339] If the levy was valid, then it *already* constituted an injunction to deliver. Levies last only ninety days, unless extended by, *inter alia*, bringing a turnover proceeding against *SP* pursuant to § 5225(b). There is no evidence in the case that the levy had been so extended, but, if it had been, the order seems well within the jurisdiction of the court. So, for example, a *defendant* (as opposed to *AD*) has been ordered to bring certificated shares to New York from Bermuda.[340] Why should it make a difference that *AD* is so ordered?

There is nevertheless troubling dictum in *ABKCO Industries, Inc. v. Apple Films, Inc.*,[341] where the court upheld garnishment of a film royalty owed by a New York *AD* to a foreign *D*. Distinguishing the intangible royalty from negotiable instruments, the court held

> Tangible personal property obviously has a unique location and can only be attached where it is. It is true that some intangibles are deemed to have become embodied in formal paper writings, *e.g.*, negotiable instruments, and in such instances attachment depends on the physical presence of the written instrument within the attaching jurisdiction.[342]

This remark overlooks the injunctive effect a levy of an order of attachment has. Since the remark is mere dictum, it should be ignored as contrary to CPLR § 6214(a).[343]

(iii) Perfection By Filing

One of the political programs of the 2000 amendments to Article 9 of the UCC was to pulverize the bankruptcy trustee for the benefit of Article 9 lenders. But this could only be done by pulverizing judgment creditors at state law, since bankruptcy trustees have, as of the day of the bankruptcy petition, all the powers of judgment creditors.[344] Any attempt by the UCC to attack bankruptcy trustees directly would likely be struck down on constitu-tional grounds. Otherwise, the drafters of Article 9 would have done it.

Accordingly, one of the important Article 9 reforms is to permit *SP* to perfect a security interest in "investment property" by filing an ordinary financing statement.[345] "Investment property" is defined to include certificated securities and security entitle-ments.[346] Therefore, after a sheriff levies, whether by serving the execution in case of the security entitlement or by seizing certificated securities, a secured party may emerge who has perfected a senior security interest in the levied property by filing a financing statement.

One possibility is for *JC* is to convert the judicial lien into an Article 9 security interest. Suppose, for example, that the sheriff, on behalf of *JC* has garnished *JD*'s broker with regard to a security entitlement. We have seen that the sheriff can insist that the broker attorn to the sheriff. We also suggested that the sheriff can use the stock market as an auction (with court assistance).[347]

If the sheriff's power could fall under the concept of control, then *JC* would be a secured party with priority over a secured party who has perfected by a mere filing.

The impediment is that the definition of "control" of a security entitlement is tied to the concept

---

[339] CPLR § 6214(b) (third sentence).
[340] United States v. Ross, 302 F.2d 831 (2d Cir. 1962) (tax lien case).
[341] 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976).
[342] 39 N.Y.2d at 676, 350 N.E.2d at 901, 385 N.Y.S.2d at 513.
[343] Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., 41 A.D.3d 25, 836 N.Y.S.2d 4 (1st Dept. 2007) (turnover order requiring debtor to bring certificated shares from Indonesia).
[344] 11 U.S.C. § 544(a).
[345] UCC § 9-312(a).
[346] UCC § 9-102(a)(49).
[347] *See supra* text accompanying notes 323-24.

of a purchaser.[348] A "purchase" is a "voluntary transaction creating an interest in property."[349] Judicial lien creditors are not purchasers.[350] So the sheriff has no control. But what if *JD* could be persuaded to sign a security agreement with the sheriff, for the benefit of *JC*? *JD*'s acquiescence to the levy would be the consensual grant of a security interest, transforming *JC*'s judicial lien into a senior security interest, which trumps *SP*'s perfect-by-filing security interest.[351]

According to CPLR § 5225(c), a court "may order any person to execute and deliver any document necessary to effect payment or delivery." Presumably, *JD* may be ordered to sign a security agreement for the benefit of *JC*, but this would not make *JC* a purchaser as *JD*s' action cannot be considered voluntary under these circumstances.

6. Negotiable Instruments

Section 5201(c)(4) proclaims negotiable instruments property capable of delivery. Therefore the sheriff must levy by seizure.[352] The same puzzles about pledgees will play out with regard to negotiable instruments.

Negotiability differentiates between bearer paper and paper requiring special indorsement. Where the sheriff levies bearer paper, the sheriff can sell it to a buyer at the execution sale who then becomes a holder. The maker or acceptor will then be obligated to honor the instrument.[353] The buyer, however, can never be a holder in due course;[354] if there is some adverse claim superior to the buyer's or an maker-issuer's defense, the adverse claim or defense will prevail.[355]

If, on the other hand, the debtor's indorsement is missing, the buyer at the foreclosure sale should be able to compel *JD* to supply the missing indorsement, thereby making the buyer a holder.[356] If the maker-issuer does not pay, the buyer can sue the maker-issuer for payment.[357]

While the law of the levied negotiable instrument is not difficult, a regrettable opinion exists within the New York oeuvre. In *In re Flax*,[358] a sheriff levied a certified check made out to *JD* about 100 days before bankruptcy. Once the bankruptcy petition was filed, the sheriff voluntarily returned the check to the attorneys for *JD*, who presumably held it in trust for the bankruptcy trustee. This should not have ended the levy. Sheriffs have a duty to return levied material to the bankruptcy estate, according to some courts.[359] The sheriff should not be taken to intend a dissolution of *JC*'s rights. Rather, the bankruptcy estate is obliged to provide adequate protection of *JC*'s valid lien on the certified check as condition to its use, sale or lease.[360]

---

[348] UCC § 9-106 ("A person has control of a certificated security, uncertificated security, or security entitlement as provided in Section 8-106"). Section 8-106 limits all forms of control to purchasers.

[349] UCC § 1-201(32). A purchaser, not surprisingly, is "a person who takes by purchase." *Id.* § 1-201(33).

[350] Federal Deposit Insurance Corp. v. Malin, 802 F.2d 12, 20 (2d Cir. 1986) (real estate case).

[351] This actually occurred in Citibank, N.A. v. Prime Motor Inns, 98 N.Y.2d 743, 780 N.E.2d 503, 750 N.Y.S.2d 818 (2002). The case did not involve investment securities, however, and JC_1, who received the consensual assignment of a payment intangible, stupidly forgot to perfect, so that JC_2 snatched away priority.

[352] CPLR § 5232(b).

[353] Where the sheriff levies personal checks made out to the debtor, the drawer of the check may well stop the payee bank from paying. N.Y.U.C.C. § 4-403(1); Argirion & Finkel v. Marciante Luncheonette II, Inc., 64 Misc. 2d 660, 315 N.Y.S.2d 448 (S. Ct. Kings Co. 1970). Nevertheless, the buyer of the personal check at an execution sale would have the right to sue the drawer for breach of warranty. The buyer must first become a holder, however. N.Y.U.C.C. § 3-413(2).

[354] N.Y.U.C.C. § 3-302(3)(a); *see* UCC § 3-302(c).

[355] *Id.* UCC §§ 3-306(a) & (b), 3-306.

[356] CPLR § 5225(c); N.Y.U.C.C. § 3-201(1); *see* Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., 41 A.D.3d 25, 836 N.Y.S.2d 4 (1st Dept. 2007) (court could order debtor to execute documents needed to transfer ownership of certificated shares of stock). Under new Article 3, the transferee can skip the step of obtaining the judgment debtor's signature and proceed directly against the maker-acceptor. Where *JC* relies on CPLR § 5225(c), *JC* must make the person executing the document a party to the supplementary proceeding. Sochor v. International Bus. Machines Corp., 60 N.Y.2d 254 , 457 N.E.2d 696, 469 N.Y.S.2d 591 (1983).

[357] N.Y.U.C.C. § 3-413(a).

[358] 179 B.R. 408 (Bankr. E.D.N.Y. 1995).

[359] Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773 (8th Cir. 1989); David Gray Carlson, *Turnover of Collateral in Bankruptcy: Must a Secured Party in Possession Volunteer?*, 6 J. BANKR. L. & PRAC. 483 (1997).

[360] 11 U.S.C. § 363(e).

Nevertheless, the *Flax* court ruled that the levy had dissolved; *JC* was unjustly demoted to the indignity of an unsecured creditor. First, the *Flax* court incomprehensibly assumed that the sheriff had levied property not capable of delivery, so that § 5232(a) governed the levy. It then assumed that the levy was unperfected because the sheriff negligently did not obtain the necessary indorsements to create a bearer instrument. There is no such principle in § 5232(a), even if it applied. The sheriff has no duty whatever to obtain signatures. This the buyer at the execution sale can do.[361] Rather, § 5232(a) indicates that, if property is transferred to the sheriff, the levy does not lapse.[362]

Meanwhile, a non-negotiable note is property not capable of delivery.[363] Yet it might still be an instrument under the Article 9 definition.[364] Prior to 2000, an *SP* claiming instruments was considered unperfected unless it had possession of them. Therefore, it became possible for *JC*s to sneak in and paper-levy *AD* by serving the execution, even if the lender had filed a financing statement, thereby depriving the secured lender of collateral.[365] After 2000, however, filing with regard to instruments (including negotiable instruments) became good enough to beat judgment creditors any instrument, negotiable or not.[366]

7. Partnership Interests

JD may be a partner in some partnership. New York Partnership Law provides a "charging order" procedure whereby the court "charges" the partnership interest of the judgment debtor.[367] Presumably this means that the court issues a turnover order requiring the partnership to pay over to *JC* any distributions the partnership may make to *JD*.

A charging order is not the exclusive mode for creating a lien on partnership distributions. The sheriff may levy pursuant to an execution by serving a partner of the judgment debtor.[368] Even service upon a limited partner binds the general partnership interest of a judgment debtor.[369] The capital account of a partner, however, may not be levied.[370] This capital is partnership property and is, in effect, like any other asset of the partnership, which creditors of individual partners cannot generally reach.[371] Whereas creditors of the partnership can reach individual partner assets, the converse is not true.

The commencement of a charging order proceeding does not create a lien. Rather, the lien arises when the court issues an order. It is therefore open for an execution creditor to seize priority by levying the partnership prior to the issuance of the charging order.[372] In this respect, the charging order is quite identical to the turnover order under § 5225(b).

8. Payment or Delivery by the Garnishee

Suppose the sheriff garnishes *AD* on behalf of *JC* and *JC* either pays the debt or delivers

---

[361] Monitor Co. v. Confianza Furniture & Appliance Co., 142 N.Y.S.2d 140 (S. Ct. King's Co. 1955) (buyer of pledged certificates sold at an execution sale entitled to inspect the books of the issuer, because *JD* had this right).

[362] CPLR § 5232(a) (eighth sentence).

[363] *See* CPLR § 5201(c)(4) (only negotiable instruments are capable of delivery).

[364] UCC § 9-102(a)(47) ("'Instrument' means a negotiable instrument or any other writing that evidence a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in is transferred by delivery with any necessary indorsement or assignment").

[365] Berkowitz v. Chavo Int'l, Inc., 74 N.Y.2d 144, 542 N.E.2d 1086, 544 N.Y.S.2d 569 (1989).

[366] UCC § 9-312(a).

[367] N.Y.P.L. § 54(1). A court may also appoint a receiver of the judgment debtor's partnership interest. *Id*.

[368] Princeton Bank & Trust Co. v. Berley, 57 A.D.2d 348, 394 N.Y.S.2d 714 (2d Dept. 1977), *aff'd mem.* 21 N.Y.2d 800, 235 N.E.2d 772. 288 N.Y.S.2d 631 (1968); *see* CPLR § 5201(3)("Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee").

[369] Executive House Realty v. Hagen, 108 Misc. 2d 986, 991, 438 N.Y.S.2d 174, 179 (S. Ct. Queens Co. 1979).

[370] MacDonald v. MacDonald, 226 A.D.2d 594, 641 N.Y.S.2d 347 (2d Dept. 1996).

[371] Princeton Bank & Trust Co. v. Berley, 57 A.D.2d 348, 394 N.Y.S.2d 714 (2d Dept. 1977), *aff'd mem.* 21 N.Y.2d 800, 235 N.E.2d 772. 288 N.Y.S.2d 631 (1968) (real estate of partnership immune from execution by creditor of a partner).

[372] Garland D. Cox & Assocs. v. Koffman, 48 N.Y.2d 878, 400 N.E.2d 302, 424 N.Y.S.2d 360 (1979).

property to the sheriff. According to CPLR § 5209:

> A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.[373]

A similar provision for pre-judgment attachment exists.[374] These provisions are designed to assure *AD* that paying the sheriff is safe and will not result in a double liability. They provide a "safe harbor that preempts the judgment debtor's. . . claim that the garnishee should have investigated the validity of the execution."[375]

Section 5209 has a design flaw that the UCC helps to remedy. Suppose *JD* transfers *AD*'s obligation to pay, but *SP* has authorized *JD* to collect from *AD* (non-notification accounts financing). *AD* is then garnished. If *AD* pays the sheriff after the assignment, § 5209 can be of no help, if we read it literally. Section 5209 requires, as of the time of the payment, that there be a debt *AD* owes to the *judgment debtor*. If *JD* has assigned absolutely to *SP*, *AD* owes *nothing* to *JD*. Rather, *AD* owes *SP* and no one else.

Nevertheless, the New York Court of Appeals has managed to rule otherwise. In *Tri-City Roofers, Inc. v. Northeastern Industrial Park*,[376] *JD* obtained a judgment against *AD* and immediately assigned it absolutely to *SP*.[377] Because the payment intangible in question was secured by a judgment, the UCC did not apply.[378] The sheriff then levied *AD* on behalf of *JC*. *AD* paid the sheriff. The court ruled, "A debtor in order to be charged with a duty to pay a debt to an assignee, must first have actual notice of the assignment."[379] This slides over the fact that, by its terms, § 5209 applies only if *AD* is paying to the sheriff "a debt he owes the judgment debtor."[380] Where *no* debt is owing because of an absolute assignment, the section does not seem to apply by its terms.

In *Tri-City*, the UCC would have helped *AD* expressly, if it had applied. According to UCC § 9-406(a):

> an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee.[381]

But is paying the sheriff the same as paying the assignor? The answer is properly yes. The levy implies that the sheriff succeeds to whatever rights *JD* had, including the right to receive cash in satisfaction

---

[373] The reference to "order" means turnover pursuant to CPLR § 5225(b). Weininger v. Castro, 462 F. Supp. 2d 457, 499-503 (S.D.N.Y. 2006).

[374] CPLR § 6204.

[375] Chin Sung Yu v, Riggs Nat'l Bank, 248 A.D.2d 235, 670 N.Y.S.2d 187 (1st Dept. 1998). Section 5209 therefore becomes a reason not to permit an interpleader, when only one levy exists, and where § 5209 protects *AD* from any double liability. Weg & Myers v. Security Sys. by Hammond, Inc., 167 Misc. 2d 1042, 641 N.Y.S.2d 1016 (Civ. Ct. N.Y. Co. 1996).

[376] 61 N.Y.2d 779, 461 N.E.2d 298, 473 N.Y.S.2d 161 (1984).

[377] *SP* in this case was the attorney to *D*. The court refers to *SP*'s recourse against *D* if *SP* did not collect the full judgment. "Having assigned its judgment with recourse, it is only the possibility of recourse by its assignee that gives [the assignor] the required status as a party aggrieved." 61 N.Y.2d at 780, 461 N.E.2d at 298, 473 N.Y.S.2d at 161. This "recourse" is consistent with the absoluteness of assignment. It is in the nature of a warranty of the product sold.

[378] UCC 9-109(d)(9).

[379] 61 N.Y.2d at 780, 461 N.E.2d at 298, 473 N.Y.S.2d at 161. If *AD* has notice of the assignment, then § 5209 or § 6204 does not protect *AD* from having to pay the assignee. Continental Cas. Co. v. Metropolitan Savs. & Loan Assn., 46 Misc. 2d 456, 259 N.Y.S.2d 612 (Civ. Ct. N.Y. Co. 1965).

[380] CPLR § 5209.

[381] An account is an obligation for goods or services, for any kind of suretyship, for energy provided, for hire of a vessel, for a credit card, for lottery winnings, for rights evidenced by chattel paper, commercial tort claims, deposit accounts, investment property, letter of credit rights, or money advanced. UCC § 9-102(a)(2). Chattel paper is a security agreement or lease of personal property. 9-102(a)(11). A payment intangible is an account or other monetary obligation. UCC § 9-102(a)(61).

of antecedent debt. Therefore, if *AD* extinguishes the debt by paying *JD* instead of *SP*, *AD* likewise extinguishes it by paying the sheriff. This remains so until *SP* notifies *AD* that *AD* must pay only *SP*.

The foregoing implies that, even if *JD* has absolutely assigned the payment intangible to *SP* prior to the execution lien, *JD* still retains an interest in the property until such time as *SP* notifies *AD* to pay *SP* exclusively. And the meaning of *Tri-City* is that the principle of UCC § 9-406(a) is part of the common law in New York.[382] For this reason CPLR § 5209 does indeed apply by its terms, when *JD* has conveyed away the payment intangible.[383]

Prior to 2000, the predecessor to this UCC provision applied only if *AD* owed an account or chattel paper or if *AD* owed a general intangible and *D* had assigned the general intangible for security. If, however, *D* made an absolute assignment of a general intangible, the UCC did not apply.[384] Article 9 now applies both to the sale *and* the hypothecation of "payment intangibles."[385]

Where *SP* is the absolute assignee of *AD*'s obligation, the situation is simple enough. Prior to notification, *AD* is privileged to pay the sheriff. After notification, *AD* must pay only *SP*. But what if *SP* only claims a security interest in *AD*'s obligation and *AD* knows about it? Is *AD* free to pay the sheriff? The answer is yes, unless *SP* has notified *AD* "that payment is to be made to the assignee."[386] Typically, secured parties permit their debtors to collect payment intangibles until default occurs. After default, *SP* can notify *AD* that *D*'s power to receive payment has terminated.[387]

These principles were overlooked in *Lincoln Rochester Trust Co. v. S.C. Marasco Steel, Inc.*,[388] where *AD* knew of and "assented to" *SP*'s perfected security interest when a sheriff levied for *JC*. *AD* paid *JC* directly. It is not clear whether assent meant that *AD* had undertaken to pay *SP* and no one else. If *JD* had authority to collect, *AD* should have been able to discharge its obligation to *JD* by paying *JC* directly. CPLR § 5209 says this expressly. Yet *AD* was made to pay again. Section 5209 was nowhere cited.[389]

Section 5209 has its dark side. It protects banks that honor garnishments, even though the bank account contains exempt funds.[390] The burden is on judgment debtors to come forward and claim that the levy affects exempt property.[391] This effect of CPLR § 5209 has become a *cause celebre*. Collection agents with judgments against the elderly have begun to garnish bank account which obviously contain nothing but social security funds–exempt under federal law.[392] The strategy is that the elderly person is too intimidated or confused to seek a refund from the collecting agent.[393] Under New York law, a debtor must be given notice that property to be levied might be exempt.[394] This notice includes the address of *JC*'s attorney.[395] These rules mitigate but do not remove the risk that a bank will

---

[382] In other words, New York does *not* follow the New York rule (first in time is first in right; *AD* pays at her own risk). On the misnamed New York rule, see Luize E. Zubrow, *Integration of Deposit Account Financing into Article 9 of the Uniform Commercial Code: A Proposal for Legislative Reform*, 68 MINN. L. REV. 899, 971 (1984).

[383] On this humble point, the house of securitization crumbles to pieces; securitized assets turn out not to be bankruptcy remote after all. David Gray Carlson, *The Rotten Foundations of Securitization*, 39 WM. & MARY L. REV. 1055 (1998). For an attempt to argue against this point, see Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655 (2004).

[384] Former UCC § 9-102(b).

[385] UCC § 9-109(a)(3).

[386] *Id*. § 9-406(a).

[387] *Id*. § 9-607(a)(1).

[388] 66 Misc. 2d 295, 320 N.Y.S.2d 864 (Co. Ct. Monroe Co. 1971).

[389] The court did note that actions under 5239 are brought to late if a *sheriff or receiver* disburses funds. Here *AD* paid *JC* directly. So a § 5239 proceeding was indeed not too late. But *AD* should have prevailed on the face of § 5209.

[390] To add injury to injury, bank agreements typically award a fee to the bank if a garnishment is received, even if the account contains only exempt funds. McCahey v. L.P. Investors, 774 F.2d 542, 545 (2d Cir. 1985); Granger v. Harris, 2007 U.S. Dist. LEXIS 30076, at *8 (April 17, 2007);

[391] McCahey v. L.P. Investors, 774 F.2d 542, 550 (2d Cir. 1985); Granger v. Harris, 2007 U.S. Dist. LEXIS 30076, at *20 (April 17, 2007); Jonas v. Citibank, N.A., 414 F. Supp. 2d 411 (S.D.N.Y. 2006) (bank paid over social security funds).

[392] 42 U.S.C. § 407.

[393] Ellen E. Schultz, *The Debt Collector vs. The Widow--Viola Sue Kell thought her Social Security benefits were safe in the bank; She was wrong*, WALL ST. J., April 28, 2007, at A-1.

[394] CPLR § 5323(c).

[395] *Id*.

indifferently pay exempt funds to the sheriff before *JD* can interfere. The matter is no doubt ripe for legislative reform.

Modern constitutional restrictions on prejudgment attachment may have an important limitation on CPLR § 6204, which provides:

> A person who, pursuant to an order of attachment, pays or delivers to the sheriff money or other personal property in which a defendant has or will have an interest, or so pays a debt he owes the defendant, is discharged from his obligation to the defendant to the extent of the payment or delivery.

In the classic case of *Harris v. Balk*,[396] a North Carolina *AD* was garnished by a plaintiff (*P*) on a casual visit to Maryland. Upon return to North Carolina, *AD* was sued by the defendant (*D*) and made to pay again. The Supreme Court reversed but sounded the following note:

> Thus it is . . . the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment . . . While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of [*AD*] to avail himself of the prior judgment and his payment thereunder. This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit.[397]

What worried the *Harris* court was the possibility that *P* was pursuing a fraudulent *quasi in rem* suit in Maryland. The above-quoted advice must be viewed, albeit anachronistically, as an *Erie* guess on the nature of Maryland law. Had CPLR § 6204 been the law of Maryland, *AD* could have paid the Maryland sheriff without worry or notice to *D*.

But there is this important limitation. Under *Shaffer v. Heitner*,[398] attachment is worthy of full faith and credit elsewhere only if *D* has minimum contacts in the adjudicating state. If *AD* in New York pays on the basis of § 6204 and if *D* has no such contact with the state of New York, then § 6204 is *not* entitled to full faith and credit, and *AD* can be made to pay again in some other state (though not in New York).[399] For this reason, § 6204 's scope is adversely affected by the modern innovation in *Shaffer*.[400]

---

[396] 198 U.S. 215 (1905).

[397] *Id*. at 227.

[398] 433 U.S. 186 (1977).

[399] To obtain an order of attachment, *P* must post an indemnity bond, but this bond need only issue for the benefit of *D*. CPLR § 4212(b) & (e). Where *AD* is made to pay twice, there is no express rule in the CPLR that *AD* is entitled to damages, much less to a bond securing *P*'s obligation to pay damages.

[400] CPLR § 5209 and § 6204 purport to discharge *AD* when *AD* pays the sheriff or *JC* pursuant to execution or order. But it does not immunize *JC* from restitutionary claims when *AD* pays by error. In Banque Worms v. BankAmerica Int'l, 77 N.Y.2d 362, 568 N.S.Y.2D 541, 544, 570 N.E.2d 189 (1991), the Court of Appeals proclaimed that the "discharge for value rule" from *Restatement of Restitution* § 14 was the law of New York, not the rule of mistaken payment. According to this rule:

> (1) A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor,l although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

The facts of *Banque Worms* did not involve a judicial lien. Rather, *D* owed money to *C*. *D* ordered its bank to wire money to *C*'s bank. *D* then countermanded this order but, by mistake, *D*'s bank wired *C*'s bank. The discharge for value rule implied that *C* did not have to give it back. Transposed to the realm of judicial liens, if *JD*'s bank pays the sheriff with funds wired to *JD* by mistake, the mistaken fund wirer cannot get the money back from *JC*. In A.I. Trade Finance, Inc. v. Petra Bank, 1997 U.S. Dist. LEXIS 7662 (S.D.N.Y. 1997), the court *Erie*-guessed that *Banque Worms* does not apply to attachment liens, even though "lien" appears prominently in the *Restatement of Restitution*. The gist of the reason was that the plaintiff did not yet have a judgment and therefore there might not be any debt at all. Also, since the sheriff was holding the funds pending the judgment, the plaintiff had notice of the error before it actually received the funds. If *A.I. Trade Financial* is correct, the law of discharge for value differs, depending on whether the creditor has a money judgment or not at the time *JD*'s bank honors the sheriff's levy.

D. Power of Sale
1. Unencumbered Property

In discussing the sheriff's power to sell, we start with the simplest case: property capable of delivery that is unencumbered by any other lien. Such property must be levied by the sheriff taking custody.[401]

Although the CPLR nowhere says so, the expectation is that such property, when levied, should be sold. But levy is not the only means by which the sheriff obtains possession of property not capable of delivery. Under turnover procedure, a court may order *JD* or *AD* to turn personal property of any sort over to the sheriff.[402]

Could a sheriff proceed directly to sale without a levy or a turnover order? Pre-CPLR case law says no.[403] Indeed, if there is to be a sale under these circumstances, it would have to be done promptly, as the execution lien dies when the execution is returned at the end of sixty days (unless extended).[404]

CPLR § 5233, governing sales, presents only an indirect obstacle to the sale-without-levy. Section 5233(a) (last sentence) requires that the "property shall be present and within the view of those attending the sale unless otherwise ordered by the court." If property capable of delivery has been levied, the sheriff easily meets this requirement. But this does not quite prove that the sheriff cannot skip the levy and just sell. By the terms of CPLR § 5233(a), the court can "otherwise order" that the property need not be visible to the bidders at the auction.[405]

Property not capable of delivery or debts are subject to paper levy. Section 5232(b) contemplates that debts should be paid to the sheriff.[406] But instead of collecting, could the sheriff sell instead? Nothing in CPLR 5233 prohibits it, but, once again, "[t]he property shall be present and within the view of those attending the sale unless otherwise ordered by the court."[407] A court would have to "order otherwise" the sale of invisible property.

Sale must be by auction.[408] Rules for advertisement are set forth.[409] A sale can occur after the sixty-day life of an execution. This is because the sheriff's duty to return the execution is suspended by the levy with regard to property capable of delivery[410] (by statute with regard to property not capable of delivery).[411] Levies of property capable of delivery are perpetual,[412] though the levy of property not capable of delivery terminate after 90 days (unless extended).[413]

The sheriff has much (but not total) discretion in scheduling and designing the sale.[414] If property cannot be sold, the sheriff is invited to apply to the court "for determination whether the

---

[401] CPLR § 5232(b).
[402] *Id*. § 5225.
[403] Hathaway v. Howell, 54 N.Y. 97, 112 (1873).
[404] Claude Neon., Inc. v. Birrell, 117 F. Supp. 706 (S.D.N.Y. 1959).
[405] *See* Manhattan Taxi Serv. Corp. v. Checker Cab Mfg. Corp., 253 N.Y. 455, 171 N.E. 705 (1930) (suggesting court has discretion to alter the rule that property must be in view, but invalidating the sale where it was not).
[406] CPLR § 5232(a) (fifth sentence) ("The person served with the execution shall forthwith. . . pay all such debts upon maturity, to the sheriff or to the support collection unit. . . ").
[407] *Id*. § 5233(a) (last sentence).
[408] *Id*. § 5233(a). Receivers are not necessarily subject to this rule. *But see* Levitan v. Homberger, 932 F. Supp. 508 (S.D.N.Y. 1996) (court orders receiver to sell general partnership pursuant to § 5233).
[409] CPLR § 5233(b). These advertisements must be posted six days before the sale. Where the advertisements are posted less than six days before, the debtor may have the sale overturned. Wholesale Serv. Supply Corp. v. Rubin, 27 A.D.2d 957, 279 N.Y.S.2d 403 (2d Dept. 1967).
[410] This is so by case law. Kennis v. Sherwood, 82 A.D.2d 847, 848, 439 N.Y.S.2d 962. 966 (2d Dept. 1981). CPLR § 5230(c) expressly suspends the duty to return only in the case of a paper levy of property not capable of delivery.
[411] *Id*. § 5230(c).
[412] Ansonia Brass & Copper Co. v. Conner, 103 N.Y. 502, 511, 9 N.E. 238, 239 (1886).
[413] CPLR § 5232(a).
[414] Morgan v. Maher, 60 Misc. 2d 642, 303 N.Y.S.2d 575 (S.Ct. Nassau Co. 1969) (in real estate sale, sheriff could not reject high bid because it was too low, without a showing that excessive debtor equity would be lost).

property can legally be sold."[415] This provision was added in light of *People v. Lo Ji Sales, Inc.*,[416] where a bookstore owner was criminally fined for selling pornography. When the fine was enforced by filing a certificate of judgment with the county clerk,[417] the sheriff levied the personal property of the debtor, which consisted, not surprisingly, of pornography, the very stuff that the debtor was fined for selling. The sheriff convinced the court that the levied property should not be sold but rather should be destroyed by shredding, a solution no longer possible in the era of the internet. The solution reached by the *Lo Ji* court is now ratified by § 5233(d).[418]

Sales can be reversed. For example, if the sheriff sells to an infant, the infant may rescind the sale for want of capacity.[419] CPLR § 5237 suggests that *JC* can be forced to disgorge proceeds if the sale is overturned for "an irregularity . . . or a vacatur, reversal or setting aside of the judgment upon which the execution or order was based."[420] This suggests that other reasons–such as, *JD* has no interest in the property–do not become cause to rescind the sale. At least one court has thought that the utter failure of *JD*'s title is nevertheless grounds for the buyer to obtain restitution.[421] This is odd, in that, when the sheriff sells, she does not warrant any amount of title.[422] *Caveat emptor* is usually the rule at the security's auction.[423]

2. Encumbered Property

Suppose the sheriff has levied personal property encumbered by *SP*'s senior perfected security interest and has sold the thing to *X*. On the theory that the sheriff can sell whatever *JD* had at the time the execution was delivered, *X* owns *JD*'s equity as encumbered by *SP*'s security interest.[424] *X* as owner of the equity is now deemed a nonrecourse[425] Article 9 debtor[426] with the present right to possess, to redeem in case of *SP*'s repossession[427] and to receive a surplus after the sale.[428]

Perversely, if the security agreement with *SP* is in default (highly likely if the sheriff is in the levying vein), *SP* has a senior right of possession. So *SP* can repossess the car from the sheriff before the sale[429] and from *X* after the sale.[430] If *SP* repossesses from the sheriff, *JC* is entitled to any surplus from the foreclosure sale.[431]

If a sheriff's sale violates *SP*'s senior right of possession, the sheriff has committed the tort of conversion. Conversion is an offense against a present possessory right. Where the sheriff rightfully possesses because *SP* has not asserted a senior right, the sheriff has not acted wrongfully. In such a case, *SP* must demand possession; only a refusal in light of a demand triggers the conversion cause of

---

[415] CPLR § 5233(d).

[416] 93 Misc. 2d 1012, 403 N.Y.S.2d 181 (Co. Ct. Oneida Co. 1978).

[417] Thereafter a fine is collected via execution issued to the sheriff. N.Y. Criminal Procedure Law § 420.20.

[418] REPORT OF THE LAW REVISION COMM. FOR 1979, 1979 Legl Doc. No. 65(U).

[419] General Motors Acceptance Corp. v. Stotsky, 60 Misc. 2d 451, 303 N.Y.S.2d 463 (S. Ct. Suffolk Co. 1969) (infant was 19 years old).

[420] CPLR § 5237. One such irregularity would be that *JD* has died and *JC* has not obtained permission from the surrogate court to proceed. *Id.* § 5208.

[421] Travitsky v. Oysterman's Dock Co., Ltd., 85 A.D.2d 554, 408 N.Y.S.2d 959 (2d Dept. 1978).

[422] Marino v. Perna, 165 Misc. 2d 504, 629 N.Y.S.2d 669 (S. Ct. Bronx Co. 1995).

[423] Hoffeld v. United States, 186 U.S. 273, 276 (1902); Clute v. Emmerich, 99 N.Y. 342, 349, 2 N.E. 6,6 (1885).

[424] General Motors Acceptance Corp. v. Stotsky, 60 Misc. 2d 451, 303 N.Y.S.2d 463 (S. Ct. Suffolk Co. 1969) (but ordering the sheriff's sale overturned because the buyer was an infant with no capacity to buy). Where the sheriff's possession stems from a turnover order, the sheriff's power of sale is judged from the time the turnover order was "secured," since that is the moment of lien creation. CPLR § 5202(b).

[425] That is, *X* has no obligation to pay *JD*'s debt to *SP*. Just because *X* bought *JD*'s equity interest does not mean that *X* has assumed *SP*'s *in personam* liability.

[426] UCC § 9-102(a)(28)(A) (defining debtor as "person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor").

[427] *Id.* § 9-623(a).

[428] *Id.* § 9-615(d)(1).

[429] William Iselin & Co. v. Burgess & Leigh, Ltd., 52 Misc. 2d 821, 276 N.Y.S.2d 659 (S. Ct. N.Y. Co. 1967).

[430] UCC § 9-609.

[431] *Id.* § 9-615(3). *JC* must make a demand for the surplus "before distribution of the proceeds is completed." *Id.* § 9-615(a)(3)(A).

action.[432]

In *Teddy's Drive In v. Cohen*,[433] a tax compliance officer enforcing a state tax warrant (equivalent of a sheriff under an execution) levied encumbered equipment. At the auction, *SP* (a corporate insider of *JD*) stood on a table and announced ownership of a senior security interest. The officer continued with the sale. The *Teddy's* court held that the officer was guilty of the tort of conversion. The court is not clear on whether *SP* demanded possession. Instead, the court speaks in terms of the officer's limited immunity as a public official, which falls away where the officer has notice of *SP*'s claim. The case should be read as holding that the officer's sale is rightful *unless*, prior to the sale, *SP* has demanded possession and the court has refused it.[434]

The question arises as to the consequence of the officer's liability. To answer that, let us consider the following scenario:

Eleventh Scenario

> *Monday*: The sheriff levies a thing worth $100 pursuant to *JC*'s execution.
> *Later*: At the execution sale, *SP* announces that she owns a perfected security interest for $80. *SP* demands possession of the thing. The sheriff refuses to give up the thing and sells it to *X* for $20. The sheriff is holding the $20 for eventual distribution to *JC*.[435]
> *Still later*: *SP* wins a money judgment against the sheriff.

The first issue is what are *SP*'s damages. One wishes to say $80, the amount of the secured claim, and should not *SP*'s recovery be limited to the amount of the loan? One must, however, contend with the ancient notion of *jus tertii*. The court in *Valentine v. Long Island R. Co.*[436] described the rule as follows:

> The rule undoubtedly is that a bailee cannot plead *jus tertii* against his bailor . . . The reason for the rule is that by such a plea the bailee . . . might through the claim of some third person keep the property for himself.[437]

This rule suggests that the sheriff must pay $100. *SP* is a bailee (coupled with an interest) of *JD*'s equity interest. The thing is worth $100 and the sheriff converted it, and no reference to *SP*'s limited interest is permitted. Happily the *Valentine* court said (albeit in dictum and without authority):

> But there are a number of exceptions to this rule, as for instance where the property has been taken from the bailee by process of law . . . [438]

Ergo, we can confidently assume that the sheriff owes $80.

It is a fundamental principle that a conversion judgment constitutes the sale of the stolen property to the defendant.[439] As applied to the Eleventh Scenario, the sheriff becomes the owner of *SP*'s security interest. This the sheriff can assert against *X* thereby more or less reimbursing the sheriff. Equilibrium is restored.

A harder question is with regard to the $20 in proceeds that *X* paid in the Eleventh Scenario.

---

[432] Tompkins v. Fonda Glove Lining Co., 188 N.Y. 261, 80 N.E. 933 (1907).
[433] 47 N.Y.2d 79, 390 N.E.2d 290, 416 N.Y.S.2d 782 (1979).
[434] According to the lower court, "when [*SP*] announced he held a chattel mortgage on the goods to be sold, he was, in effect, stating that he held title." Teddy's Drive-In, Inc. v. State of New York, 63 A.D.2d 1070, 1071, 406 N.Y.S.2d 157, 157 (3d Dept. 1978). If "title" means "the right to possess," then indeed *SP* was demanding a superior right of possession.
[435] *See* CPLR § 5234(a) ("No distribution of proceeds shall be made until fifteen days after service of the execution except upon order of the court").
[436] 187 N.Y. 121, 79 N.E. 849 (1907).
[437] 187 N.Y. at 127, 79 N.E. at 851.
[438] 187 N.Y. at 127, 79 N.E. at 851.
[439] Pierpoint v. Hoyt, 260 N.Y. 26, 30, 182 N.E. 235, 236 (1932).

One would think that, since *SP*'s security interest was not foreclosed, *SP* would have no right to these proceeds. Yet Article 9 holds that *SP* has *both* a security interest on *X*'s thing *and* a claim to the money *X* paid for *JD*'s equity. According to § 9-315 of the UCC:

> (1) a security interest . . . continues in collateral notwithstanding sale . . . ; and
> (2) a security interest attaches to any identifiable proceeds of collateral.

So *JC* does not own the $20 surplus after all. CPLR § 5234(a) commands the sheriff to dis-tribute these proceeds to *JC*, but *JC* and also the sheriff[440] commit the tort of conversion if she converts to her own use *SP*'s cash. This is the notorious and unacceptable "two for one" effect that Article 9 provides when collateral is sold subject to a security interest.[441]

Suppose *SP* claims the $20 as proceeds. Apparently this reduces *SP*'s claim against *X*'s thing to $60. Yet *X* paid $20 because this was the value of the equity in light of a surviving security interest of $80. With *SP* claiming only $60, *X* obtains a windfall. The windfall would be removed if *JC* could be subrogated to *SP*'s security interest for $20. But *JC* did not even own the $20 that *SP* received. Subrogation presumably frowns on *JC* paying *SP* with *SP*'s own money.

Sales procedure is particularly mystifying when *SP* is a pledgee. In the case of pledged property, the sheriff may not levy at all.[442] Yet, perhaps the sheriff can sell under § 5233, since § 5233 does not expressly require there to be a levy.[443] All of this is very unclear.

There is yet another unanswered question with pledges. Suppose it is agreed that the sheriff can sell pledged property. Perhaps the sheriff has levied Article 8 certificated securities because UCC § 8-112(a) overrides § 5232(b)'s anti-levy rule. Or perhaps a court has ordered *SP* to turn over the property to the sheriff under § 5225(b). It is still the case that *SP* has a senior right of possession; if the sheriff sells, the sheriff commits the tort of conversion. Can *SP* take back possession and then *not* foreclose, thereby defeating *JC*'s right to a valuable equity? In hypothecations, repossession is in anticipation of foreclosure. This is not so with pledges. Possession is a mode of perfection. Therefore, a pledgee might play dog in the manger, taking back the collateral and refusing to foreclose, even though *JC* might have a valuable equity. Whether this is possible is not clear.

E. Priority

Suppose only one execution is delivered to a sheriff, and the sheriff has obtained cash either through sale or collection of payment intangibles. According to CPLR § 5234(a), the sheriff first distributes the proceeds to payment of fees, expenses and taxes. The sheriff then pays the creditor. The surplus is returned to the debtor. The sheriff may not distribute proceeds until fifteen days have passed since the execution was delivered to the sheriff.

---

[440] United States v. Yonkers Child Care Assn., Inc., 566 F. Supp. 1509 (S.D.N.Y. 1983) (sheriff liable for distributing to JC moneys on which the IRS had a senior lien).

[441] David Gray Carlson, *Bulk Buyers Under Article 9: Some Easy Cases Made Difficult*, 41 ALA. L. REV. 729, 741 (1990). That this effect exists is exacerbated by new UCC § 9-615(g), which provides:

> A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:
> (1) takes the cash proceeds free of the security interest or other lien;
> (2) is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and
> (3) is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

Since this new provision protects a junior *SP* from a senior *JC* but does not protect a junior *JC* from a senior *SP*, it must be concluded that the baleful two-for-one rule is intentionally imposed.

[442] CPLR § 5232(b).

[443] Under old Civil Practice Act 688, pledged property *could* be sold without interfering with the possessory rights of *SP*. Monitor Co. v. Confianza Furniture & Appliance Co., 142 N.Y.S.2d 140, 142 (S. Ct. King's Co. 1955).

Where two or more executions are delivered to the sheriff, priority is in order of delivery,[444] except that executions for child support have priority over all other executions.[445]

Executions may be delivered to different court officers, such as a marshal for the federal court or a lower court.[446] In such cases, there is a "first to levy" rule. The first officer to levy established priority for all her "clients" who have served executions on her. The slow-footed officer who did not manage to levy must apply hat in hand to the swifter officer for any leftovers.[447] This rule, however, applies only if the property is "levied upon within the jurisdiction of all the officers."[448] This is one of the few hints in the CPLR that a sheriff is only supposed to levy within the county of her jurisdiction. Meanwhile, at the very end of this rule is appended an exception: "except that such executions for child support shall have priority over any other assignment, levy or process." So if the second, slower officer has a child support execution, she can take away the proceeds from the first sheriff.

This rule involving duelling sheriffs reflects the notion of *in custodia legis*.[449] According to this doctrine, if a court, however humble in dignity, brings property under its control, all other courts must kotow to the court with control over the property in question.[450]

A final rule mediates between those who claim under executions and those who claim equity liens–liens arising from turnover orders and receiverships.[451] The first between the levy under an execution and the filing of the turnover order or appointment of a receiver prevails.[452] So where the

---

[444] Beef & Bison Breeders, Inc. v. Capitol Refrigeration Co. 105 Misc. 2d 275, 431 N.Y.S.2d 275 (S.Ct. Albany Co. 1980).

[445] *See also* CPLR § 5241(h). The priority for family support executions was added in 1993. L. 1993, Ch. 59. In enforcement of child support obligations, New York has established support collection units in every social services district. N. Y. Social Services Law § 111(h). This unit receives payment from the defendant in a support matter and distributes it to the plaintiff. The CPLR often gives to the support collection unit the rights of plaintiff's counsel or the sheriff. For example, the support collection unit may issue restraining notices, CPLR § 5222(a), and executions to the sheriff or to itself. *Id* § 5230(b). The support collection unit may also levy upon property, just as a sheriff would. *Id*. § 5232(a) & (b). It may issue executions for support obligations, pursuant to CPLR § 5241(b), just as a sheriff may. *See generally* Lombardi v. Suffolk Co., 2007 U.S. Dist. LEXIS 8721 (E.D.N.Y. February 7, 2007) (describing support collection units generally).

[446] In New York City, the mayor is authorized to appoint up to 83 different marshals for the Civil Court. N.Y.C. Civ. Ct. Act § 1601(1).

[447] CPLR § 5234(b) (second sentence) ("and thereafter shall be applied in satisfaction of the executions or orders of attachment delivery to those of the other officers who, before the proceeds are distributed, make a demand upon the officer who, before the proceeds are distributed, make a demand upon the officer who levied, in he order of such demands . . . ").

[448] *Id*.

[449] Estate of Livingtson, 30 Misc. 2d 71, 74, 211 N.Y.S.2d 897, 901 ("Once levied upon the property is deemed to be in custodia legis").

[450] Garro v. Republic Sheet Metal Works, Inc., 284 A.D. 660, 663, 134 N.Y.S.2d 151, 155 (4th Dept. 1954) ("It may be questioned whether the Supreme Court . . . may . . . direct an officer of the City Court of Utica to thus turn over proceeds of a sale in his hands to a person other than the judgment creditor in the City Court . . .). Under former Civil Practice Act § 680, the first creditor to serve an execution was the winner, even if the second creditors's sheriff was the first to levy. In re General Assignment for the Benefit of Creditors of Ace Food Corp., 23 Misc. 2d 274, 274-75, 200 N.Y.S.2d 891 (S. Ct. Queens Co. 1960). A first-to-levy rule did exist for the justice courts--courts not of record. Distler & Shubin, *supra* note 8, at 467. On courts not of record, see N.Y. Judiciary Law § 2 (any court not enumerated therein not a court of record).

[451] CPLR § 5202(b).

[452] *Id*. § 5234(c). In Citrus Bowl, In. v. Colonial Farms, 47 Misc. 2d 220, 262 N.Y.S.2d 258 (S. Ct. Queens Co. 1965), *aff'd*, 27 A.D.2d 942, 278 N.Y.S.2d 989 (2d Dept. 1967). a receiver preceded any levy by *JC*s and so had priority. JC_1 was given priority over a subsequent tax lien. The United States tried to argue that it had priority under what is now numbered as 31 U.S.C. § 3713, which provides:

> (a)(1) A claim of the United States Government shall be paid first when--
> (A) a person indebted to the Government is insolvent and--
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
> (ii) property of the debtor, if absent, is attached; or
> (iii) an act of bankruptcy is committed; or
> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor
> (2) This subsection does not apply to a case under [the Bankruptcy Code].

The court rejected the claim of the United States, as the equity lien associated with the receiver did not constitute any of the enumerated events. On appeal, however, the United States won priority over JC_2 on the basis of the timing of its lien.

sheriff levies for JC_1 and then JC_2 obtains (and the clerk files) a turnover order or the appointment of a receiver, JC_1 has priority.[453] A turnover order has been called an "equitable levy."[454] If this metaphor is accepted, then our last rule resembles the "first to levy" rule. Finally, if two equity liens exist, "the proceeds of the property or debt shall be applied in the order of filing."[455]

The last sentence of § 5234(c) provides:

> Where delivery, transfer, or payment to the judgment creditor, a receiver, or a sheriff or other officer is not completed within sixty days after an order is filed, the judgment creditor who secured the order is divested of priority, unless otherwise specified in the order or in an extension order filed within the sixty days.

No case has ever applied this woeful sentence. It should be noted, however, that it applies only where the sheriff has levied on the same property covered by the equity order. Why the equity lien holder should lose out when the sheriff has successfully levied is a mystery, especially when turnover orders require *AD* to deliver non-monetary property directly to the sheriff. And how important is this principle, if it can be dispelled by the incantation of preservative words in the order itself? If there is a point to this sentence, it eludes me.

F. Setoffs and Execution Liens

AD may have the power to offset *JD*'s obligation to pay *AD* because *JD* owes *AD* for a mutual debt.[456] Execution liens potentially come into conflict with this right. To give *AD*'s right of setoff a high degree of protection, the legislature has enacted Debtor & Creditor Law § 151.[457] Courts, however, have failed to see how limited § 151 really is. In many cases, *AD*'s setoff right needs no protection and would continue to exist even if § 151 had never been enacted. As a result, § 151 has sometimes been misinterpreted.

---

[453] H&H Poultry Co. v. Lafayette Nat'l Bank, 45 Misc. 2d 480, 257 N.Y.S.2d 182 (S. Ct. N.Y. Co. 1965); Graze v. Bankers Trust Co., 45 Misc. 2d 610, 257 N.Y.S.2d 483 (S. Ct. N.Y. Co. 1965). Even if the levy is senior, the receiver might equitably be given control of the property, so long as JC_1's seniority from the earlier levy is respected. Lankenau v. Coggeshall & Hicks, 350 F.2d 61 (2d Cir. 1965).

[454] CITE

[455] *Id.*

[456] "Debts are mutual when the debts and credits are in the same right and are between the same parties, standing in the same capacity . . . Where, for example, one party owes a fiduciary duty to the other, or has a claim for trust funds, and the other side's claim is a simple unsecured debt, mutuality is lacking" Scherling v. Hellman Elec. Corp., 181 B.R. 730, 739 (Bankr. S.D.N.Y. 1995).

[457] According to this provision:

> Every debtor shall have the right upon:
>
> . . .
>
> (c) the application for the appointment, or the appointment, of any receiver of, or of any of the property of a creditor;
>
> (d) the issuance of any execution against any of the property of a creditor;
>
> (e) the issuance of a subpoena or order, in supplementary proceedings, against or with respect to any of the property of a creditor; or
>
> (f) the issuance of a warrant of attachment against any of the property of [fig 1] a creditor,
>
> to set off and apply against any indebtedness, whether matured or unmatured, of such creditor to such debtor, any amount owing from such debtor to such creditor, at or at any time after, the happening of any of the above mentioned events, and the aforesaid right of set off may be exercised by such debtor against such creditor . . . receiver or execution, judgment or attachment creditor of such creditor, or against anyone else claiming through or against such creditor . . . receivers, or execution, judgment or attachment creditor, notwithstanding the fact that such right of set off shall not have been exercised by such debtor prior to the making, filing or issuance, or service upon such debtor of, or of notice of, any such petition; assignment for the benefit of creditors; appointment or application for the appointment of a receiver; or issuance of execution, subpoena or order or warrant.

Where *AD* is a bank, *AD* must notify *JD* of the setoff on the same business day. N.Y. Banking Law § 9-g(2).

The common law makes setoff of a mutual debt a defense against an obligation to pay.[458] One way of putting the matter is to say that any obligation to pay is contingent if there is a countervailing debt that the payor could assert against the payee.

For example, if *AD* (a bank) owes *JD* for the amount of a checking account ($100), and if *AD* lends *JD* $75, payable on demand, we may say that *AD* has a setoff opportuni-ty[459]–the right to assert a setoff in lieu of payment. *AD* may or may not choose to assert this right. If *AD* chooses not to assert it and if *AD* pays the $100, *AD* loses the setoff opportunity. Like the ability to speak a foreign language, setoffs are subject to the rule of "use it or lose it."

Given the setoff opportunity, if the sheriff garnishes *AD* on behalf of *JC*, *JC* can only take whatever *JD* had–a right contingent on *AD* not declaring the setoff. So, after the gar-nishment, it is open for *AD* to assert the setoff, thereby reducing the debt from $100 to $25.[460] All that *JC* obtains is a conditional lien on *AD*'s obligation to pay $75 to *JD* and an absolute lien on *AD*'s obligation to pay the remaining $25. Where the setoff opportunity precedes the lien, Debtor & Creditor Law § 151 is not needed to vindicate *AD*'s power to declare a setoff in lieu of paying the sheriff.[461]

Suppose, on these facts, that *JD* deposits an additional $50 with *AD*. This deposit is instantly made conditional on *AD*'s right of setoff.[462] *JC* obtains no senior lien on this new deposit. In these cases, *AD* has no need of § 151 to protect its right of setoff.[463]

Section 151 comes in handy when *AD*'s claim against *JD* is not yet mature, whereas *AD*'s obligation to *JD* is fully mature. One thing § 151 achieves is to permit *AD* to assert a setoff of mature debt against unmatured debt.[464] Some old cases had asserted otherwise.[465] To be distinguished is contingent debt, which *AD* may never owe. While unmatured may be set off, contingent debt may not be.[466]

---

[458] Green v. Disbrow, 79 N.Y. 1, 9 (1879).

[459] I use the term "setoff opportunity" to distinguish the actual manifested act of setoff. The act of setoff extinguishes *AD*'s debt. The setoff opportunity implies an ongoing existence of two mutually existing obligations between *JD* and *AD*. GILMORE AND CARLSON, *supra* note 225, § 4.02[G].

[460] Baker v. National City Bank, 511 F.2d 1016, 1018 (6th Cir. 1975) ("The setoff is not complete until three steps have been taken: (1) the decision to exercise the right, (2) some action which accomplishes the setoff and (3) some record which evidences that the right of setoff has been exercised").

[461] These are the facts of Industrial Commissioner v. Five Corners Taverns, Inc., 47 N.Y.2d 639, 393 N.E.2d 1005 (1979), where the court wrote as if § 151 was absolutely central to the result.

[462] Cibro Petroleum Prods. v. Fowler Finishing Co., 92 Misc. 2d 450, 400 N.Y.S.2d 322 (S.Ct. Albany Co. 1977) (bank lender prevailed as to deposit of non-proceeds into proceeds account). The mirror opposite of this proposition is Lopez v. New York, 152 Misc. 2d 817, 819, 578 N.Y.S.2d 101, 10153 (S. Ct. Bronx Co. 1991), where *JD* sought to offset its own judgment against *JC*, even though *JC*'s attorney had a charging lien on *JC*'s claim. The setoff was not permitted to interfere with the charging lien, which came into existence at the inception of *JC*'s judgment.

[463] Stephen L. Sepinuck, *The Problems With Setoff: A Proposed Legislative Solution*, 30 WM. & MARY L. REV. 51, 77 (1988) ("courts have almost uniformly held that the setoff rights of a garnishee defeat the rights of the garnishor").

[464] Siegel v. State of New York, 262 A.D.2d 388, 390, 28 N.Y.S.2d 958, 961 (3d Dept. 1941).

[465] Appleton v. National Park Bank of New York, 211 App. Div. 708, 208 N.Y.S. 228 (1st Dept. 1925), *aff'd mem.*, 241 N.Y. 561, 150 N.E. 555 (1925). In *In re Hunt*, 250 B.R. 482 (Bankr. E.D.N.Y. 2000), a credit union sought to lift the automatic stay in bankruptcy in order to assert a setoff against exempt pension funds owed to the debtor. Clearly the court should have granted the relief (assuming no adequate protection of the credit union's setoff right). A bankruptcy trustee is a hypothetical judicial lien on the day of bankruptcy. If the bankruptcy trustee had claimed the pension funds, the credit union could have set off the debtor's obligation to repay a loan. Since the bankruptcy trustee had no right against the credit union, neither could the debtor, whose right to exempt property is derivative of the trustee's right. The court, however, held otherwise, holding that exemptions under New York law are valid against the common law right of set off. This must be counted as a very bad *Erie* guess indeed of the law of New York. *Cf.* N.Y. Banking Law § 9-g(1) (no setoff against social security proceeds).

[466] Trojan Hardware Co. v. Bonacquisti Constr. Co., 141 A.D.2d 278, 534 N.Y.S.2d 789 (3d Dept. 1988); Sepinuck, *supra* note 463, at 67-68. In *Trojan Hardware*, *JD* opened a bank account (*A*) with *AD* to assure performance of a construction project for a town. The *A* account was assigned for security to the town. *JD* then opened a second account (*B*) and deposited funds from an unconnected job. *JD* also borrowed funds from *AD*. *JD* defaulted and *AD* declared the setoff of account *B*. A sub-contractor, however, claimed that account *B* had trust funds in it for the benefit of the sub-contractor, of which *AD* had knowledge. A trial was set to determine whether this was so. Before the trial, *JC* obtained a judgment against *JD* and levied the *A* account. The town had been pledged this account, but there would probably be a surplus. *AD* argued that it should not have to turn the surplus over to the sheriff because the sub-contractor might win at trial, in which case *AD*'s claim against *JD* would be revived. *AD* wanted to preserve the surplus in case it needed to offset against its claim against *JD*. The court upheld summary judgment for *JC* against *AD* pursuant to a § 5225(b) turnover action.

Let us now take another scenario where § 151 always has bite. Suppose that *AD* has no setoff opportunity at the time the sheriff levies. *JC* obtains a lien on *AD*'s obligation to pay $100. Suppose thereafter *AD* lends *JD* $75. Since the sheriff has the unconditional right to $100, *AD* has no setoff right at all, without the aid of § 151. *AD* owes $100 to the sheriff and, separately, *AD* has a claim against *JD* for $75. The two debts–*AD* owes the sheriff and *JD* owes *AD*–are no longer reciprocal debts. Under the common law, *AD* has no setoff right. Debtor & Creditor Law § 151 reverses this result by declaring that *AD* may set off "any amount owing from such debtor to such creditor, at or at any time after," *JC* obtains a lien.

In short, § 151 is not needed to protect the pre-existing setoff opportunity of *AD*. The very nature of *AD*'s conditional obligation to pay implies that *AD* may assert the setoff against the sheriff. The function of § 151 is to authorize *AD* to assert a setoff where *AD*'s claim is not yet mature and where no common law setoff opportunity existed at the moment of the levy.

The nature of setoff and the role of § 151 has been misconceived in *United States v. Sterling National Bank & Trust Co.*,[467] which presented the following chronology;

> *February 13, 1970:* The IRS assesses $8,000 in taxes against *D* and therefore has a lien on *D*'s bank account with *AD*.
> *June 23*: *D* borrows $6,000 from *AD*.
> *August 14:* The IRS assesses $6,400 more in taxes.
> *November 5*: The IRS files notice of the first assessment.
> *March 3, 1971*: The IRS files notice of the second assessment.
> *June 9:* The IRS serves notice of levy on *AD*, pursuant to Internal Revenue Code § 6331(a).
> *July 2: AD* purports to manifest its setoff of $3,800. A balance of $1,300 is left, which *AD* tenders to the IRS.

The IRS then sued *AD* for the amount of the setoff.

Properly, the IRS had a lien on the bank account for $8,000 as of February, 1970. So no setoff opportunity ever arose for *AD*. Rather, *AD* owed the IRS and later *AD* advanced funds to *JD*. *AD*'s obligation to pay belonged to the IRS before a setoff opportunity could ever arise.[468]

The Second Circuit thought the only question was whether *JD* had a property interest in the bank account at the time of the levy. If so, the IRS had priority, even if its lien arose at a time when *AD* could have asserted a setoff.

> The cases cited deal only with the right of setoff, and not with whether the full amount in the account is "property" of the bank's customer. The literal language of § 151 . . . would indicate that the full amount in the account is the customer's property. Under any realistic definition of "property" the full amount in [*JD*]'s account was his property or his right to property. Until the bank acted to restrict his right to draw on the funds, Smith was entitled to write checks up to the full amount in the account. Clearly then all the funds in Smith's checking account were his property at the time that the IRS served the bank with notice of levy.[469]

Read carefully, the *Sterling* court seems to be saying that Debtor & Creditor Law § 151 does not apply to liens created by federal law, which is fair enough. But the court also says that § 151 does not negate the idea that *JD* has "property" in a bank account. Since that is so, the IRS wins. This is a misconception. Where the setoff opportunity pre-exists the IRS liens, *JD* has only conditional property,

---

[467] 494 F.2d 919 (2d CIr. 1974).

[468] Bank of Nevada v. United States, 251 F.2d 820, 825 (9th Cir., 1958), *cert. denied*, 356 U.S. 938 (1959). The matter would have been different if the setoff opportunity pre-existed the creation of the tax lien. United States v. Harris, 249 F. Supp. 221 (W.D. La. 1966).

[469] 494 F.2d at 922.

and the IRS succeeds only to that.[470] In short, the Second Circuit thought that either there is property or there is no property. In fact, there is a third category–conditional property.[471]

The *Sterling* misconception soon blossomed into error. In *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*,[472] *JC* obtained a federal maritime attachment lien. In non-admiralty federal cases, ordinary attachments are issued pursuant to state law.[473] Maritime attachments, however, are thoroughly federal in nature. In *Aurora*, however, *AD* owed *JD* and *JD* owed *AD* at the time of the garnishment. So, regardless of what § 151 means, *JC* should have taken subject to *AD*'s senior right of setoff. The *Aurora* court ruled that New York Debtor & Creditor Law was preempted, and therefore *JC* ought to have a lien on the entire amount *AD* had owed *JD*, as if no setoff opportunity existed. But even if we concede that § 151 is preempted, *JC* still only obtained *AD*'s conditional right of payment. Even without § 151, the setoff opportunity pre-existed and should have been assertable against the maritime attachment lien.[474]

The New York courts have also misunderstood the scope of § 151. In *Aspen Industries, Inc v. Marine Midland Bank*,[475] the New York Court of Appeals read § 151 as authorizing *AD* to pay *JD* in spite of a restraining notice, so long as *AD*'s claim against *JD* exceeds *JD*'s claim against *AD*. In *Aspen*, *AD* (a bank) had a very large claim against *JD* relative to *JD*'s small checking account balance. *JD* continued to deposit funds. Properly, *AD* had a setoff right regardless of Debtor & Creditor § 151. But it did not *use* the setoff right. Rather, it honored *JD*'s checks. The Court of Appeals ruled that since, *AD could* have set off the entire checking account, it did not cause any damage to *JC* when, in violation of the restraining notice, it put *JD* into funds. This opinion plays fast and loose with the "use it or lose it" nature of setoffs. Having chosen to put *JD* in funds, *AD* chose *not* to use the setoff. It therefore was not under the shelter of § 151 when it honored *JD*'s checks. Having elected not to set off, it should have preserved the money it gave to *JD* for the benefit of *JC*.

G. Income Executions

---

[470] The case can also be read as not saying anything at all about *AD*'s right of setoff. Rather, the case holds that, where a taxpayer has "property" in *AD*'s obligation, *AD* must pay; competing property rights must be litigated in some other forum:

> [A] person served with a tax levy has only two defenses for a failure to comply with the demand, which are either that the person is not in possession of the taxpayer's property or the property is subject to a prior judicial attachment or execution. Therefore, the defense of lien priority is not before us.

494 F.2d at 921 (footnote and citations omitted). *See* Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co., 85 F.3d 33, 47 (2d Cir. 1996) (reading *Sterling* in this way).

[471] *Sterling* was wrongly decided for a reason not related to the discussion in the text. According to Internal Revenue Code § 6323(b)(10), the tax lien is no good against

> a savings deposit or other account, with an institution described in section 581 or 591, to the extent of any loan made by such institution described without actual notice or knowledge of the existence of such lien, as against such institution, if such loan is secured by such account.

Although *AD*'s promissory note directly referred to a "continuing lien and/or right of set-off" against his bank account, the Second Circuit in *Sterling* simply ignored this dispositive provision. The lower court ruled this provision only applies to consensually created security interests, which a setoff right could never be. The lower court suggested that, if *AD* had taken possession of a passbook, *AD*'s right of setoff would have been good against the IRS. 360 F. Supp. 917, 926 (S.D.N.Y. 1973). Yet what good would that do, if *AD* cannot have a contractual lien on its own obligation to *JD*? In truth, § 6323(b)(10) seems tailor-made to a bank's right of setoff, and *AD* should have prevailed on its basis.

[472] 85 F.3d 33 (2d Cir. 1996).

[473] Fed. R. Civ. Pro. 64.

[474] The lower court in *Aurora* thought that § 151 permits setoff against liens only when the setoff is actually manifested before the competing lien arose. Because of this assumption, the lower court ruled that § 151, under the circumstances, was not in conflict with the admiralty attachment lien. *JC* prevailed simply because *AD* had not manifested the setoff before *JC* obtained the lien. 890 F. Supp. at 328-29. This is exactly the wrong reading of § 151. Under this reading, *AD* never has a right of setoff against *JC* unless *AD* manifests the setoff before *JC*'s lien. The opposite is true. *AD* has a right to setoff no matter when *JC*'s lien arises. Industrial Commissioner v. Five Corners Taverns, Inc., 47 N.Y.2d 639, 393 N.E.2d 1005 (1979). The lower court acknowledged *Five Corners* but thought it applied only to liens under New York law, not to federal liens.

[475] 52 N.Y.2d 575, 579, 421 N.E.2d 808, 810, 439 N.Y.S.2d 316, 319 (1981).

Aside from reaching debts due or certain to become due[476] or property (contingent or vested),[477] *JC* can also reach income by serving an income execution.[478] Income is considered a third thing, compared to property and debts.[479] An income execution is appropriate when "a judgment debtor is receiving or will receive money from any source. . . "[480] Because income is this third thing, it cannot be the basis of pre-judgment attachment, since CPLR § 6202 makes only debt or property "as provided in section 5201" subject to attachment.[481] Meanwhile, where *JD* has income, *JC* is completely free to use regular executions to obtain debts or property aside from the income.[482]

There are two types of income executions. The one available to judgment creditors in general I will call regular income executions.[483] The other is available for family creditors who claim alimony or child support.[484] Unlike other executions, the sheriff is included as among those authorized to issue an income execution for enforcement of a support obligation.[485]

An income execution has different formalities from a simple execution. It must include the name and address of the person from whom *JD* will receive money,[486] the amount of money and frequency of payment.[487] It must set forth a long description of the law of income execution, warning that the burden is on *JD* to step forward and object if the amounts withheld are excessive.[488]

The income execution must be served on the sheriff of the county where *JD* resides. Where *JD* is not a resident of the state, *JC* must deliver the income execution to the sheriff of the county where the debtor is employed.[489] Here is one of the few provisions in the CPLR making reference to the geographical limitations of a sheriff's jurisdiction. Its effect is to immunize debtors who work outside the state for an employer who is present in New York. In *Brown v. Arabian American Oil Co.*,[490] *JD* worked in Saudi Arabia and *AD* was properly served in Manhattan. Since *JD* neither lived nor was employed in Manhattan, *JC* could not comply with the above requirements. Accordingly, the levy was quashed.[491] Yet in *Oysterman's Bank & Trust Co. v. Manning*,[492] a sheriff refused to serve an income execution on a California resident. The *Manning* court simply ignored the jurisdictional limitation in

---

[476] CPLR § 5201(a).

[477] *Id*. § 5201(b).

[478] For a history of the income execution, see Kerry Daniel Marsh, Note, *Wage Garnishment in New York State: Practical Problems of the Employer*, 34 ALB. L. REV. 395 (1970).

[479] Glassman v. Hyder, 23 N.Y.2d 354, 360, 244 N.E.2d 259, 262, 296 N.Y.S.2d 783, 296 (1968); Brown v. Arabian American Oil Co., 53 Misc. 2d 182, 278 N.Y.S.2d 256 (S. Ct. Suffolk Co. 1967) (earnings not reachable under § 5227 turnover proceeding).

[480] CPLR § 5231(a). A restraining order, however, cannot be served upon "the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor." CPLR § 5222(a); Silbert v. Silbert, 25 A.D.2d 570, 267 N.Y.S.2d 744 (2d Dept. 1966).

[481] Gulf Int'l Bank B.S.C. v. Othman, 1993 U.S. Dist. LEXIS 17508 (S.D.N.Y. 1993); Glassman v. Hyder, 23 N.Y.2d 354, 360, 244 N.E.2d 259, 262, 296 N.Y.S.2d 783, 296 (1968).

[482] Midlantic Nat'l Bank/North v. Reif, 732 F. Supp. 354, 358 (E.D.N.Y. 1990).

[483] CPLR § 5231.

[484] CPLR § 5241. "Support" is defined by Family Court Act § 416. A provision similar to § 5241, applying only to family support creditors, permits injunctive orders to employers to pay wages. CPLR § 5242. There is also extensive legislation on executions for medical support. These are not traditional garnishments but rather orders to employers to enroll the debtor's family into health benefits a debtor might have obtained for his family if he had been willing to apply for them. CPLR § 5241(b). *See* Oneida Co. Dept. of Social Servs. v. S., 2007 N.Y. App. Div. LEXIS 7016 (4th Dept., June 8, 2007).

[485] CPLR § 5241(b)(1); Smith v. ABC Co., 2005 N.Y. LEXIS 3467, at *9 (Fam. Ct. Nassau Co., September 29, 2005). Prior to the CPLR, a court order was necessary to garnish wages. WEINSTEIN ET AL., *supra* note 25, ¶ 5231.09. *JC* also had to show a regular execution returned unsatisfied before an income execution could be had. Kaplan v. Supak & Sons Mfg. Co., 46 Misc. 2d 574, 576, 260 N.Y.S.2d 374, 375 (S. Ct. New York Co. 1965).

[486] It need not include the social security number. Rahman v. New York City Transit Auth., 111 Misc. 2d 30, 443 N.Y.S.2d 348 (S. Ct. Bronx Co. 1981).

[487] CPLR § 5231(a).

[488] CPLR § 5231(g). This section was added in 1987 to address constitutional objections that debtors were insufficiently notified of the rules of garnishment. Follette v. Cooper, 658 F. Supp. 514 (N.D.N.Y. 1987). The notice is not required for income executions under CPLR § 5241 (support enforcement).

[489] CPLR § 5231(b).

[490] 53 Misc. 2d 182, 278 N.Y.S.2d 256 (S. Ct. Suffolk Co. 1967).

[491] Accord, Kaplan v. Supak & Sons Mfg. Co., 46 Misc. 2d 574, 260 N.Y.S.2d 374 (S. Ct. New York Co. 1965).

[492] 59 Misc. 2d 144, 298 N.Y.S.2d 355 (S. Ct. N.Y. Co. 1969).

CPLR § 5231(b) and ordered the California sheriff to serve the debtor in California.[493] It cited as authority CPLR § 5240, which invites courts to change the rules whenever they want.[494]

The jurisdictional limits connecting the sheriff with the *JD*'s domicile or place of work overturns older decisions which permitted New York garnishment of wages paid by foreign employers to foreign workers, because the employer happened to be present in New York.[495] The statute therefore does not go as far as the Constitution allows. In non-wage cases, if a court has jurisdiction over *AD*, the court can indeed order *AD* to pay or deliver property to the New York sheriff.[496]

The procedure in the case of an income execution is that the sheriff serves the income execution on *JD*, either by personal service or by certified mail. The income execution demands that the debtor pay the sheriff directly,[497] with the warning that the employer will be garnished if the debtor defaults.[498] This procedure was designed "to avoid annoyances to third parties and to give the judgment debtor an opportunity to make payment without embarrassment."[499] If *JD* does not start paying within 20 days after service,[500] or if the sheriff is unable to effectuate service within 20 days, the sheriff garnishes the employer.[501] The income execution for support operates on a different basis. The debtor must be served first. Unless she alleges a mistake of fact, the employer is served fifteen days thereafter.[502]

After being served with the income execution, the employer has the duty to withhold wages until the judgment is paid.[503] Importantly, the maximum a creditor can obtain from a regular income execution is 10% of income.[504] This amount coheres with the exemption of

> ninety percent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution, and at any time after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment.[505]

The sixty day limit is significant. Where earnings have been due for over sixty days, the earnings are not exempt. Or if a bank account consists of old wages,[506] only an amount equating with 90% of the earnings over the past 60 days are exempt.[507] Indeed, once in the bank account, the earnings are "debts" that can be levied pursuant to a simple execution. Where past earnings are less than sixty days old, they are 90% exempt; the balance can be reached by a simple non-income execution. Sums not yet earned

---

[493] *See* CPLR § 313 (authorizing such orders).

[494] *Compare* Kaplan v. Supak & Sons Mfg. Co., 46 Misc. 2d 574, 578, 260 N.Y.S.2d 374, 378 (S. Ct. New York Co. 1965) ("CPLR 5240 permits a certain amount of tinkering on the structure by the judicial handyman, but it does not permit the construction of an entirely new wing using jurisprudential architecture").

[495] Morris Plan Indus. Bank v. Gunning, 295 N.Y. 324, 67 N.E. 510 (1946).

[496] Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., 41 A.D.3d 25, 836 N.Y.S.2d 4 (1st Dept. 2007) (turnover order requiring debtor to bring certificated shares from Indonesia).

[497] If the debtor is paying 10% to the sheriff directly, no other creditor can insist that an income execution be levied on the employer. Citibank v. East, 121 Misc. 2d 861, 469 N.Y.S.2d 557 (S. Ct. Queens Co. 1983).

[498] CPLR § 5231(a). The form of the income execution for support is rather different. Notably, the income execution must notify the debtor that, unless she claims a mistake of fact, the execution will be served on the employer in 15 days. CPLR § 5241(c).

[499] County Federal Savs. & Loan Assn. v. Cummings, 42 Misc. 2d 949, 950, 249 N.Y.S.2d 449, 450 (S. Ct. Kings Co. 1964).

[500] At least as of 1970, few *JD*s ever paid the sheriff. Marsh, *supra* note 478, at 402-03.

[501] CPLR § 5231(e). Levy is contingent on the sheriff receiving in advance the $15 fee required by CPLR § 8011(b)(2). Pegalis v. Varelas, 123 Misc. 2d 920, 474 N.Y.S.2d 898 (S. Ct. Nassau Co. 1984).

[502] CPLR § 5241(f).

[503] *Id.* § 5231(f). An employer is prohibited from firing a worker whose wages have been garnished. *Id.* § 5252. The sheriff has the duty to calculate interest. If she does not, the employer is not liable for paying the amount that the income execution requires to be paid. National Surety Corp. v. R.H. Macy & CO., 116 Misc. 2d 780, 455 N.Y.S.2d 1007 (S. Ct. N.Y. Co. 1982).

[504] CPLR § 5231(b).

[505] *Id.* § 5205(d)(2).

[506] That bank accounts are exempt if they contain exempt wages depends upon a tracing rule applicable to exemptions. *See infra* text accompanying notes 713-20.

[507] In re Lubecki, 332 B.R. 256, 261 (Bankr. W.D.N.Y. 2005).

can be reached only by an income execution.[508]

With regard to bank accounts containing wages, CPLR § 5205(d)(2) exempts earnings only in cases where an income execution has actually been served. Where only a non-income execution has been served, *no* wages are exempt, if we read the CPLR literally. Happily for wage earners, no court has yet noticed that the plain meaning of § 5205(d)(2) permits a 100% garnishment of recent earnings in a bank account under a regular non-income execution.[509]

The 10% limit of CPLR § 5231(b) coheres with federal legislation which commands that state legislation permit the garnishment of no more than 25% of income.[510] The 10% maximum is reduced where a wage earner is at or near the minimum wage.[511] With regard to regular income executions, garnishment is altogether prohibited if disposable earnings for the week are less than 30 times the minimum wage.[512] For this purpose, disposable earnings are defined as take-home pay–"that part of the earnings . . . after the deduction from those earnings of any amounts required by law to be withheld."[513] The amount withheld cannot exceed 25% of disposable income or thirty times the minimum wage, whichever is less.[514]

The limits for income execution for domestic support obligations are far more creditor-generous. If the debtor has a new spouse or dependent child, up to 50% of take-home pay can be withheld. If arrears on past support obligations exist, this number rises to 55%.[515] Where there is no current spouse, 60% of take-home pay can be reached, 65% if arrears exist which are more than twelve weeks old.[516] These limits, which are consistent with the Federal Consumer Credit Protection Act,[517] apply only "[w]here the income is compensation paid or payable to the debtor for personal services . . . ."[518] In comparison, a covenant not to compete–that is, a covenant to offer *no* personal services–can be 100% garnished.[519]

There is an odd entanglement between regular income executions and support income

---

[508] In Girard Trust Bank v. Gotham Football Club, Inc., 31 A.D.2d 142, 295 N.Y.S.2d 741 (1st Dept. 1968), *AD* owed *D* football bonuses for a season. First, if *D* played in 50% of the defensive or offensive plays, *D* would receive $2,000. If *D* showed a good attitude, *D* would get $1,000 at the end of the season. After the season but before the bonuses were paid, JC_1 served an income execution on *AD* and obtained 10% of the bonuses. JC_2 served both an income execution and an ordinary execution on *AD*. *D* claimed the bonuses were exempt because they consisted of earnings for "personal services rendered within sixty days before . . . an income execution is delivered to the sheriff. . . " The court agreed with the proposition and remanded to see whether any part of the above two bonuses were earned before the sixty day period. The court seemed to think that if the 50% level was reached within the sixty day period, all earnings were within the exemption. 31 A.D.2d at 147, 295 N.Y.S.2d at 746. In fact, § 5205(d)(2) refers to "earnings of the judgment debtors for his personal services rendered within sixty days before . . . an income execution is delivered to the sheriff . . . " So the issue is not *earning* (*i.e.*, the vesting of *AD*'s obligation to pay) but rather is rendering services. Properly, both bonuses should have been prorated.

[509] The attempt to obtain 100% of wages via a regular execution was rejected in Cadle Co. v. Newhouse, 26 Fed. Appx. 69 (2d Cir. 2001). In Power v. Loonam, 49 Misc. 2d 127, 266 N.Y.S.2d 865 (S. Ct. Nassau Co. 1966), the court ruled that a restraining notice had no effect as to 90% of a bank account, even though no income execution had been served.

[510] Federal Consumer Credit Protection Act, 15 U.S.C. § 1671. This act permits garnishment to rise to 65% if family support obligations are due and owing.

[511] CPLR § 5231(b)(i) & (ii).

[512] *Id.* § 5231(b)(i).

[513] *Id.* § 5231(c)(ii).

[514] *Id.* § 5231(b)(ii).

[515] Amounts paid must first be applied to current obligations; only the surplus can be applied to retire the arrears. Smith v. ABC Co., 2005 N.Y. LEXIS 3467, at *13-*14 (Fam. Ct. Nassau Co., September 29, 2005).

[516] For purposes of these limits, property settlements are not considered support obligations; the creditor must resort to regular income executions, where only 10% can be obtained. Brody v. Brody, 196 A.D.2d 308, 609 N.Y.S.2d 191 (1st Dept. 1994); Maloney v. Maloney, 140 Misc. 2d 852, 532 N.Y.S.2d 203 (S. Ct. Richmond Co. 1988). In Kahn v. Trustees of Columbia University, 109 A.D.2d 395, 492 N.Y.S.2d 33 (1st Dept. 1985), *JC* had served a regular income execution with regard to a judgment for conversion of a joint bank account and also had a support turnover order pursuant to § 5242. *JD* asserted that, since the payment order exceeded 25% of earnings, *AD* should not pay the income execution. The court ruled, rather questionably, that the money judgment for conversion of the bank account was for the "support" of *JC* and could be included in the 50% limit imposed by § 5241(g).

[517] 15 U.S.C. § 1673(b)(2); Kennedy v. Kennedy, 195 A.D.2d 229, 607 N.Y.S.2d 773 (4th Dept. 1994). Major conforming adjustments were needed in 1987. Samuel J. M. Donnelly & Mary Ann Donnelly, *Commercial Law*, 39 SYR. L. REV. 159, 205-08 (1988).

[518] CPLR § 5241(g) (fourth sentence).

[519] Kennedy v. Kennedy, 195 A.D.2d 229, 607 N.Y.S.2d 773 (4th Dept. 1994).

executions. A support income execution can capture up to 65% of personal earnings. But if it absorbs more than 25%, no other regular income execution can be honored.[520] If, on the other hand, the support income execution captures, say, 23% of earnings, then the regular income execution may get 2%. Family support obligations have priority over executions on other kinds of debt.[521] So where the family's income executions are second in time but occupy the 25% or more of wages, ordinary income execution creditors will obtain nothing.[522]

A divorced *JD* may be paying support voluntarily when served with an regular income execution. May *JD* claim that the voluntary support payments exhaust the 25% maximum to which *JC* is entitled, thereby defeating the income execution?[523] The statute requires that a support income execution must exist to soak up the 25% before *JC*'s regular income execution is blocked.[524] Nevertheless, courts have used the mandate of § 5240[525] to change the rules to give *JD* the credit the statute so stingily denied.[526]

A strange collision between CPLR § 5231(b) and Debtor & Creditor Law § 151 can occur. The latter section permits *AD*s to set off their obligation to *JD* against *JD*'s obligation to them, thereby defeating a levy. In *Franklin National Bank v. Brita Homes Corp.*,[527] *AD* made cash advances to *JD* on commissions not yet earned. The court ruled that these loans were not earnings and so could not be garnished by an income execution.[528] But when the commissions *were* earned, presumably *AD*'s setoff right would defeat the levy. So any *JD* who can arrange to be paid in advance[529] can render herself judgment proof from income executions. Advance pay is a mere loan, not earnings. The setoff right of the employer assures that *JC* never gets a dime.

The regular income execution only encumbers 10% of income. But, according, to § 5205(d), 90% of earnings are exempt,[530] "*except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents. . .* "[531] If some of the 90% is unnecessary in this way, the judgment creditor can obtain an installment payment order under CPLR § 5226.[532] This permits low-priority creditors to jump to the head of the line. Suppose JC_1 has served an income execution and is receiving the 10% of the income permitted by § 5231(b). JC_2 might steal a march and obtain an installment payment order that requires *JD* to pay extra "unnecessary" wages directly to JC_2, even though JC_1 has not been paid in full.[533]

Putting aside the above point, priorities are different for income executions, compared to non-income executions. Plain vanilla executions are subject to a "first to levy" rule: the officer who first levies establishes priority for all creditors who have delivered executions to that officer.[534] Income

---

[520] CPLR § 5231(b)(iii).
[521] CPLR § 5241(h).
[522] Long Island Trust Co. v. United States Postal Serv., 647 F.2d 336 (2d Cir. 1981).
[523] CPLR § 5231(b)(iii).
[524] Tilden Fin. Corp. v. Corwin, 149 Misc. 2d 544, 566 N.Y.S.2d 457 (S. Ct. New York Co. 1990). A support order within the meaning of CPLR § 5242, however, is to be treated like a garnishment for purposes of calculating the 25% limit. General Motors Acceptance Corp. v. Metropolitan Opera Assn., 98 Misc. 2d 307, 413 N.Y.S.2d 818 (1st Dept. 1978).
[525] *See also* CPLR § 5231(i) ("At any time, the judgment creditor or the judgment debtor may move, upon such notice as the court may direct, for an order modifying an income execution").
[526] Midlantic Nat'l Bank/North v. Reif, 732 F. Supp. 354, 358 (E.D.N.Y. 1990); American Express Centurion v. Melia, 155 Misc. 2d 587, 589 N.Y.S.2d 290 (S. Ct. Kings Co. 1992). In Spatz Furniture Corp. v. Lee Letter Service, Inc., 52 Misc. 2d 291, 276 N.Y.S.2d 219 (S. Ct. N.Y. Co. 1966), *aff'd*, 54 Misc. 2d 359 (1st Dept. 1967), JC_1 consented to a reduction, and so *AD* reduced withheld amounts paid to JC_1, which meant that JC_1's payout took longer. This was held prejudicial to JC_2. So *AD* had to pay, in effect, damages to JC_2. Had JC_1 moved for a court order reducing the withholding, *AD* would have avoided this liability.
[527] 35 A.D.2d 550, 313 N.Y.S.2d 248 (2d Dept. 1970).
[528] *Contra*, Goldwater v. C.B. Snyder Nat'l Realty Co., 48 Misc. 2d 669, 265 N.Y.S.2d 542 (S. Ct. N.Y. Co. 1965).
[529] If the advances are contractually mandated, however, they are leviable debts. Publishers Distrib. Corp. v. Independent News Co., 55 A.D.2d 571, 390 N.Y.S. 2d 77 (1st Dept. 1976).
[530] CPLR § 5205(d)(2).
[531] Emphasis added.
[532] *See* Judware v. Judware, 71 Misc. 2d 795, 337 N.Y.S.2d 115 (Fam. Ct. St. Lawrence Co. 1972). A receivership is possible as well. A receivership is possible as well. Edelman v. Edelman, 83 A.D.2d 622, 441 N.Y.S.2d 529 (2d Dept. 1981).
[533] Schwartz v. Goldberg, 58 Misc. 2d 308, 295 N.Y.S.2d 245 (S. Ct. Bronx Co. 1968).
[534] CPLR § 5234(b).

executions are not subject to a first-to-levy rule. Where different officers deliver executions to the debtor at different times, the creditor who first delivered an income execution to an officer has priority.[535] Priority is also preserved after the officer returns an income execution unsatisfied.[536] So if the second sheriff receives an income execution after the first sheriff has returned an income execution, the first income execution still has priority, provided a new sheriff receives an income execution from the same *JC* within twenty days of the return.[537] With simple executions, return means that the associated execution lien is dead.[538] On the other hand, an income execution dies if a debtor quits his job; a new income execution served on a new employer has priority over the earlier execution directed toward the first employer.[539]

With regard to income executions for support, a levy pursuant to § 5242 takes priority over any other levy.[540] If two such levies exhaust the applicable limit on deductions, the levies share pro rata.[541]

It seems to be assumed that a radical chasm exists between ordinary executions and income executions. But is this distinction justified on the language of the CPLR? Why couldn't a sheriff who has received an income execution levy a bank account? Nothing in the CPLR prevents such a conclusion. An income execution has extra requirements that exceed the requirements of an ordinary execution, but perhaps that means that every income execution is also a regular execution. Nevertheless, income executions have extra disabilities, compared to ordinary executions. Income executions must be served on *JD* twenty days before any levy.[542] In the case of support income executions, the execution may be issued by the sheriff directly;[543] this is not true for ordinary executions.[544] So where a sheriff issues a support income execution, this could not also serve as an ordinary execution.

At least one court[545] and the leading treatise[546] deny the proposition that income executions are also ordinary executions, mainly in the name of making sense of the entire system. But there is no real need for this denial. For instance, suppose JC_1 serves an income execution on the sheriff, and JC_2 serves an ordinary execution. The sheriff then levies *AD* with regard to a bank account. The world will not dissolve if the sheriff gives priority to JC_1 as the first to deliver an execution.

In *Beneficial Fin. Co. of New York v. Baker*,[547] *JC* served an execution on the sheriff. Thereafter, *JD* assigned his wages[548] to *SP*, and *SP*, and *SP* notified the employer of the assignment. Nevertheless, *JC*'s execution lien had priority over the voluntary assignment. This could be true only if *SP* did not qualify for the exceptions in either CPLR § 5202(a)(1) or (2), suggesting that somehow income executions are simply different from ordinary executions. But why should this be so? If the preamble of CPLR § 5202(a) applies to create a lien on wages when the execution was delivered to the sheriff, why shouldn't the exceptions to the preamble apply as well?

---

[535] CPLR § 5231(j); *see* National Bank v. State Tax Commissioner, 106 A.D.2d 377, 482 N.Y.S.2d 508 (2d Dept. 1984) (minor misspelling of *AD*'s name in execution did not invalidate JC_1's priority).

[536] *Id.* CPLR § 5230(c), however, makes clear that income executions need not be returned in sixty days, as is true of regular executions. Yet § 5231(j) refers to the return of income executions.

[537] *Id.* § 5231(j) (last two sentences).

[538] There is some doubt as to this, however. *See supra* text accompanying notes 160-66.

[539] Lischer v. Halsey-Reid Equipment, Inc., 63 Misc. 2d 637, 313 N.Y.S.2d 136 (S. Ct. Erie Co. 1970).

[540] CPLR § 5242(h).

[541] *Id.*

[542] *Id.* § 5231(d).

[543] *Id.* § 5241(b)(1).

[544] *Id.* § 5230(b).

[545] Yeh v. Seakan, 119 Misc. 2d 681, 683, 464 N.Y.S.2d 627, 629 (S. Ct. Oneida Co. 1983).

[546] WEINSTEIN ET AL., *supra* note 25, ¶ 5202.07 ("With an income execution, the only thing that the sheriff can levy upon is the judgment debtor's paycheck and not his property in general").

[547] 43 Misc. 2d 546, 251 N.Y.S.2d 556 (S. Ct. Monroe Co. 1964).

[548] Wage assignments are not covered by Article 9 of the UCC. UCC § 9-106(d). Rather, they are governed by N.Y. Personal Property Law § 46 *et seq*. Voluntary wage assignments seem to have gone the way of the dinosaur. There has been no reported litigation concerning them for at least twenty years.

H. Executions Liens as Voidable Preferences

One of the things bankruptcy is supposed to do is to prevent unsecured creditors from rushing to the court house to obtain judicial liens.[549] A key tool for accomplishing this goal is voidable preference law. To oversimplify, voidable preference law guarantees that any judicial lien attaching to a debtor's property within 90 days of the debtor's bankruptcy petition is a voidable preference. This federal principle has a chilling effect on obtaining a lien under state law, as *JD* can always defeat the lien by filing for bankruptcy within 90 days.[550]

In order to avoid a preference, the trustee must prove six elements. First, there must be a transfer of debtor property.[551] A "transfer" is defined broadly to include "the creation of a lien."[552] Second, the transfer must be to or for the benefit of a creditor.[553] Third, the transfer must be "for or on account of an antecedent debt owed by the debtor."[554] This requirement is guaranteed in the case of a judicial lien, as the debt on which it is based precedes the declaration of the lien. Fourth, the lien must be created when the debtor is insolvent.[555] Fifth, the transfer must occur within 90 days of bankruptcy.[556] Finally, the lien must allow the creditor to get more than she would have received if the lien were never created and the creditor simply took the dividend from a hypothetical liquidation of the debtor's estate instead.[557] This test is automatically met whenever an unsecured creditor becomes secured, if the debtor is insolvent on the day of bankruptcy.[558] If the trustee proves the prima facie case against a judicial lien,[559] no defense will save it from doom.

It would seem that, so long as the judicial lien is more than ninety days old at the time of bankruptcy, *JC* (if not an insider) will be a secured creditor in the bankruptcy. This assures that *JC* will always obtain the value of the collateral in question.[560] But things are not so simple. Federal law casts a strange hoodoo on the clock when it is time to figure out when a debtor actually transferred property. The question of *when* is crucial for no less than three of the six elements of the trustee's *prima facie* case of voidable preference.[561]

According to Bankruptcy Code § 547(e)(2)(A), a transfer is deemed to occur when it occurs, but only if it is "perfected" within thirty days of the transfer. This thirty-day "grace period" was lengthened in 2005 from the mean-spirited ten-day grace period of the original Bankruptcy Code.[562]

Perfection is defined as follows by Bankruptcy Code § 547(e)(1):

> For the purposes of this section:

---

[549] Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 308 (1911) ("the policy and purpose of the Bankruptcy Act [is] to hold the estate in the custody of the court for the benefit of creditors after the filing of the petition . . . To permit creditors to attach the bankrupt's property between the filing of the petition and the time of adjudication would be to encourage a race of diligence to defeat the purposes of the act and prevent the equal distribution of the estate among all creditors of the same class which is the policy of the law.").

[550] Young v. Lucasa Int'l, Ltd. (In re Lucasa Int'l, Ltd.), 13 B.R. 596 (Bankr. S.D.N.Y. 1981) (delivery of execution and levy within 90 day preference period).

[551] 11 U.S.C. § 547(b) (preamble).

[552] *Id.* § 101(54)(A).

[553] *Id.* § 547(b)(1).

[554] *Id.* § 547(b)(2).

[555] *Id.* § 547(b)(3). Insolvency is presumed in the ninety day period preceding the bankruptcy petition. *Id.* § 547(f).

[556] *Id.* § 547(b)(4)(A). There is a one-year period for insiders, which will typically be triggered in intra-family litigation. *Id.* § 547(b)(4)(B).

[557] *Id.* § 547(b)(5).

[558] 1 GILMORE & CARLSON, *supra* note 225, § 2.05. In fact, the debtor is presumed to be insolvent at all times 90 days before the bankruptcy petition. 11 U.S.C. § 547(g). In Barr v. National Aircraft Servs. (In re Cosmopolitan Aviation Corp), 34 B.R. 592 (Bankr. E.D.N.Y. 1983), a judicial lien survived even though created within 90 days of bankruptcy because the trustee did not carry the burden of proof on § 547(b)(5), but given the presumption, the trustee should have prevailed.

[559] The trustee has the burden of proof on each of the above elements. 11 U.S.C. § 547(g).

[560] 11 U.S.C. § 725.

[561] Timing of the transfer is important for figuring out whether the transfer was on antecedent debt, whether the debtor was insolvent at the time of the transfer, and whether the transfer was within 90 days of bankruptcy (one year for insiders).

[562] Pub. L. No. 109-8, § 403 119 Stat. 23 (2005).

> . . .
> (B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

So every transfer must be tested against a hypothetical judicial lien under state law. If the transfer is no good against a subsequent judicial lien, it is an unperfected transfer.

Suppose perfection does not occur within the thirty day grace period. Then, according to Bankruptcy Code § 547(e)(2)(B), the transfer does not occur when it occurs. Rather, it occurs when it is perfected.[563] This can be very bad news for a creditor. It can place a transfer within the ninety day period, even though the transfer occurred earlier.

A New York judicial lien must therefore be tested against yet another *hypothetical* New York judicial lien. We discover that, under CPLR § 5202(a), an execution lien is created when an execution is delivered to the sheriff. But CPLR § 5234(b) and (c) impose a complex priority rule. Where all creditors have served executions on the same enforcement officer, priority is decided by the order in which the executions are delivered. If we stopped here, we could affirm that execution liens are always self-perfecting transfers, and we would never have occasion to apply the time-deferring rule of § 547(e)(2)(B). But it is also possible for executions to be delivered to different enforcement officers. If this occurs, the first officer to levy establishes priority for her portfolio of creditors, compared to the creditors who served slower, flatfooted officers. For example, imagine the following scenario:

Twelfth Scenario

> *December 1, 2006*: JC_1 serves an execution on the federal marshal.
> *January 1, 2007*: The start of the preference period.
> *March 1*: The marshal levies on the debtor's property.
> *April 1*: *JD* files for bankruptcy.

Now imagine a hypothetical creditor–JC_2. This creditor could serve an execution on the sheriff on December 2. If the sheriff were to levy before the marshal–say on February 28–then JC_2 would have priority to any proceeds generated by the sheriff's execution sale. This possibility proves that JC_1's execution lien was not perfected until March 1. Only after March 1 does JC_2 lose the capacity to get a senior judicial lien. So, according to Bankruptcy Code § 547(2)(B), JC_1 received a transfer on March 1, well within the preference period. JC_1 therefore has received a voidable preference, even though, under New York law, JC_1 has an execution lien on December 1.

In order to arrive at the conclusion that March 1 is the date of the transfer (because that was the date of perfection and perfection was more than thirty days after the lien was created on December 1), I imagined JC_2 who (1) served an execution on an officer other than the federal marshal and (2) this make-believe sheriff levied before the federal marshal did. Am I allowed to imagine, not only the *creation* of a subsequent judicial lien, but also a *levy* pursuant to the creation? To ask the same question in different words, in my fiction, my dream of passion, may I force my soul so to imagine a subsequent *perfected* judicial lien,[564] or am I limited to imagining the creation of an unperfected execution lien (which would be potentially but not necessarily senior to JC_1's actual judicial lien)? Unfortunately, the Bankruptcy Code does not spell out any limitations on what a bankruptcy trustee may imagine in testing JC_1's judicial lien. Nevertheless, several New York bankruptcy courts have limited the imaginary exercise to the *creation* of a competing judicial lien. They have not permitted the bankruptcy

[563] What if a transfer is never perfected? Since voidable preferences are pre-bankruptcy transfers, Bankruptcy Code § 547(e)(2)(C) provides that the unperfected transfer is deemed made slightly before the bankruptcy petition.

[564] *See* Musso v. Ostashko, 468 F.3d 99, 102 (2d Cir. 2006) ("the so-called 'strong arm' provision of the Bankruptcy Code--gives the bankruptcy trustee the rights of a hypothetical *perfected* judgment lien creditor as of the petition date") (emphasis added). Although this remark concerns Bankruptcy Code § 544(a), not voidable preference law, both concepts require the imagination of attributes of a hypothetical judicial lien.

trustee to imagine a levy following that creation.[565] Another court, however, has ruled that an execution lien is unperfected until the sheriff levies; therefore any judicial lien is invalid if the levy is within 90 days of bankruptcy.[566]

In fact, even if the bankruptcy trustee's imagination is too impoverished to conceive of a levy, the bankruptcy trustee can *still* show that execution liens are unperfected until the time of levy. In New York, we do not even need to imagine a competing levy. An alternative scenario goes as follows. Suppose on February 28, JC_2 obtains a turnover order requiring the debtor or a third party to turn property over to the sheriff, and suppose this turnover order is filed with the clerk on the same day. Such an equity lien is guaranteed priority over JC_1 at any time before the sheriff levies on behalf of JC_1. CPLR § 5234(c) makes clear that the filing of a turnover order establishes priority for JC_2. JC_2's senior judicial lien is a self-perfecting one. Therefore, by simply imagining equity lien creation (without any subsequent lien perfection), I can show that JC_1's execution lien is not perfected.

The matter stands differently with income executions. Here CPLR § 5231(j) makes clear that the first creditor to serve *any* enforcement officer with an income execution establishes priority. True, an ordinary income execution falls to an income execution for a domestic support obligation. But the perfection test of § 547(e)(1)(B) requires that I imagine a creditor suing for breach of a simple contract. This limit on my imagination precludes me from finding JC_1 unperfected when JC_1 serves an income execution.[567] Therefore, so long as the income execution is served more than ninety days before bankruptcy, the creditor in question has not received a voidable preference.

Where *JC* is an intra-family creditor seeking to enforce a support obligation, the lien arising from an income execution may not be a voidable preference, even if *JC* serves the execution within the preference period. After 2005, *JC*'s claim for a domestic support obligation is entitled to the highest possible bankruptcy priority for unsecured creditors–higher even than administrative claims.[568] If the debtor has sufficient unencumbered assets to pay this highest of all the priorities, then *JC* has not received a voidable preference. Under the hypothetical liquidation test of § 547(b), if *JC* were to surrender her judicial lien and enter into a hypothetical chapter 7 liquidation, *JC* might still receive a 100% dividend. Accordingly, the judicial lien might not be preferential. Such a finding does not even require a level of assets sufficient to cover *JC*'s priority. *JC* will have the highest right of distribution. So what *JC* loses by surrendering the judicial lien *JC* gets back under her § 507(a)(1) priority. This means that a bankruptcy trustee can never undo a judicial lien for a domestic support obligation.

Income executions in New York are not voidable preferences, if the sheriff has served the employer more than 90 days before a debtor's bankruptcy petition. This was the holding of *Riddervold v. Saratoga Hospital (In re Riddervold)*.[569] The court ruled that *JC* did not receive a voidable preference, even though actual payments and services performed by *JD* occurred during the preference period.[570]

---

[565] Balaber-Strauss v. Marine Midland Bank (In re Marceca), 129 B.R. 369 (Bankr. S.D.N.Y. 1991); Syed Industries Corp. v. Cohen (In re Syed Indus. Corp.), 58 B.R. 920 (Bankr. E.D.N.Y. 1986); Barr v. National Aircraft Servs., Inc. (In re Cosmopolitan Aviation Corp.), 34 B.R. 592 (Bankr. E.D.N.Y. 1983); Talcott Factors, Inc. v. Blatter (In re Blatter), 16 B.R. 137 (Bankr. S.D.N.Y. 1981).

[566] Sapir v. Mancuso (In re Kambourelis), 8 B.R. 138 (Bankr. N.D.N.Y. 1981).

[567] Dorey v. Perfetti Builder's Hardware, Inc. (In re New Life Builders, Inc.), 241 B.R. 507, 510 (Bankr. W.D.N.Y. 1999).

[568] 11 U.S.C. § 507(a)(1).

[569] 647 F.2d 342 (2d Cir. 1981).

[570] The avoidance action was brought by *JD*, not the bankruptcy trustee, pursuant to Bankruptcy Code § 522(h). Debtors are able to bring voidable preference cases to recover exempt property only if they have not made voluntary transfers of the property in question. 11 U.S.C. § 522(g)(1)(A). The wages were exemptible under Bankruptcy Code § 522(d)(5)--a wild card that allows any type of property to be exempted. In 1981, however, the New York legislature would prohibit New York debtors from choosing federal exemptions. Today, debtors wishing to challenge garnishments as voidable preferences must assert the cash exemption in New York Debtor & Creditor Law § 283. Price v. Manufacturers & Traders Trust Co. (In re Price), 266 B.R. 572, 574 (Bankr. W.D.N.Y. 2001). Or they could show that bank accounts contain wages from the ungarnished portion. McMahon v. Nourse (In re McMahon), 70 B.R. 290 (Bankr. N.D.N.Y. 1987). But only wages earned within 60 days before the garnishment are properly exempted. CPLR § 5205(d)(2); In re Wrobel, 268 B.R. 342 (Bankr. W.D.N.Y. 2001). Meanwhile, nothing in CPLR § 5205 would sustain an exemption in the 10% of wages actually paid over to the sheriff.

Although many have attacked this position,[571] it is perfectly correct. *JD*'s "job" is what Article 9 would call an account (if Article 9 applied to wages).[572] The fact that the account is contingent on *JD*'s work does not change the fact that the account existed as soon as *JD* was hired. When *JC* delivered the income execution to the sheriff prior to the preference period, *JC* obtained a property interest in that account at that time.[573] In fact, the levy is quite irrelevant to the analysis. *JC*'s lien depends on delivery to the sheriff, not on the levy.[574] Properly, this result should hold even if the sheriff never serves the debtor or the employer with the income execution.

Furthermore, suppose the sheriff serves *JD*, as CPLR § 5231(d) requires, and *JD* makes voluntary payments to the sheriff. The voluntary payments are transfers of debtor property within the 90 day preference period, but it is also true that *JC* has a judicial lien on the employment contract which is valid in bankruptcy, provided the income execution was delivered to the sheriff before the preference period.[575] As a result, every dollar voluntarily paid to the sheriff releases a dollar of wages encumbered by the judicial lien. As a result, *JD*'s payment to the sheriff, a prima facie voidable preference, is defended by Bankruptcy Code § 547(b)(1), which excuses preferences if contemporaneous with the release of a lien.[576] The only case on this subject, however, misses this point.[577]

Once the bankruptcy commences, failure of the creditor to take voluntary affirmative steps to halt the "continuing levy" of garnishment violates bankruptcy's automatic stay provision.[578] For this the creditor could be liable in damages.[579] The garnishment itself, though a valid lien on the debtor's pre-petition property, dissolves of its own accord under the authority of *Local Loan v. Hunt*.[580] In that case, a voluntary wage assignment was proclaimed automatically dissolved in the name of bankruptcy's fresh start principle, even though the assignment was valid under Illinois law. And if pre-petition voluntary wage assignments dissolve from post-petition wages, surely an involuntary assignment (*i.e.*, a garnishment) does too.[581]

---

[571] *E.g.*, Morehead v. State Farm Mut. Auto. Ins. Co. (In re Morehead), 249 F.3d 445 (6th Cir. 2001); Gouveia v. McCowen (In re Coppie), 728 F.2d 951 (7th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985).

[572] Article 9 disavows jurisdiction over wage assignments. UCC § 9-106(d).

[573] David Gray Carlson, *Security Interests in the Crucible of Voidable Preference Law* 1995 U. ILL. L. REV. 211, 238. The reasoning in *Riddervold*, however, is different. There Judge Henry Friendly ruled that, when *AD* paid the sheriff after the levy, *AD* was not transferring *JD*'s property. Rather, after the levy, *JC* owned the wages. 647 F.2d at 346 ("service of the income execution on the employer in effect works a novation whereby the employer owes 10% of the employee's salary not to the employee but to the sheriff for the benefit of the judgment creditor"). This is untenable as stated. Imagine that *JD* pays *JC* the amount of the judgment on the side. Properly, this payment cancels the levy. The 10% payable to *JC* should now be paid to *JD*. On Judge Friendly's reasoning, since *JC* owns the wages outright, payment to *JC* would not affect *JC*'s continuing right to receive 10% of the wages.

For the view that a federal property rule for transfer of wages renders *Riddervold* erroneous, see Matthew Frankle, Note, *Wage Garnishments in Bankruptcy:* Riddervold *Revisited*, 21 CARDOZO L. REV. 927, 952-56 (1999). For opinions within the Second Circuit that decline to follow *Riddervold* on the erroneous premise that *Riddervold* is overruled by Barnhill v. Johnson, 503 U.S. 393, 398 (1992), see Price v. Manufacturers & Traders Trust Co. (In re Price), 272 B.R. 828 (Bankr. W.D.N.Y. 2002); Arway v. Mount St. Mary's Hospital, 227 B.R. 216 (Bankr. W.D.N.Y. 1998). These cases are based on the premise that a debtor has no property right in an employment contract until she actually does the work. In other words, a contingent right to payment is equated with *no* right to payment.

[574] *Cf.* Beneficial Fin. Co. of N.Y. v. Baker, 43 Misc. 2d 546, 251 N.Y.S.2d 556 (S. Ct. Monroe Co. 1964) (where *JC* served an income execution on sheriff and *JD* assigned wages and assignee notified employer of assignment, *JC* still had the senior lien on wages).

[575] "First to deliver" is the rule for income executions, but it is not necessarily the rule for ordinary non-income executions. With regard to the latter, JC_1 might serve an execution to the sheriff first, but JC_2 might still have priority if JC_2 serves an execution on a federal marshal who is the first to levy. CPLR § 5234(b). As a result, the execution lien is unperfected prior to levy, for the purposes of § 547(e)(2)(a).

[576] 1 GILMORE & CARLSON, *supra* note 225, § 3.02. Release of valid liens is defined in Bankruptcy Code § 547(a)(2) to be new value.

[577] In re Lawrence, 18 B.R. 360 (Bankr. E.D.N.Y. 1982).

[578] 11 U.S.C. § 362(a)(2) (forbidding "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title"). On a creditor's duty under Bankruptcy Code § 362(a) to put the debtor back into possession of property, see 1 GILMORE & CARLSON, *supra* note 225, § 13.09 (2000).

[579] Sucre v. MIC Leasing Corp. (In re Sucre), In re 226 B.R. 340 (Bankr. S.D.N.Y. 1998).

[580] 292 U.S. 234 (1934).

[581] *See* In re Rutty, 39 B.R. 204 (Bankr. S.D.N.Y. 1984) (assuming that the debtor owns postpetition wages in a chapter 7 case, in spite of garnishment).

II. Equity Liens

In ancient times, the writ of execution was deemed the "legal" remedy for a money judgment. Equitable remedies existed, but these were subject to the rule that equity disdained to intervene if a legal remedy proved adequate. So, unless the sheriff returned an execution unsatisfied, or *nulla bona*, or unless the property was "equitable" (inherently not subject to execution), the equitable remedies were not available.[582]

If the execution was indeed *nulla bona*, the creditor could file a "creditor's bill in equity." The creditor's bill was a grab-bag of equitable remedies, including the right to a turnover order directing *JD* or *AD* to pay or to surrender property to the sheriff, the right to have a receiver appointed to liquidate property, the right to discovery against *JD* or *AD* in order to locate *JD*'s loot, and restraining orders, prohibiting *JD* or *AD* from transferring *JD*'s property.

When New York adopted the Field Code in 1848, a series of provisions introduced many of the above ideas under the rubric of a supplementary proceeding.[583] As with the creditor's bill, a supplementary proceeding was initially possible only if the execution were returned *nulla bona*. In 1935, however, the legislature abolished the requirement of the execution *nulla bona*.[584] Today it is possible for judgment creditors to proceed directly to the equitable remedies.

A. Creation

Heretofore we have considered mainly the execution lien. Yet CPLR § 5202(b) also provides liens in connection with "the securing of an order for delivery of, payment of, or appointment of, a debt owed to the judgment debtor or an interest of the judgment debtor in personal property. . . " Strangely, when these equity liens come up against levies pursuant to executions, the equity lien's priority depends on when the order "is filed."[585] If a sheriff levies property after the judgment creditor has "secured" an order from a judge but before the county clerk "files" the court order, the sheriff has priority. Or if JC_1 "secures" an order first, but the clerk "files" JC_2's order first, JC_2 prevails.[586] This gap is no doubt the result of legislative negligence.

Once created, the equity lien is vulnerable to "a transferee who acquired the debt or property for fair consideration and without notice of such order."[587] This vulnerability exists whether or not the property is capable of delivery. In this sense, the equity lien is weaker than the execution lien, where the sheriff has levied property capable of delivery. Following such a levy, bona fide transferees for value do not take free of the execution lien. This is no doubt because a levy of such property implies dispossession of *JD*–a warning to anyone who seeks a transfer from *JD*. With equity liens, however,

---

[582] "Proceedings supplementary to execution are remedies in equity for the collection of the creditor's judgment, and were intended as a substitute for the creditor's bill, as formerly used in chancery. In such cases it was the settled rule that unless the creditor had exhausted all his remedies at or in case he was not a position to avail himself of all the ordinary remedies which courts of law gave for the enforcement of judgments, the bill in equity could not be maintained and would be dismissed." Importers' & Traders' Nat'l Bank v. Quackenbush, 143 N.Y. 567, 571, 38 N.E. 728 (1894). As a practical matter, if the judgment debtor did not contest the bill, inquiry into the adequacy of the legal remedy was waived. Cohen, *Supplementary Proceedings*, *supra* note 6, at 1013.

[583] The Field Code was displaced by the Throop revision of the Code of Civil Procedure in 1876, which in turn was overthrown by the Civil Practice Act in 1920. Isadore H. Cohen, *Attachment of Property Fraudulently Transferred in New York: The Influence of Abstractions on the Rights of Creditors*, 49 Colum. L. Rev. 501, 516 (1949) [hereinafter cited as Cohen, *Property Fraudulently Transferred*]. The CPLR went effective on September 1, 1963.

[584] N.Y. Sess. Laws 1935, ch. 630; Utilities Engineering Institute v. Mangan, 276 A.D.2d 922, 94 N.Y.S.2d 244 (2d Dept. 1950).

[585] CPLR § 5234(c).

[586] *See* CPLR § 5234(c) (second sentence) ("where two or more such orders affecting the same interest in personal property or debt are filed, the proceeds of the pp or debt shall be applied in the order of filing"). An untenable suggestion appears in the leading treatise: perhaps an order to a third party under § 5225(a) is merely a judgment against the third party, which must be enforced by execution. WEINSTEIN ET AL., *supra* note 25, ¶ 5225.06a. The language of § 5225(b) is clearly injunctive; if *AD* violates it, she is in contempt of court. CPLR § 5210. Besides, if the property is not capable of delivery, execution culminates in a paper levy, which is not enforced by the sheriff but rather must be enforced by a turnover proceeding. *See supra* text accompanying notes 185-215. So the suggestion ends up, in this context, requiring *two* turnover proceedings instead of one.

[587] CPLR § 5202(b).

JD or perhaps *AD* stays in possession, at least initially. This provides no notice to bona fide transferees.

Oddly, suppose *JD* obeys a turnover order and hands property capable of delivery over to the sheriff. Though dispossessed, *JD* still has the power to give better title to a good faith transferee for value. So if the sheriff possesses property capable of delivery by levy, *JD* is disempowered. If the sheriff possesses turned-over property, *JD*'s power continues.

Suppose, however, that the sheriff holds an auction where *X* is the buyer. Can *X* be confident that *JD*'s power to convey free of the lien has finally been laid to rest? There is nothing on the face of the CPLR to give *X* any such assurance–yet more testimony to the negligence with which the CPLR was drafted.

According to CPLR § 5202, equity liens arise, not when an equitable action is commenced,[588] but when the action terminates with the "securing" of an order. Thus, if JC_1 commences a turnover proceeding and JC_2 manages a levy before the conclusion of the turnover proceeding, JC_2 snatches the laurel wreath of priority from the brow of JC_1.[589] This is a change from prior law. In *Metcalf v. Barker*,[590] for example, *JC* commenced a turnover proceeding with regard to fraudulently conveyed assets eighteen months before bankruptcy. It secured a turnover order five months before bankruptcy. The order was filed within four months of bankruptcy. Under the Bankruptcy Act of 1898, any lien obtained within four months of bankruptcy was null and void.[591] The creditor, however, escaped this avoidance theory because its equity lien was created when the turnover proceeding was commenced, more than a year beyond the fatal four-month period.[592] In modern times, the equity lien would have been judged from the time it was secured or perhaps filed.[593]

Commencement of a turnover proceeding does not create a lien,[594] but it does perpetuate a levy. According to the eighth sentence of CPLR § 5232(b):

> At the expiration of ninety days after a levy is made by service of the execution. . . the levy shall be void except as to property or debts which have been transferred or paid to the sheriff. . . or *as to which a proceeding under sections 5225 or 5227 has been brought.*

Significantly, the mere bringing of the turnover proceeding extends the execution lien past the ninety days. Where there has been no levy, the turnover order must be "secured" before the creditor has a lien.

The rejection of the rule of *Metcalf v. Barker* for lien creation has a convoluted history. In the nineteenth century, writs of execution could not reach intangible property of the debtor–a limitation abolished in 1952.[595] The only way for a creditor to reach intangible property was by bringing a supplementary proceeding, as the remedy of execution was *per se* not possible. In such supplementary proceedings, the creditor had a lien at the commencement of the case, or so it was agreed by the end of 19th century.[596]

---

[588] At least when a creditor sought the appointment of a receiver, the supplementary proceeding was deemed commenced when a subpoena was served on the debtor, when a subpoena was delivered to a third party (but the lien bound only property controlled by the third party, or when the debtor received notice that the creditor would seek the appointment of a receiver, whichever was earlier. Former Civil Practice Act § 808.

[589] Kitson & Kitson v. City of Yonkers, 778 N.Y.S.2d 503 (2d Dept. 2004); This is indicated by the negative pregnant in the first sentence to § 5234(c); *see* City of New York v. Panzirer, 23 A.D.2d 158, 259 N.Y.S.2d 284 (1st Dept. 1965).

[590] 187 U.S. 165 (1902).

[591] Bankruptcy Act of 1898, § 67f.

[592] *See also* Wickwire Spencer Steel Co. v. Kemkil Scientific Corp., 292 N.Y. 139, 142, 5 N.E.2d 336, 337 (1944).

[593] For the record, a bankruptcy trustee would prevail for a different reason. In *Metcalf*, *JC* obtained a lien on fraudulently conveyed property by commencing an supplementary proceeding. Today, provided the trustee could find some other unsecured creditor who could have avoided the same fraudulent conveyances, the trustee could subrogate to the unsecured creditor, 11 U.S.C. § 544(b)(1), and could recover from *JC* as a transferee of a transferee. 11 U.S.C. § 550(a)(2); David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination* 44 WM. & MARY L. REV. 157, 179-80 (2003).

[594] County Natl. Bank v. Inter-County Farmers Coop. Assn., Inc., 65 Misc. 2d 446, 317 N.Y.S.2d 790 (S.Ct. Sullivan Co. 1970).

[595] N.Y. Sess. Laws 1952, ch. 835.

[596] Cohen, *Supplementary Proceedings*, *supra* note 6, at 1015-17 (describing the back-and-forth history of equitable lien commencement). Earlier, it was sometimes suggested that equity must treat all creditors equal, so that anyone who intervened in a creditor's bill proceeding shared in the bounty. Comment, *Priorities of Creditors Under Judgment creditor's Bills*, 42 YALE L.J. 919,

With regard to *tangible* property, however, courts declared that, if JC_1 commenced a supplementary proceeding, she had a lien.[597] But courts also insisted that, if the sheriff levies for JC_2 before the turnover or receivership order was entered, JC_2 took priority.[598] Of course, in ancient days, JC_1 was not entitled to an equitable remedy unless the legal remedy of execution was impossible; the sheriff's levy for JC_2 therefore undercut JC_1's entitlement to any equitable relief.[599] How could JC_1 claim the legal remedy was inadequate when JC_2 had successfully executed? When, in 1935, the legislature abolished the requirement of the *nulla bona* execution, this justification for the priority of the sheriff's levy dissolved. Nevertheless, the priority of JC_2's levy absurdly continues on.[600]

After 1952, it became possible for the sheriff to levy property not capable of delivery.[601] This new power of the sheriff extended the realm of conflict between the execution and the equity liens. Both tangible and intangible property were now up for grabs. As matters stood on the eve of the CPLR, the creditor who commenced an equity proceeding had a lien, but the lien would fall to an actual levy by the sheriff. Where two creditors each commenced supplementary proceedings, the first to commence the action would prevail.[602] Bona fide purchasers could take free and clear of a receiver until the receiver was actually appointed.[603] No express bona fide purchaser rule existed outside the context of receivership.[604]

The CPLR drops the notion that commencement of the supplementary proceeding is the moment of lien creation. Substantively, the greatest effect of the CPLR's innovation is to change the rules for two creditors who both seek equitable relief. Today, the first creditor to secure the relief[605] and have the order filed by the clerk[606] prevails.[607]

Deferral of lien creation from commencement to the conclusion of a supplementary proceeding is regrettable. Of considerable interest, then, is a recent case that ignores CPLR § 5202(b) in favor of

---

930 (1933).

[597] Doubt was expressed on that score. First National Bank v. Shuler, 153 N.Y. 163, 172, 47 N.E. 262, 264 (1897) ("But in respect of chattels, subject to be taken on execution, the mere commencement of the action creates no lien as against other creditors, and if any lien whatever exists, it is so incomplete and imperfect that it is subject to be overreach by a subsequent levy in favor of other creditors, made before the appointment of a receiver") (citations omitted).

[598] Davenport v. Kelly, 42 N.Y. 193 (1870); Van Alstyne v. Cook, 25 N.Y. 489 (1862) (equity action started at 2 p.m.; levy occurred at 5 p.m.); *see* Kitchen v. Lowery, 127 N.Y. 53, 60, 27 N.E. 357, 3581) ("the commencement of an action in the nature of a creditor's bill creates a lien upon the choses in action and equitable assets of the judgment debtor. It does not create a lien upon his tangible personal property subject to levy by an execution, unless he procures a receiver to be appointed."); Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 COLUM. L. REV. 504, 510 (1929) ("It would seem therefore that . . . manual seizure is the acme of vigilance").

[599] Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 COLUM. L. REV. 504, 507 (1929).

[600] Distler & Shubin, *supra* note 8, at 494.

[601] N.Y. Sess. Laws 1952, ch. 835.

[602] Hubbard v. J.P. Lewis Co., 128 A.D. 416, 112 N.Y.S. 1050 (4th Dept. 1908).

[603] Former Civil Prac. Act § 808 (last sentence). This provision was somewhat complex. Former § 807 provided that a receiver has title to a debtor's property upon being appointed. Section 808 then imposed a "relation back" rule to the beginning of the proceeding. The bona fide purchaser protection occurred only in § 808, meaning that no bona fide purchaser protection existed after the receiver's appointment. Isadore H. Cohen, *Collection of Money Judgments in New York: Third Party Orders*, 35 COLUM. L. REV. 1196, 1209 (1935) [hereinafter cited as Cohen, *Third Party Orders*].

[604] A concurring Court of Appeals judge once suggested that bona fide purchasers took free and clear of turnover orders. Lynch v. Johnson, 48 N.Y. 27, 33 (1871) (Earl, J., concurring).

[605] CPLR § 5202(b).

[606] *See* CPLR § 5234(c) (second sentence).

[607] So, for example, the result in *Hubbard v. J.P. Lewis Co.*, 128 A.D. 416, 112 N.Y.S. 1050 (4th Dept. 1908), would surely be different. In *Hubbard*, JC_1 commenced a supplementary proceeding seeking appointment of a receiver. Before the receiver was appointed, *AD* (who had been served with notice of the supplementary proceeding) paid *JD*. Thereafter, JC_2 had the receivership extended to JC_2's judgment. *See* CPLR § 5228(b) ("[w]here a receiver has been appointed, the court, upon motion of a judgment creditor, upon such notice as it may require, shall extend the receivership to his judgment"); Bostwick v. Menck, 40 N.Y. 383, 389-90 (1869) (where a receivership is extended to JC_2, JC_1 still has priority). The effect of the extension was that JC_2 had a lien as of the day he commenced the action seeking the extension. Since *AD* had paid after JC_1's commencement (but before JC_2's extension), the receiver could require *AD* to pay the receiver the amount of JC_1's judgment. Beyond that, *AD* had the right to pay *JD* free and clear of JC_2. In other words, commencement of the supplementary proceeding was the moment of lien creation. Under the modern CPLR, commencement of the supplementary proceeding does not create a lien, and so *AD* would have escaped liability altogether.

the non-statutory idea of *in custodia legis*. In *Clarkson Co. v. Shaheen*,[608] *JD* fraudulently conveyed certificated equity shares to *X*. *JC* commenced a turnover proceeding against *X* under CPLR § 5225(b). *X* responded by claiming the transfer was in good faith and for a fair consideration. While the District Court pondered the bona fides of *X*, it required *X* to hand over the equity shares to an officer of the court. Thereafter, the sheriff, on behalf of JC_2, levied the shares.[609] On these facts, if the matter were governed by the CPLR alone, JC_2 should have prevailed, as JC_2 levied before JC_1 obtained a turnover order.[610] The court nevertheless held for JC_1; the shares were *in custodia legis* at the time of the levy. Therefore, the court officer held the property in trust for JC_1. The most JC_2 could have was the surplus.

The *Clarkson* court emphasized that the moment of *in custodia legis* was when *X* actually delivered certificated shares to an officer of the court. But this seems unnecessary to the decision. Once the *Clarkson* court had jurisdiction over the person of *X*, the property that *X* held was already *in custodia legis*.[611] In general, jurisdiction over the person possessing property is jurisdiction over the property itself.[612]

Does *Clarkson* simply override CPLR § 5202(b)? One limitation is that *in custodia legis* is a doctrine wherein different courts respect each other's power over person and property. So, in *Clarkson*, where a state sheriff sought to levy from a federal receiver, *in custodia legis* established the dignity of the federal court against the state court. Where a state sheriff tries to levy property as to which a turnover proceeding has commenced in New York state court, *in custodia legis* might not apply because there are not two courts competing for jurisdiction. Rather, there is only one court, disappointingly misgoverned by the terms of the CPLR.

B. Scope

When a creditor secures a turnover order or receivership, does the creditor have a lien on all of a debtor's property, or only on the property to which the order refers? According to § 5202(b), where a creditor has secured a turnover order or receivership with regard to a debtor or an interest of the judgment debtor in personal property, a creditor's interest in *the* debt or *the* property is superior to the rights of a transferee. The emphasized word "the" testifies in thunder against the generality of the lien on all *JD*'s property. If this reading is correct, then a turnover against *AD* encumbers the debt owed or property held by *AD*. A turnover order against *JD* can be general in nature, but if limited to specific assets, the lien would presumably be limited as well.

If this is so, then the CPLR accords with a distinction that anciently existed. Prior to the CPLR, liens were created with the commencement of a supplementary proceeding. Where the proceeding was aimed at *AD* who owed a debt or held *JD*'s property, then the lien was limited to that debt or that property. Where commencement was against *JD*, then the lien was general in nature.[613]

C. Debt v. Property

---

[608] 716 F.2d 126 (2d Cir. 1983).

[609] The *Clarkson* court does not discuss the form this levy took. Stock certificates are property capable of delivery. CPLR § 5201(c)(4). But, where the stock is in the "lawful possession of a pledgee," no levy by seizure is permitted. CPLR § 5232(b). Paper levies have been upheld, but only for the fallow purpose of generating poundage fees for the sheriff. *See supra* text accompanying notes 298-310.

[610] CPLR § 5234(c). Actually, not only had JC_1 commenced a turnover proceeding but JC_1 was the first to levy. The lower court therefore concluded that JC_1's levy continued to be valid after the 90 day expiration period, even though JC_1's turnover proceeding was commenced before the levy. 540 F. Supp. 636 (S.D.N.Y. 1982).

[611] Taylor v. Sternberg, 293 U.S. 470, 473 (1934) (bankruptcy estate *in custodia legis* the minute a bankruptcy petition is filed, even though a state receiver had physical possession); Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922) ("Where the action is in rem the effect is to draw to the federal court the possession or control, *actual or potential*, of the res, and the exercise impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that when the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction.") (emphasis added).

[612] For the Full Faith and Credit worth of this lien, see *supra* text accompanying notes 647-60.

[613] Distler & Shubin, *supra* note 8, at 486.

In the context of execution liens, the New York Court of Appeals has attempted to obliterate the difference between debts garnishable under § 5201(a) and property leviable under § 5201(b).[614] Yet this distinction has refused to be obliterated.[615] Just as it lives on in the realm of the execution lien, so it lives on in the realm of the equity lien.

If the *res* in question is a debt, the creditor must proceed under § 5227, which presupposes that the proper party to enjoin is *AD*.[616] If, however, the *res* is also property, then a court must determine who possesses this property.[617] If *JD* possesses it, *JD* is the proper party to enjoin under § 5225(a), and *JC* may proceed by motion. If *AD* possesses property, then *AD* should be enjoined pursuant to § 5225(b), which requires a "special proceeding."[618] Because under *ABKCO Industries, Inc. v. Apple Films, Inc.*,[619] the difference between debt and property has been largely (but not entirely) erased, CPLR § 5225(b) and § 5227 are "essentially interchangeable."[620]

The Second Circuit had occasion to address these issues in *Alliance Bond Fund, Inc. v. Grupo Mexicano Desarrollo S.A.*[621] In this case, *JD*, a Mexican entity, was a subcontractor in a toll road project in Mexico. The project failed, and the contractor could not pay *JD*, The Mexican government intervened and intimated that it perhaps might issue notes directly to *JD* or perhaps to the contractor, who would use them to pay *JD*. Whether the Mexican government had actually committed itself to do this was in dispute.

When *JD* defaulted on notes issued under a New York indenture, *JC* commenced a diversity suit in federal court. Prior to judgment, *JC* alleged that *JD* planned to assign its rights (whatever they might be) to Mexican creditors. *JC* requested from the District Court a preliminary injunction to prevent the dissipation of this asset.

Provisional remedies in federal court are governed by Federal Rules of Civil Procedure 64 and 65. Rule 64 incorporates state law by reference, with regard to pre-judgment attachment. Concluding that state law would not support an injunction, the District Court instead issued a preliminary injunction under Rule 65,[622] only to be reversed by the United States Supreme Court, on the antiquarian ground that, in 1789, the year of the Judiciary Act, a court of equity would not have given a like injunction.[623] The Supreme Court, however, took no position on whether attachment under New York law would have sustained a similar injunction. Had it condescended to examine the matter,[624] it would have found that pre-judgment attachment under Article 62 of the CPLR to be a close question. Under Article 62,

---

[614] ABKCO Industries, Inc. v. Apple Films, Inc., 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976).

[615] *See supra* text accompanying notes 240-59.

[616] If *JC* brings a proceeding under § 5225(b) and it should be brought under § 5227, courts are prepared to overlook the gaffe. City of New York v. Midmanhattan Realty Corp., 119 Misc. 2d 968, 464 N.Y.S. 2d 938 (S. Ct. N.Y. Co. 1983); *but see* V P Supply Corp. v. Normand, 27 A.D.2d 797, 279 N.Y.S.2d 124 (4th Dept. 1967) (reversing for many reasons, including trying to collect a debt under § 5225(b).

[617] It is reversible error to order a turnover without finding that "the judgment debtor is entitled to the possession of such property" held by a third party. Beauvais v. Allegiance Securities, Inc., 942 F.2d 838 (2d Cir. 1991).

[618] A special proceeding is governed by Article 4 of the CPLR. *JD* is not a necessary party to such a supplementary proceeding. RCA Corp. v. Tucker, 696, F. Supp. 845 (E.D.N.Y. 1988). Nevertheless, *JD* is entitled to notice of the § 5225(b) proceeding. CPLR § 5225(b) (third sentence). A federal court need not find separate jurisdictional grounds for a supplementary proceeding, if there was subject matter jurisdiction over the original law suit. *Id*. Filing a § 5227 proceeding against *AD* is the equivalent of moving for summary judgment against him. A.F.K. Falck, S.p.A. v. E.A. Karay Co., 722 F. Supp. 12 (S.D.N.Y. 1989). Since *JC* brings a "special proceeding" in the case of § 5225(b) and § 5227, *AD* has a right to a jury, if there are facts in dispute. CPLR § 410. If *AD* does not dispute the indebtedness, no costs against him may be assessed. CPLR § 5227 (second sentence). A bank's failure to pay over a joint account because the bank is unsure of non-debtor ownership is not considered disputing the existence of the bank's debt to *JD*. Household Fin. Corp. v. Rochester Community Savs. Bank, 143 Misc. 2d 436, 541 N.Y.S.2d 160 (City Ct. Rochester 1989). Where *JC* had a judgment against all the partners in a partnership, a special proceeding under § 5225(b) is not necessary for the court to order the partners to pay. Jones v. Palermo, 105 Misc. 2d 405, 432 N.Y.S.2d 288 (S.Ct. N.Y. Co. 1980).

[619] 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976).

[620] Mendel v. Cherganyou, 147 Misc. 2d 1056, 559 N.Y.S.2d 616, 617 (S. Ct. Kings Co. 1990).

[621] 190 F.3d 16 (2d Cir. 1999).

[622] Alliance Bond Fund, Inc. v. Grupo Mexicano Desarrollo S.A., 143 F.2d 688, 682 (2d Cir. 1998), *rev'd*, 527 U.S. 308 (1999).

[623] Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999).

[624] On other occasions, the Supreme Court has shaken off its laziness and has declared its ability to affirm a lower court opinion on grounds not considered by the court below. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711 (1996).

the court issues an order of attachment only if the plaintiff can show statutory grounds for it. One of the grounds is that "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned. . . property. . . or is about to do [so]."[625] In New York, insider preferences are fraudulent conveyances.[626] Plausibly, the desire to prefer Mexican creditors over their American competitors might constitute grounds for attachment, if patriotic affinity is the same as giving preferences to insiders.[627]

If these preferences were fraudulent conveyances, an order of attachment could have issued. If delivered to the sheriff, a lien is created.[628] The sheriff must levy under the order of attachment. The language relevant to our analysis is CPLR § 6214(a):

> The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, *or upon the defendant if property to be levied upon is in the defendant's possession or custody*. . . [629]

The emphasized language indicates that a valid levy has occurred if the defendant (*D*) possesses or has custody of personal property. In *Grupo Mexicano*, the availability of attachment devolves to whether *D* with a claim against *AD* "possesses" that claim. If possession means dominion[630] or the legal ability to exclude others,[631] then indeed a levy could be achieved by serving an order of attachment on *D*.[632] While it was never clear in *Grupo Mexicano* that the Mexican government was an *AD*, the defaulting contractor certainly was. So at least to this extent, there could have been a levy, provided that *D* generally "possesses" the accounts receivable that are owed to him.

If attachment was available, would this have sustained the injunction that the *Grupo Mexicano* majority struck down? A levy under a New York order of attachment has express injunctive effect only with respect to a *garnishee*. If a levy occurs, the "garnishee is forbidden to make of suffer any. . . assignment [of] such property."[633] Astonishingly, the New York legislature forgot to provide injunctive effect when *D* is levied directly.[634] Nevertheless, under CPLR § 6313, a court is expressly authorized to issue a temporary restraining order against *D* if *P* can show "immediate and irreparable injury, loss or damages will result unless [*D*] is restrained before a hearing can be had . . . " This should easily add

---

[625] CPLR § 6201(3).

[626] American Panel Tec v. Hyrise, 31 A.D.2d 586, 819 N.Y.S.2d 768 (2d Dept. 1906); Mega Personal Lines, Inc. v. Halton, 9 A.D.3d 553, 556, 780 N.Y.S.2d 409, 411 (3d Dept. 2004); P.A. Bldg. Co. v. Silverman, 298 A.D.2d 327, 750 N.Y.S.2d 13 (1st Dept. 2002); Siemens & Halskui GmbH v. Gres, 32 A.D.2d 624, 299 N.Y.S.2d 908 (1st Dept. 1969).

[627] A near miss is CPLR § 5229:

> In any court, before a judgment is entered, upon motion of the party in whose favor a verdict has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment.

This provisional remedy is available to federal courts under Rule 64. Sequa Cap. Corp. v. Nave, 921 F. Supp. 1072 (S.D.N.Y. 1996). But it requires the entry of a verdict. Brookhaven Anesthesia Assoc. v. Flaherty, 798 N.Y.S. 343 (2d Dept. 2004). In *Grupo Mexicano*, the preliminary injunction was issued months before the plaintiff was granted summary judgment. 190 F.3d at 19.

[628] CPLR § 6203.

[629] Emphasis added.

[630] Benedict v. Ratner, 268 U.S. 45 (1925) (under New York law, a debtor has dominion over a receivable until the account debtor is informed of the assignment); *but see* Harris v. Balk, 198 U.S. 215 (1905) ("It is not a question of possession in the foreign State, for possession cannot be taken of a debt . . . as tangible property might be taken advantage of").

[631] Adam Mossoff, *What is Property: Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 384 (2003); Jeanne L. Schroeder, *The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis*, 16 CARDOZO L. REV. 805, 861-62 (1995).

[632] *But see* Michelsen v. Brush, 233 F. Supp. 868, 871 (E.D.N.Y. 1964) (CPLR § 6214 "contemplates service of the attachment order on the defendant only with respect to property 'in the defendant's possession or custody'. . . and, hence, the duty 'forthwith' to 'transfer or deliver all such property' extends only to property of the tangible kinds capable of delivery that is in defendant's 'possession or custody'").

[633] CPLR § 6214(b) (fifth sentence).

[634] Finance Inv. Co. (Bermuda) Ltd. v. Gossweiler, 145 A.D.2d 462, 535 N.Y.S.2d 633 (2d Dept. 1988).

the injunctive consequence that the legislature so negligently forgot to supply.[635]

By the time *Grupo Mexicano* was remanded from its unedifying stay with the Supreme Court, the District Court had granted *JC* a judgment, so the question of pre-judgment attachment was superseded, and the Supreme Court's advice about the preliminary injunction was useless and moot. The preliminary injunction had become a permanent injunction–a restraining order. The propriety of this injunction was not disputed.[636] In addition, the District Court ordered *JD* to "irrevocably assign or transfer to [*JC*] a sufficient amount of toll road receivables or government notes to satisfy the judgment . . . "[637] On further appeal, the issue became whether this court order was justified as a turnover order under CPLR § 5225 or 5227.

JD claimed not,[638] because its receivables were "debts," not "property." If so, then *JC* could proceed only under § 5227, which would have required action against the two Mexican *ADs*, neither of whom were present in New York. But *JD*'s argument foundered on the shoals of *ABKCO Industries, Inc. v. Apple Films, Inc.*,[639] which sought to erase the distinction between debts and property. So the *Grupo Mexicano* court analyzed only whether the receivables were property.[640]

According to CPLR § 5201(b), a judgment can be enforced against property only if it "could be assigned or transferred." The court therefore remanded for a finding on this score. But even if the receivables were assignable, the court declined "the invitation to hold that an asset characterized as property for the purposes of § 5201 is necessarily characterizable as property for purposes of §§ 5225 and 5227 as well."[641] Rather, the court ruled:

> A judgment creditor seeking a turnover order therefore must show: First, that the asset it seeks to collect has been made available to judgment creditors by § 5201; and second, *that the party against which the creditor has chosen to proceed has the ability to produce the asset.*[642]

This second requirement seems merely to be a restatement of § 5225(a)'s requirement that "the judgment debtor [be] in possession or custody of money or other personal property. . . " Therefore, we have the same issue as we had for our analysis of pre-judgment attachment: is a debtor in "possession" of her property not capable of delivery?[643] The answer must be yes. The premise of *Grupo Mexicano* is that debt *is* property. Property must have a possessor, if possession means the power to exclude (and not mere manucaption). So defined, who but *JD* is eligible to be the possessor? Certainly not *AD*. For

---

[635] A post-*Grupo-Mexicano* court has ruled that, where a creditor is likely to succeed on the merits of a fraudulent conveyance, a preliminary injunction under Rule 65 can issue. Trafalgar Power, Inc. v. Aetna Life Ins. Corp., 131 F. Supp. 2d 341 (N.D.N.Y. 2001). This holding, if correct, reduces the significance of the Supreme Court's antiquarian dalliance in *Grupo Mexicano* to near zero.

[636] Probably because the court, or even *JC*'s attorney as officer of the court, can issue retraining notices. CPLR § 5222.

[637] 190 F.3d at 19; *see* CPLR § 5225(c) ("The court may order any person to execute and deliver any document necessary to effect payment or delivery").

[638] *JD* argued that, but for the illegal preliminary injunction, it would have dissipated its assets and therefore the turnover order should be dissolved as a kind of remedy to address the earlier illegality. This claim was summarily rejected. 190 F.2d at 20; *cf.* Gadsby & Hannah v. Socialist Rep. of Romania, 698 F. Suoo. 483 (S.D.N.Y. 1988) (where illegal restraining order kept bank accounts in place, a turnover order, which could have been authorized, was denied).

[639] 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976); *see* Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarollo, S.A., 190 F.3d 16, 23 (2d Cir. 1999) ("*ABKCO* virtually erases the distinction in § 5201 between 'debt' and 'property' by re-characterizing--as 'property against which a money judgment may be enforced'--debts that otherwise are placed out of reach by § 5201(a)'s requirement that the debt be either past due or certain to become due upon demand").

[640] *Accord*, Beauvais v. Allegiance Securities, Inc., 942 F.2d 838 (2d Cir. 1991) (debt could be recovered under § 5225(b)).

[641] 190 F.2d at 25.

[642] *Id* (emphasis added).

[643] The *Grupo Mexicano* court also held open the possibility that, if New York law did not permit the turnover order, the District Court could "craft an enforcement device that deviates from that available under state law." 190 F.2d at 25. This would appear, at first, to exceed the scope of Federal Rule of Civil Procedure 69, which requires deference to state law. But state law basically permits a court to do what ever it wants. CPLR § 5240 ("The court may. . . make an order. . . extending. . . the use of any enforcement procedure").

AD the debt is the *opposite* of property; it is *liability*.[644] Therefore, turnover is possible because, in general, a debtor possesses her general intangible property.[645]

Unless *JD* had already conveyed away these accounts receivable, it seems quite clear that *JD did* possess its accounts receivable and could be compelled to execute assignments to the sheriff. This in turn suggests that pre-judgment attachment would have upheld the preliminary injunction the Supreme Court needlessly struck down.

The rule that emerges from *Grupo Mexicano* is that persons over whom a court has jurisdiction can be ordered to fetch property located outside New York. In *In re Gaming Lottery Securities Litigation*,[646] the court did not hesitate in ordering a judgment debtor to collect an amount due from a Scottish bank and bring the proceeds into New York.[647] It found *Grupo Mexicano* to be consistent with such an order. Similarly, in *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co.*,[648] a debtor was ordered to deliver certificated shares to a New York sheriff, even though the shares were not located in New York and even though a court in Indonesia ordered the debtor not to do this.[649]

We must then concede a New York court may order a person over whom it has jurisdiction to bring assets back to New York, but until this is done, is there a lien on the assets not yet located in New York? Ironically, the answer seems to be that, just as the *ABKCO* court sought to erase the distinction between debt and property, the United States Constitution arguably insists upon preserving it.

With regard to debts, the leading authority is good old *Harris v. Balk*,[650] a case overruled for its jurisdictional holding[651] but not for its proposition about the nature of debt, which it presumably borrowed from state law.[652] In *Harris*, as every first-year law student knows, the Supreme Court remarked: "The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."[653] *Harris* suggests that a turnover order issued in New York against a person subject to its jurisdiction creates a lien on a debt that must be recognized nationally. In *Harris*, *JC* was in Maryland, *JD* and *AD* in North Carolina. On a Maryland sojourn, *AD* was garnished on behalf of *JC*. *AD* paid up. Upon returning to North Carolina. *JD* sued *AD* on the debt and won at all levels of the North Carolina

---

[644] According to CPLR § 5232(a) (fourth sentence), "[a]ll property not capable of delivery in which [*JD* had] an interest . . . thereafter coming into the possession or custody of such a person . . . shall be subject to the levy." So the CPLR oddly refers to *AD* has possession of its own obligation to *JD*.

[645] My conclusion is contradicted by Harris v. Balk, 198 U.S. 215 (1905), a case on which I will, with some embarrassment, substantially rely. *See infra* text accompanying notes 650-63. There, the Court states: "It is not a question of possession in the foreign State, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of." 198 U.S. at 223. In my view, the word possession implies a *power to exclude*, not physical grasping of a thing.

[646] 2001 U.S. Dist. LEXIS 1204 (S.D.N.Y. February 13, 2001).

[647] Accord, Miller v. Doniger, 28 A.D.3d 405, 814 N.Y.S.2d 141 (1st Dept. 2006) (out-of-state bank account); Starbare II Partners L.P. v. Sloan, 216 A.D.2d 238, 239, 629 N.Y.S.2d 23 (1st Dept. 1995) (out-of-state artworks).

[648] 41 A.D.3d 25, 836 N.Y.S.2d 4 (1st Dept. 2007).

[649] The *Gryphon* court distinguished pre-judgment attachment cases:

> The defendants' citations to cases involving attachment are inapposite. Clearly, it would violate the sovereignty of another state if a New York sheriff tried to attach property in another state. However, a turnover order merely directs a defendant, over whom the New York court has jurisdiction, to bring its own property into New York. We find no reason why such an order would offend another state's sovereignty, unless the other state has ordered the defendant not to move its property from that state. . . .

41 A.D.3d 25, 31, 836 N.Y.S.2d 4, 6 (1st Dept. 2007). In fact, garnishment in New York is injunctive in nature. So if a turnover order against a debtor is capable of binding the debtor to bringing property to New York, so is a garnishment, provided, of course, that the New York court has jurisdiction over the person of the garnishee.

[650] 198 U.S. 215 (1905).

[651] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980) ("We recently abandoned the outworn rule of *Harris v Balk*").

[652] Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L. J. 203, 218-37 (2004).

[653] 198 U.S. at 222. Some cogent discussion of these two holdings of *Harris* appear in WEINSTEIN ET AL., *supra* note 25, ¶ 5209.04. In ancient times, New York scorned *Harris v. Balk* and held that debt did *not* cling to the debtor; therefore, unless a debt had a connection to New York, it could not be garnished. Heydemann v. Westinghouse Elec. Mfg. Co., 80 F.2d 837 (2d Cir. 1936). The legislature, however, overruled this delicate attitude in 1936 and pushed garnishability to the *Harris v. Balk* maximum. Morris Plan Indus. Bank v. Gunning, 295 N.Y. 324, 67 N.E. 510 (1946).

courts. The Supreme Court, however, reversed. *AD*'s payment to the Maryland sheriff extinguished *JD*'s claim against *AD*, and the North Carolina courts were obliged to give this Maryland fact full faith and credit.

In *Harris*, *AD* actually paid the Maryland sheriff. But the result did not turn on actual payment. If *AD* had returned to North Carolina without paying, the debt still would have belonged to the Maryland sheriff, as garnishment is an involuntary assignment of property.[654] *JD* would have been dispossessed of this payment intangible and would lack the right to collect it, if the garnishment was large enough in size.[655] This analysis, however, no longer pertains in pre-judgment situations because of *Shaffer v. Heitner*,[656] but it still holds in the post-judgment venue of *Grupo Mexicano*.

In *Harris*, the Supreme Court rejected the notion that debts have a location separate from the debtor. Rather, wherever a debtor is, his debt is there too. But the *Harris* court hints at a constitutional distinction between debts and property, when it remarks (in contradiction to what I said earlier), "It is not a question of possession in the foreign State, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of."[657] In other words, according to the Supreme Court, intangible property is impossessible. Possession is a word relevant to tangible property only.

Four years later, the Supreme Court would widen the divide between tangible and intangible property in the oft derided case of *Fall v. Eastin*,[658] where a Washington divorce court ordered a husband to convey Nebraska land to his wife. When he ungallantly refused, the Washington court issued a decree declaring the wife to be a Nebraska freeholder. The husband then conveyed to *X* a mortgage on, and later a deed in lieu of foreclosure to, the debatable land. In Nebraska, the wife tried to quiet title against *X*, but the Nebraska court snubbed the Washington decree and held for *X*, a refusal upheld by the United States Supreme Court.[659]

Fall applies equally well to judicial liens on tangible personal property.[660] According to New York law, the turnover order creates a lien.[661] But if the tangible personal property is located, say, in Nebraska, a Nebraska sheriff could, *sans* offense to the Constitution, levy the property in question pursuant to a Nebraska judgment. When it comes to judicial decrees declaring *JC* in State *A* to be the owner of real or tangible personal property located in state *B*, Full Faith and Credit accords *JC* neither faith nor credit. In short, *Fall* suggests a disjunction between liens on intangible property and liens on tangible property not located in New York.

Nevertheless, it is open for Nebraska to recognize a lien on tangible property located in Nebraska.[662] Should *JD* in New York be ordered to deliver Nebraska-located property to a New York

---

[654] 198 U.S. at 222 ("If the debtor leave the foreign State without appearing, a judgment by default may be entered . . . and may be sued upon in any other State where the debtor might be found").

[655] In *Harris*, *AD* owed *JD* $180. *JC* claimed $300 from *JD*. If *JC* claimed less than $180 from *JD*, the garnishment would not have entirely extinguished *AD*'s obligation to *JD*. *JD* would still have the right to a surplus.

[656] 433 U.S. 186 (1977).

[657] 198 U.S. at 223.

[658] 215 U.S. 1 (1909). *E.g.*, David P. Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights: 1889-1910*, 52 U. CHI. L. REV. 867, 889 n.134 (1985) ("obscure and turgid . . . unexplained dissents"). The classic deconstruction is Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

[659] The matter would have been different if the wife had sought confirmation from a Nebraska court. In such a case, the Nebraska court would have been obliged to recognize the judgment of the Washington court, *Id*. at 12. Any subsequent conveyance by the husband to *X* would have been void. But where *X* was already the owner by the time the wife sought enforcement, the Nebraska court was within its rights to deny recognition of the wife's title.

[660] *Id*. ("Plaintiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply").

[661] CPLR § 5202(b).

[662] New York courts are inclined to honor foreign attachments when the Constitution does not require it. Oppenheimer v. Dresdner Bank A.G., 41 N.Y.2d 949, 363 N.E.2d 358, 394 N.Y.S.2d 634 (1977) (bank garnished in Germany did not have to pay a second time in New York). In American Fidelity Fire Ins. Co. v. Paste-Ups Unlimited, Inc., 368 F. Supp. 219 (S.D.N.Y. 1973), however, a Washington state lien was dishonored. In *American Fidelity*, a New York insurance company held a negotiable instrument in New York and was served with a garnishment order in the state of Washington. Various conflicting garnishments and liens were asserted, and so the insurance company interpleaded in New York. There is no reason why the garnishment should not have created a lien,

sheriff, and should *JD* file for bankruptcy, the bankruptcy trustee will have to test the New York judicial lien by inquiring into whether a Nebraska sheriff would take priority over the New York lien by levying in Nebraska.[663] If so, then *JC* is not a secured creditor in the bankruptcy. Rather, *JC*'s New York judicial lien falls afoul of the trustee's status as a hypothetical judicial lien creditor in Nebraska.

Does *Fall v. Eastin* cohere with *Harris v. Balk*? Should *Fall* provide the rule for intan-gible as well as tangible property? Imagine an alternative history in which, not *AD*, but *JD* traveled from North Carolina to Maryland. *JD* is served with process by JC_1. The Maryland court enters a money judgment and then issues an injunction *à la Grupo Mexicano*, ordering *JD* to assign all receivables to JC_1 immediately, adding that the assignment shall be deemed accomplished when the turnover order is entered. Meanwhile, JC_2 back in North Carolina obtains a levy of *AD*. Is not the Maryland injunction worthy of Full Faith and Credit? The order compelling *AD* to pay the Maryland sheriff was so entitled. The order compelling *JD* to assign to the sheriff should be equally entitled. If *AD* interpleads, as he is well advised to do, I think the interpleader court awards the funds to JC_1 on the authority of *Harris v. Balk*. And what distinguishes the case from *Fall v. Eastin*? *Harris* reigns over intangible personal property. *Fall* presides over all other kinds of property. If I am right, the distinction between debt and property, which the New York legislature has sought to preserve and the New York courts have tried to abolish, is enshrined in the Constitution itself.

D. Pledged Property

When *JD* pledges property to *SP* in exchange for a loan, *JD* typically has no right of possession until she pays up. Yet *JD* may have a valuable equity in the pledged property. We have already seen that execution liens are difficult in this context. If the pledged property is "capable of delivery," the sheriff may not levy it by seizure because she may not interfere with the possession of pledgees.[664] Yet since the property *is* capable of delivery, the sheriff may not paper-levy because such levies are only good for property *not* capable of delivery. One proposed answer is that *JD*'s right to a surplus is property not capable of delivery and thus can be garnished. This conclusion divides the thing from *SP*'s obligation to pay the surplus, if any.[665]

JC also has the option of obtaining some sort of equity lien on the surplus. A receivership is possible,[666] but a turnover proceeding seems the most logical alternative.[667] Can the language of § 5225(b) accommodate *JC*? The pledgee is "a person in possession of . . . personal property in which the debtor has an interest," as § 5225(b) requires. But *JC* must also show that *JD* "is entitled to the possession of such property or that the judgment creditor's rights are superior to those of the transferee . . . " The first possibility clearly cannot be shown.[668] *JD* has *no* right of possession against *SP*. Can *JC*

---

even though the instrument was in New York. Nevertheless, the court held that the Washington garnishment was ineffective.

The *American Fidelity* court's authorities are all completely inapposite. Two cases hold only that a local court has jurisdiction to adjudicate ownership of local assets. Clark v. Willard, 294 U.S. 211 (1955); Green v. Van Buskirk, 72 U.S. 307 (1968). These cases certainly do not preclude injunctions requiring a person properly served with process to bring assets of a debtor into the state. A third case only holds that, where neither a person nor assets of the person are in a state, the state court may not assert jurisdiction solely on the basis of a special appearance to contest service of process by publication. A fourth case cited is Heydemann v. Westinghouse Manufacturing Co., 80 F.2d 837 (2d Cir. 1936), which turned on a statutory garnishment restriction that the New York legislature later repealed. Patel Cotton v. Steel Traveler, 108 F. Supp. 595 (S.D.N.Y. 1952). The *American Fidelity* holding should therefore be viewed as a bad *Erie* guess about New York law, in light of the *Openheimer* case.

[663] A bankruptcy trustee is deemed to be a judicial lien creditor as of the time of the bankruptcy petition. 11 U.S.C. § 544(a)(1). Presumably the trustee has a hypothetical judicial lien as of the bankruptcy petition in all fifty states and other territories of the United States.

[664] CPLR § 5232(b).

[665] *See supra* text accompanying notes 294-310.

[666] In re Myer, 273 A.D. 387, 77 N.Y.S.2d 660 (1st Dept. 1948).

[667] Knapp v. McFarland, 462 F.2d 935, 941 (2d Cir. 1972) (dictum); Key Lease Corp. v. Manufacturers Hanover Trust Co., 117 A.D.2d 560, 499 N.Y.S.2d 66 (1st Dept. 1986); Samuels v. Samuels, 99 A.D.2d 986, 473 N.Y.S.2d 436 (1st Dept. 1984) (*JD*'s claim that the third party was a pledgee ignored).

[668] Key Lease Corp. v. Manufacturers Hanover Trust Co., 117 A.D.2d 560, 561 499 N.Y.S.2d 66, 68 (1st Dept. 1986).

show that her rights are superior to those of *SP*?

In this respect, new Article 9 muddies the previously crystalline waters from which New York *JC*s must drink. According to old UCC § 9-311, "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of . . . attachment, levy, garnishment or other judicial process) . . . " Under this language, *JC* could have shown that *JC*'s right to *JD*'s equity are superior to those of *SP* (with the proviso, of course, that *SP*'s security interest remain intact). New UCC § 9-401 is less satisfactory. It states, "whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this article." In other words, Article 9 refuses to say whether *JC* has access to *JD*'s equity.

Meanwhile, the CPLR is likewise opaque. CPLR § 5201 states that enforcement of a money judgement is possible "against any property which could be assigned or transferred . . . " Can equity in collateral be assigned or transferred? New UCC § 9-401 refuses to say. Yet we learn from UCC § 2-403 that a "purchaser of goods acquires all title which his trans-feror had . . . " This implies a power to convey the equity in pledged goods. "Equity" in this context would include the right of redemption[669] and the right to receive a surplus if the pledgee forecloses.[670] Similar statements can be found in Article 3 for instruments[671] and Article 8 for securities.[672] So on this basis, we can affirm that § 5225(b) permits access to the equity interest of *JD* in pledged collateral.

An oddity about § 5225(b), as applied to pledged property, is that, if the court so orders, the pledgee must hand the property over to the sheriff for sale. Now the sheriff could not *levy* the same pledged property, probably out of a misplaced fear that a levy would compromise perfection of the pledgee's security interest. Somehow that delicate attitude disappears when turnover orders are issued. One way or another, the sheriff ends up getting the pledged property.

E. Fraudulent Conveyance Recoveries

Under § 5225(b), *AD* can be ordered to turn over *JD*'s property over to the sheriff. But it is likewise true that a transferee can be ordered to turn over property in which the debtor has no interest at all–property which *JD* has fraudulently conveyed? According to § 5225(b), turnover can be had "against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the. . . the judgment creditor's rights to the property are superior to those of the transferee. . . "[673] The glove of this provision well fits the hand of fraudulent conveyance.[674]

Perhaps a creditor get a lien on fraudulently conveyed property earlier than the entry of a turnover order. We have seen that the non-statutory idea of *in custodia legis* might push the date of the lien to the commencement of a proceeding under § 5225(b).[675] But beyond that, must we conclude that, since a debtor who fraudulently conveys property has com-pletely alienated it, a receivership cannot reach the property because the receiver only obtains power over "property in which the judgment debtor

---

[669] UCC § 9-623; *see* Leumi Fin. Corp. v. Wydler, Balin, Pares & Soloway, 60 Misc. 2d 1021, 1028, 304 N.Y.S.2d 988, 996 (S.Ct. Nassau Co. 1969) (suggesting *JC* could redeem pledged stock by paying *SP* the amount of the secured debt).

[670] *Id.* § 9-615(d)(1).

[671] *Id*. § 3-203(b) (""Transfer of an instrument, whether or not the transfer is a negotiation, vest in the transferee any right of the transferor to enforce the instrument . . . ").

[672] *Id*. § 8-302(a) ("a purchaser of a . . . security acquires all rights in the security that the transferor had . . . ").

[673] CPLR § 5225(b).

[674] *Id*. § 5225(b) is also a proper vehicle for piercing *JD*'s corporate veil to reach assets of *JD*'s shareholder. Cordius Trust v. Kummerfeld, 153 Fed. Appx. 761 (2d Cir. 2005); Ren-Cris Litho, Inc. v. Vantage Graphics, Inc., 1997 U.S. App. LEXIS 3333 (2d Cir., February 24, 1997). What if *JD* has made a fraudulent conveyance to *X* and *X* no longer has possession of the property conveyed? In such a case, *X* has committed the tort of conversion, and a money judgment against *X* is appropriate. Carlson, *Logical Structure*, *supra* note 592, at 171. Can this judgment be entered under the aegis of § 5225(b)? The answer is yes. So long as *X* is a transferee, § 5225(b) authorizes the proceeding, even if *X* is no longer in possession. Federal Deposit Ins. Corp. v. Conte, 204 A.D.2d 845, 612 N.Y.S.2d 261 (3d Dept. 1994).

[675] *See supra* text accompanying notes 607-11.

has an interest?"[676] A receiver, however, may also "do any . . . act designed to satisfy the judgment."[677] This would include the *bringing* of a fraudulent conveyance action against the transferee, but any lien would depend upon securing a turnover order under § 5225(b).[678]

Suppose, on the other hand, *JD* has fraudulently conveyed personal property to *X*, and *JC* serves an execution on the sheriff. By virtue of this delivery, does *JC* have a lien on *X*'s property, received in the fraudulent conveyance? Again, it is tempting to say no. According to CPLR § 5202(a):

> Where a judgment creditor has delivered an execution to a sheriff, the judgment creditor's rights in a . . . *an interest of the judgment debtor in personal property* . . . are superior to the extent of the amount of the execution to the rights of any transferee of the . . . property.[679]

These are the words that create the execution lien. But they apply only to property in which the debtor has an interest. *Ex hypothesi*, *JD* has *no* interest in property she has conveyed away, even if creditors have the right to reach that property now owned by a transferee.

Nevertheless, New York's fraudulent conveyance statute (the Uniform Fraudulent Conveyance Act) provides:

> Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person . . .
>
> b. *Disregard the conveyance and attach or levy execution upon the property conveyed.*[680]

This language, which precedes the enactment of the CPLR,[681] suggests somehow that the execution delivered to the sheriff by *JC* pursuant to a judgment against *JD* does indeed encumber *X*'s property. Otherwise, how could the sheriff levy upon it?

One riposte might be that the execution lien encumbers only the property of *JD*. But where *JD* has fraudulently conveyed to *X*, *X* holds the property in trust for creditors of *JD*. The sheriff, as agent of such a creditor, rightfully dispossess *X*, who has no beneficial interest and therefore a duty to hand over the property to creditors. So the execution lien does *not* encumber *X*'s property when the execution is delivered to the sheriff. Rather, the sheriff's possession is what creates the lien. This represents the moment when *JC*'s equity interest in *X*'s property becomes a "legal" interest–a judicial lien.[682]

Yet it must be admitted that, where *JD* conveys real property to *X* prior to *JC*'s judgment, docketing a judgment against *JD* creates a lien against *JC*.[683] This is so even though the docketing lien, created under CPLR § 5203(a), attaches to "an interest of the judgment debtor [not *X*] in real property, against which property a money judgment may be enforced . . . " Here the objection is that *JD* has *no* interest after conveying to *X*. Yet the courts think *JC* has a lien on *X*'s property all the same. Given this analysis, why shouldn't an execution encumber *X*'s personal property with a lien when *JC* delivers it to the sheriff?[684]

---

[676] CPLR § 5228(a).
[677] *Id*.
[678] Fannie Mae v. Olympia Mortgage Corp., 2006 U.S. Distr. LEXIS (E.D.N.Y. 2006).
[679] Emphasis added.
[680] N.Y. Debtor & Creditor Law § 278(1) (emphasis added).
[681] New York enacted the Uniform Fraudulent Conveyance Act in 1925. L. 1925 ch. 254, effective April 1, 1925.
[682] Thus, in Thurber v. Blanck, 50 N.Y. 80 (1872), the Court of Appeals said:

> In the case of personal chattels, the sheriff seizes property and takes it into his possession and renders himself liable to an action by the claimant. *He acquires by such seizure a specific lien* . . .

Id. at 86. The *Thurber* court goes on to make a different rule for liens on intangible property, engendering the some rather sarcastic criticism in Cohen, *Property Fraudulently Transferred*, *supra* note 582, at 510-13.
[683] Carlson, *Real Property*, *supra* note 10.
[684] *See* Blue Giant Equipment Corp. v. Tex-Ser, Inc., 92 A.D.2d 630, 459 N.Y.S.2d 948 (3d Dept. 1983) (restraining notice served on *X* deemed effective, even though 5222(b) is keyed to "property in which [X] knows or has reason to believe the judgment debtor . . . has an interest . . . "). In Rich v. New York White Line Tours, Inc., 266 A.D. 752 41 N.Y.S.2d 283 (2d Dept. 1943), *JD* made

The analysis assumes (erroneously, in my opinion) that when *JD* fraudulently conveys to *X*, *JD* actually conveys nothing and is still the owner. In other words, a fraudulent conveyance is *no* conveyance. This regrettable conclusion is completely unnecessary, however. *JD* alienates everything to *X* in a fraudulent conveyance. *X*, however, holds in trust for *JD*'s creditors. The first creditor to avail herself of the trust (by the sheriff's seizure or by obtaining a turnover order or like judicial declaration) should have priority to *X*'s trust.

No modern case exists in which the sheriff is asked to levy the property of *X* directly.[685] Perhaps suspecting constitutional problems,[686] judgment creditors are utilizing turnover procedures, which guarantee to *X* notice and a hearing before *X*'s property is "taken" to satisfy *JD*'s debt to *JC*. Under such a procedure, *JC* has a lien only after the court orders *X* to turn over the loot.

F. Injunctions that Do Not Create Liens

According to § 5203(b), an equity lien arises from the securing of an order for

(a) the delivery of a debt owed to the *JD*;
(b) the payment of a debt owed to the *JD*;
(c) delivery of an interest of the *JD* in personal property;
(d) the appointment of a receiver of a debt owed to the *JD*;
(e) the appointment of a receiver of a an interest of the *JD* in personal property.[687]

Missing from the list are certain other injunctions authorized by the CPLR. For example, a court can order *JD* to make installment payments,[688] but, other than the leading treatise,[689] no one has suggested that such an order puts a lien on the assets of a debtor.[690] Most notably, a court (or the judgment creditor's attorney as officer of the court) can issue a restraining notice to any person except the employer of *JD*.[691] According to § 5222(b), the effect of serving a notice is that the recipient is forbidden to transfer any property or pay any debt in which *JD* has an interest. Nothing is said about creating a lien on the property held or debt owed by the recipient of the notice. If the recipient transfers or pays, she is in contempt of court, but *JC* cannot pursue the property now in the hands of a third party.[692]

---

a fraudulent conveyance to *X*. JC_2 sought to set it aside. The lower court ruled that JC_1 had priority because JC_1 served an execution and therefore has an equitable lien on *X*'s property. On appeal, the court held that JC_1's lien died when sheriff returned the execution unsatisfied.

[685] For ancient cases, see Rinchey v. Stryker, 28 N.Y. 45 (1863) (levying sheriff unsuccessfully sued for trespass of chattels); Hall v. Stryker, 27 N.Y. 596 (1863) (same).

[686] Save Way Oil Co. v. 284 Eastern Parkway Corp., 115 Misc. 2d 141, 453 N.Y.S.2d 554 (S.Ct. Kings Co. 1982) (fraudulent conveyance law "tread[s] on thin constitutional ground [and] must be employed with the strictest adherence to statutory requirements").

[687] A receiver can be authorized to "administer, collect, improve, lease, repair or sell real or personal property." CPLR § 5228(a). If JC_1 has obtained the appointment of a receiver, JC_2 is not necessarily entitled to a different receiver, but may have the receivership "extended" to JC_2, with JC_1 having first priority. CPLR § 5225(b).

[688] CPLR § 5226.

[689] WEINSTEIN ET AL., *supra* note 25, ¶ 5202.15.

[690] Section 5226 orders are the mode for reaching wages and other exempt income above and beyond the 10% limit on income executions. *See supra* text accompanying notes 529-32. Oddly, a creditor can obtain appointment of a receiver to receive income, Edelman v. Edelman, 83 D.A.2d 622, 441 N.Y.S.2d 529 (2d Dept. 1981), in which case a lien *is* created.

[691] CPLR § 5222(a). A pre-judgment restraining notice is also possible upon court order, but only if the plaintiff has received "a verdict or decision." CPLR § 5229.

[692] Midlantic Nat'l Bank/North v. Federal Reserve Bank of New York, 814 F. Supp. 1195 (S.D.N.Y. 1993); In re Cosmopolitan Aviation Corp., 34 B.R. 592, 597 (Bankr. E.D.N.Y. 1983); Aspen Indus., Inc v. Marine Midland Bank, 52 N.Y.2d 575, 579, 421 N.E.2d 808, 810, 439 N.Y.S.2d 316, 319 (1981). Although turnover proceedings do not require service of a restraining notice, where *JC* has chosen to serve a restraining notice on *AD* and where *JC* has not sent *JD* the notice warning that *JD* has the right to exemptions, some courts prohibit *JC*'s attempt to commence a turnover proceeding until *JC* serves the required notice. Chemical Bank v. Flaherty. 121 Misc. 2d 509, 468 N.Y.S.2d 315 (S.Ct. Queens Co. 1983); Weinstein v. Gitters, 119 Misc. 2d 122, 462 N.Y.S.2d 553 (S.Ct. Suffolk Co. 1983).

In *International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.*,[693] however, the Court of Appeals ruled otherwise. In this forgotten case, *JC* served a restraining notice on the debtor. Shortly after, *JD* made an assignment for the benefit of creditors. *JC* then sought a turnover against the assignee pursuant to § 5225(b). Obviously, a turnover was appropriate only if *JC* already had a lien on the assignee's property that was senior to the rights of the assignee.

Judge Charles Breitel ruled that, by virtue of the restraining notice, *JC* was senior to the assignee.[694] He so ruled even as he acknowledged that early drafts of CPLR § 5222 had expressly granted creditors a lien, a provision later deleted.[695] The thrust of his analysis is the truism that an assignee takes the same rights as the assignor had. Since the assignee was enjoined from making conveyances, the assignor was likewise enjoined. The only way to escape the injunction was for the assignee to pay *JC* the amount of *JC*'s judgment.

If logic holds sway, this ruling cannot be contained to assignments for the benefit of creditors. *All* assignments convey only the rights of the debtor; *any* assignee is subject to the restraining notice since *JD* was so restrained.

Oddly, Judge Breitel overruled his own opinion for the Appellate Division in *City of New York v. Panzirer*.[696] There, JC_1 served a restraining order on *AD*, who held proceeds from the sale of *JD*'s business. JC_1 also commenced a turnover proceeding. JC_2 obtained a levy before the turnover order was procured. Judge Breitel, citing the very legislative history he dismissed in *International Ribbon*, wrote:

> The result, then, is that in order for a judgment to attain status in the ranking of priorities there must either be a levy, an order directing delivery of property, or the appointment of a receiver. Any other measures taken by the judgment creditor, no matter how diligent, on an absolute or comparative basis, do not suffice to qualify for priority.[697]

While *International Ribbon* holds that a restraining notice gives rise to a lien, the Court of Appeals soon stated the opposite (albeit in dictum) in *Aspen Industries, Inc. v. Marine Midland Bank*.[698] Astonishingly, it cited *International Ribbon* as authority for its dictum, even though *International Ribbon* holds the dead opposite.[699]

Still, one can find recent examples where a lien emerges from § 5222 nevertheless. In *Kates v. Marine Midland Bank, N.A.*,[700] *JC* served a restraining notice on *AD*, a trustee of *JD*. After the restraining notice, *AD* made an advance distribution to *JD*. It then sought to set off its loan to *JD* against *JC*'s levy. The court did not permit the setoff, although setoffs are generally good against levies.[701] Is this not attributing the power of a lien to the lowly restraining notice?

Similarly, in *Rafkind v. Chase Manhattan Bank, N.A.*,[702] the SEC had enjoined a bank from paying a bank account. Admittedly, the injunction had a federal origin, but Judge John Martin cited CPLR § 5201(b) to the effect that "[a] money judgment may be enforced as to any property which

---

[693] 36 N.Y.2d 121, 325 N.E.2d 137, 365 N.Y.S.2d 808 (1975).

[694] The court cites with approval In re City of New York, 56 Misc. 2d 602, 289 N.Y.S.2d 680 (S. Ct. Queens Co. 1968), where the city owed *JD* a condemnation award. *JC* served a restraining notice and *JD* made an assignment for the benefit of creditors in violation of the restraining notice. While denying that *JC* had a lien, the court ordered the city to pay *JC*--which, of course, meant that *JC did* have a lien.

[695] The court cites Advisory Committee on Prac. & Pro., 3d Preliminary Report, N. Y. Legis. Doc., 1959, No. 17, at 252; Advisory Committee on Prac. & Pro., Final Report, 1961, at A562-A563.

[696] 23 A.D.2d 158, 259 N.Y.S.2d 284 (1st Dept. 1965).

[697] 23 A.D.2d at 162, 259 N.Y.S.2d at 288.

[698] 52 N.Y.2d 575, 579, 421 N.E.2d 808, 810, 439 N.Y.S.2d 316, 319 (1981).

[699] As did Garland D. Cox & Assocs. v. Koffman, 67 A.D.2d 1025, 413 N.Y.S.2d 260 (3d Dept. 1979), *rev'd on other grounds*, 48 N.Y.2d 878, 400 N.E.2d 302, 424 N.Y.S.2d 360 (1979); Steingart Assocs., Inc. v. Lots of Fun, Inc., 127 Misc. 2d 60, 485 N.Y.S.2d 193 (Co. Ct. Sullivan Co. 1985).

[700] 143 Misc. 2d 721, 541 N.Y.S.2d 925 (S. Ct. Monroe Co. 1989).

[701] N.Y. Debtor & Creditor Law § 151.

[702] 1992 U.S. Dist. LEXIS 18625 (S.D.N.Y. December 7, 1992).

could be assigned or transferred . . . " Judge Martin reasoned that, since JC_2 could not bring a turnover proceeding against the bank under § 5227, the SEC was senior. If this is correct, then restraining notices generally have a lien effect on bank accounts. Judge Martin's decision, however, is open to the criticism that, just because the bank could not *pay* its debt does not mean that *JD* cannot transfer the ownership of it. The restraining notice served on the bank binds the bank, not *JD*.[703]

A different sort of injunction which has been denied lien status is one in connection with selling shares in a cooperative apartment. Such shares are considered personal property.[704] If they represent the debtor's principal residence, they are exempt property under CPLR § 5206(a)(1). According to § 5206(e), a creditor is invited to commence a special proceeding for the sale of the shares if they exceed $50,000 in value. If the homestead were real estate, there would tend to be a judicial lien arising from the docketing of the judgment in the local county where the real estate is located.[705] But where the homestead is in personal property, the special proceeding, which culminates in a court order, should be viewed as a turnover order. In other words, if a court orders the sale of cooperative shares, a lien arises when the court actually orders the sale. In *In re Pandeff*,[706] however, the court ruled otherwise. It relied on the premise that the order in question was not among those referred to in § 5202(b). This decision must be viewed as wrongly decided. Section 5206(e) empowers the court to order a sale. A lien is a power of sale. The court order directing a sale must therefore be a lien if syllogism still has bite in the state of New York.[707] If this order was 90 days old by the time of the debtor's bankruptcy petition,[708] then the creditor should have been deemed a secured creditor in *JD*'s bankruptcy.

Prior to the CPLR, the Court of Appeals, in *Wickwire Spencer Steel Co. v. Kemkit Scientific Corp.*,[709] held that service of a subpoena on *JD* or third party constituted commencing a supplementary proceeding, thereby creating a lien on the debtor's assets. *Wickwire* was controversial, because the only reference to subpoenas was in former Civil Practice Act 808, which presupposed the appointment of a receiver. Section 808(1) and (2) provided that the title of a receiver to the debtor's property related back to the service of a subpoena either on the debtor or on a third party.[710] Yet there was no receiver in *Wickwire*. The *Wickwire* court drew from the receivership statute a state policy that commencement of a supplementary proceeding should be associated with the creation of a lien, and that serving a subpoena on *JD* or *AD* was tantamount to starting a supplementary proceeding. After the enactment of the CPLR, however, it has not proved possible to claim that the subpoena is a lien-significant event.[711]

III. Exempt Property

A. Monetary Exemptions

Like all states, New York exempts certain personal property "from application to the satisfaction of a money judgment."[712] Most items of exempt tangible property are of negli-gible value. The real money is in the intangibles–pensions, trust funds and the like. Almost all the reported cases involve, in effect, cash. The courts have had little occasion to address exemptions of tangible property such as the family bible, a team of oxen or other items the CPLR deems worthy of exemption.

When it comes to the monetary exemptions, the debtor may not only protect exempt cash flow

---

[703] *See* Cohen, *Third Party Orders*, *supra* note 602, at 1210; Note, 35 COLUM. L. REV. 944 (1935).
[704] Tax Commission v. Shor, 43 N.Y.2d 151, 371 N.E.2d 523, 400 N.Y.S.2d 805 (1977)
[705] CPLR § 5203(a).
[706] 201 B.R. 865 (Bankr. S.D.N.Y. 1996).
[707] Perhaps syllogism went out in 1896. Whitney v. Davis, 148 N.Y. 256, 261, 42 N.E. 661, 663 (1896) ("We do not stop to examine that syllogism for flaws. Assuming its correctness, we reject the result.").
[708] Otherwise it is a preference under Bankruptcy Code § 547(b).
[709] 292 N.Y. 139, 54 N.E.2d 336 (1944).
[710] Distler & Shubin, *supra* note 8, at 484-91.
[711] Montovani v. Fast Fuel Corp., 494 F. Supp. 72 (S.D.N.Y. 1980); Meadow Brook National Bank. v. Federal Ins. Co., 24 A.D.2d 487, 260 N.Y.S.2d 814 (2d Dept. 1965); City of New York v. Panzirer, 23 A.D.2d 158, 259 N.Y.S.2d 284 (1st Dept. 1965).
[712] CPLR § 5205(a).

but may also exempt *proceeds* of the cash. In *Yates County National Bank v. Carpenter*,[713] the debtor used an exempt military pension[714] to buy a house. The Court of Appeals ruled that the source of the purchase money made the house exempt:

> [W]here the receipts from a pension can be directly traced to the purchase of property, necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt under the provisions of this statute. Where such moneys can be clearly identified and are used in the purchase of necessary articles, or are loaned or invested for purposes of increase or safety, in such form as to secure their available use for the benefit of the pensioner in time of need, we do not doubt but that they come within the meaning of the statute; but where they have been embarked in trade, commerce, or speculation, and become mingled with other funds so as to be incapable of identification, or separation, we do not doubt but that the pensioner loses the benefit of the statutory exemption.[715]

Consistent with this sentiment, courts agree that the income exemptions survive at least when deposited in checking accounts,[716] even commingled bank accounts.[717]

If monetary exemptions can be traced into non-exempt assets, may tangible exemptions be traced into money? There is a good argument that the answer is no. CPLR § 5205(b) exempts choses in action stemming from the destruction of exempt property.[718] The exemption continues for one year after collection.[719] Similarly, the real estate exemption safeguards the cash proceeds of real estate for one year after a judicial sale.[720] The fact that a proceeds theory was expressly provided in these instances suggests that it exists nowhere else *but* these instances. But then, if this were true, then *Carpenter* would seem to be overruled by the enactment of the CPLR. Yet courts routinely protect bank accounts and the like if exempt funds are deposited in them. At least where money exemptions are concerned, the rule of tracing still holds sway.

1. Trusts

Spendthrift trusts are exempt in New York, so long as they are not self-settled.[721] But the CPLR extends protection of even self-settled spendthrift trusts if they qualify as tax deferred retirement accounts within the meaning of ERISA.[722] In this respect, the legislature need not have bothered, as

---

[713] 119 N.Y. 550, 23 N.E. 1108 (1890).

[714] *See* CPLR § 5205(e).

[715] 119 N.Y. at 555-56, 23 N.E. at 1109.

[716] In re Wrobel, 268 B.R. 342, 343-44 (Bankr. W.D.N.Y. 2001).

[717] In re Colbaugh, 250 B.R. 162 (Bankr. W.D.N.Y. 2000) (tracing rule presumed all withdrawals within sixty days of bankruptcy are withdrawals of exempt wages; the leftovers are presumed to be non-exempt cash).

[718] This provision foresees that the sheriff might levy exempt property wrongfully, in which case she is guilty of the tort of conversion. Conklin v. McCauley, 41 A.D. 452, 58 N.Y.S. 879 (2d Dept. 1899) (marshal levied piano). The exemption does not apply, however, if a non-debtor sustained the loss and then assigned the insurance proceeds to a debtor. In re Kleinman, 172 B.R. 764, 775 (Bankr. S.D.N.Y. 1994). It does not apply to New York's bankruptcy only exemptions. CPLR § 5205(b) requires the injured property to be "exempt from application to the satisfaction of a money judgment." Since cars are bankruptcy-only exempt but fully subject to money judgments, § 5205(b) did not technically apply. In re De Vries, 76 B.R. 917 (Bankr. N.D.N.Y. 1987); In re Lauterbach, 74 B.R. 627 (Bankr. N.D.N.Y. 1987).

[719] CPLR § 5205(b) (last sentence).

[720] *Id.* § 5206(e).

[721] CPLR § 5205(c)(1). Where a partnership contributes the funds to a trust for the benefit of a debtor-partner, the trust is not exempt because it is self-settled. Lerner v. Williamsburg Savs. Bank, 87 Misc. 2d 685, 386 N.Y.S.2d 906 (S.Ct. Queens Co. 1976). The trust in *Lerner* was a Keough Plan, which since 1987 is exempt even if self-settled. L. 1987, ch. 108. Not all trusts are spendthrift trusts. Anti-alienation language must appear in the trust instrument before it can be considered spendthrifted. In re McNeil, 193 B.R. 654 (Bankr. E.D.N.Y. 1996).

[722] CPLR § 5205(c)(2). Profit sharing plans that are not related to "illness, disability, death, age, or length of service" do not fall under § 5205(c)(2). In re Lowe, 252 B.R. 614 (Bankr. W.D.N.Y. 2000) (self-settled spendthrift trust not exempt). Canadian ERISA-like accounts are not exempt. In re Ondrey, 227 B.R. 211 (Bankr. W.D.N.Y. 1998). ERISA qualification can be lost for highly technical reasons. In In re Feldman, 171 B.R. 731 (Bankr. E.D.N.Y. 1994), a self-employed person with no employees wrote a "top heavy" plan--a plan that granted non-key employees too few benefits. Even though the debtor had no employees at all, the purely hypothetical terms of the plan prevented the ERISA plan from being exempt. The court nevertheless granted the debtor some time to amend the plan and regain the exemption. *Id.* at 739. But would not the trustee's hypothetical judicial lien on the day of the

federal law preempts the justified hostility of state law to self-settled trusts of this sort.[723] New York also follows the federal lead by making ERISA property accessible if *JC* holds a "qualified domestic relations order."[724] Undoubtedly, New York would have been preempted if it dared to legislate otherwise.[725]

Section 5202(c) exempts the *principal* of trusts. Income of an exempt trust can be reached under § 5205(d), which suggests that creditors may obtain at least 10%–plus greater amounts, if "unnecessary for the reasonable requirements of the judgment debtor and his dependents."[726] Therefore, whereas the *corpus* of a spendthrift trust is entirely exempt, the income is garnishable in the amount of at least 10% or more, as described below.

Individual retirement accounts, after 1994, are exempt,[727] even if created by the judgment debtor. According to CPLR § 5205(c)(2) an IRA or Keough plan

> shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keough (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.[728]

By deeming the IRA to be a trust (even though it is not one), the New York legislature has avoided pitfalls faced by debtors in other states, where courts have refused to find an ordinary custodial account to be a trust.[729]

Can a debtor simply stuff extra funds into an ERISA or IRA account, beyond what tax law

---

bankruptcy petition guarantee that the lien had attached to the pension already? CPLR § 5205(c)(2) does not address whether pensions can be disencumbered after the fact by qualifying amendments. Nowhere else in the CPLR is there provision for dissolving existing liens in order to honor an exemption. Meanwhile, a debtor's violation of ERISA in administering funds does not entail forfeiture of the exemption. In re Handel, 301 B.R. 421 (Bankr. S.D.N.Y. 2003).

[723] Patterson v. Shumate, 504 U.S. 753 (1992). A profit-sharing plan was held to be self-settled in In re Lowe, 252 B.R. 614 (Bankr. W.D.N.Y. 2000), where the plan was funded by wages otherwise payable to the worker and where the plan did not qualify for ERISA or other tax-deferring legislation. Profit sharing is mentioned in New York's bankruptcy-only exemption, N.Y. Debtor & Creditor Law § 282(2)(e), but such a plan must be related to "illness, disability, death, age or length of service. . . " 252 B.R. at 623.

[724] CPLR § 5205(c)(4). The term is defined in 26 U.S.C. § 414(p). A spendthrift trust is subject to a "qualified domestic relations order." CPLR § 5205(c)(4). Since principal can be invaded on behalf of such orders, likewise income can be obtained without any inquiry into the reasonable requirements of the debtor. Smith v. ABC Co., 2005 N.Y. LEXIS 3467, at *7 (Fam. Ct. Nassau Co., September 29, 2005). EPTL § 7-3.4 provides:

> When a trust is created to receive the income from property and no valid direction for accumulation is given, the income in excess of the sum necessary for the education and support of the beneficiary is subject to the claims of his creditors in the same manner as other property which cannot be reached by execution.

In *Smith*, *supra*, the court concluded that CPLR § 5205(c)(4) simply overrides EPTL § 7-3.4, when it comes to qualified domestic relations orders.

[725] Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988) (states cannot exempt welfare plan proceeds because ERISA did not similarly exempt them).

[726] National Bank v. Pension Fund of Intern. Brotherhood of Teamsters & Chauffeurs, 463 F. Supp. 636 (E.D.N.Y. 1978).

[727] CPLR § 5205(c)(2). "Either by statute or case law, virtually every type of retirement plan is exempt from the claims of creditors. . . " Estate of King, 196 Misc. 2d 250, 764 N.Y.S.2d 519, 523 (Surr. Ct. Broome Co. 2003).

[728] *See* Pauk v. Pauk, 232 A.D.2d 392, 394, 648 N.Y.S.2d 134 (2d Dept. 1996) ("The [1994] amendment does not differentiate between IRAs created as a result of rollovers from an exempt plan, or those created directly by the judgment debtor").

[729] C. Scott Pryor, *Rock, Scissors, Paper: ERISA, the Bankruptcy Code and State Exemption Laws for Individual Retirement Accounts*, 77 AM. BANKR. L.J. 65, 79-83 (2003). Prior to 1994, New York law expressly made IRAs a bankruptcy-only exemption under New York Debtor & Creditor Law § 282. Dubroff v. First Nat'l Bank (In re Dubroff), 119 F.3d 75 (2d Cir. 1997). In 1994, the IRA was added to CPLR § 5205(c)(2). Similarly, deferred employment plans offered by local governments pursuant to Internal Revenue Code § 457 were interpreted as falling under Debtor & Creditor Law § 282(2)(e) but, after 2001, are directly protected by CPLR § 5205(c)(2). *Compare* In re Ruffo, 261 B.R. 580 (Bankr. E.D.N.Y. 2001) (such plans fell under § 282(2)(e)) *with* In re Johnson, 254 B.R. 786 (Bankr. W.D.N.Y. 2000) (holding otherwise). On the nature of New York's bankruptcy-only exemptions, see *infra* text accompanying notes 758-66.

permits to be tax-deferred, claiming that the entire account is spendthrifted? In *Tompkins County Trust Co. v. Gowin*,[730] a retiree deposited $100,000 into his retirement account. Although the entire account was protected by a spendthrift clause as required by ERISA, the debtor was made to disgorge this amount, as it was not tax deferred under the Internal Revenue Code. Only that part of the ERISA account which is tax deferred is actually exempt.

New York also has exceptions for ERISA or IRA contributions that are fraudulent conveyances.[731] More unusually, a judgment creditor can reach any ERISA contribution made ninety days before "the interposition of the claim on which such judgment was entered."[732] This latter phrase–interposition of a claim–has been interpreted to mean the service of a summons or complaint that commences a civil action.[733] At least one court has declared that CPLR § 5205(c)(5) is preempted by ERISA,[734] under the Supreme Court's broad preemption principle articulated in *Mackey v. Lanier Collection Agency & Service, Inc*.[735] In *Mackey*, the Supreme Court smacked down Georgia for daring to exempt an ERISA welfare plan. Since ERISA requires retirement plans to be spendthrifted but not welfare plans, the state exemption provision impermissibly intruded on the federal prerogative to govern retirement and welfare matters.

There is a contrary argument in favor of § 5202(c)(5), however. If the debtor has made a fraudulent conveyance to an ERISA plan, the ERISA plan never received the beneficial interest in the funds. Rather, the ERISA plan holds the funds in trust for the creditors of the debtor. And given that the ERISA plan never owned the funds, the ERISA preemption rule rests unoffended.[736] This should equally apply to transfers within 90 days of the "interposition of the claim."[737] CPLR § 5205(c)(5) creates for such payments the same status as does fraudulent conveyance law for payments made by an insolvent debtor.

2. Income
a. Trust Income

New York provides various income exemptions. These differ from the exemption or trust principal in that "such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents" is not exempt after all. The debtor has the burden to show that the income is indeed necessary for the debtor's reasonable requirements.[738]

Where the debtor is receiving such exempt income, and where the creditor serves a restraining notice, the debtor does not violate the injunction by spending any of the income.[739] Rather, the creditor must seek an installment payment order pursuant to CPLR § 5226. Such an order is subject to the following admonition: "In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents . . ." This has been declared the proper venue for a court to consider just how much income under § 5202(d) is necessary for the reasonable requirements of the judgment debtor and dependents.[740] In such a hearing the debtor has the

---

[730] 163 Misc. 2d 418, 621 N.Y.S.2d 476 (S. Ct. Tompkins Co. 1994).
[731] CPLR § 5205(c)(5)(ii). Where the employer's contribution is a fraudulent conveyance, the employer's judgment creditor can reach the employee's ERISA account. Planned Consumer Marketing, Inc. v. Coats & Clark, Inc., 71 N.Y.2d 442, 522 N.E.2d 30, 527 N.Y.S.2d 185 (1988).
[732] CPLR § 5205(c)(5)(i).
[733] Baker v. Dorfman, 2000 U.S. Dist. LEXIS 10142, at *25 (S.D.N.Y. July 21, 2000); Tompkins County Trust Co. v. Gowin, 163 Misc. 2d 418, 621 N.Y.S.2d 476 (S. Ct. Tompkins Co. 1994).
[734] Federal Deposit Insurance Corp. v. Merrill Lynch, Pierce, Fenner & Smith, 1992 Dist. LEXIS 12275 (S.D.N.Y. 1992).
[735] 486 U.S. 825 (1988).
[736] Lisa M. Smith, Note, *ERISA Qualified Pension Plans as Part of the Bankruptcy Estate After* Patterson v. Shumate, 21 CARDOZO L. REV. 2119, 2143 (2000).
[737] CPLR § 5205(c)(5).
[738] Balanoff v. Niosi, 16 A.D.2d 53, 751 N.Y.S.2d 553 (2d Dept. 2005).
[739] Balanoff v. Niosi, 16 A.D.2d 53, 751 N.Y.S.2d 553, 560-61 (2d Dept. 2005).
[740] Balanoff v. Niosi, 16 A.D.2d 53, 751 N.Y.S.2d 553 (2d Dept. 2005).

burden of proving necessity.[741]

According to § 5205(d)(1), 90% of income from spendthrift trusts is exempt. Oddly, the exemption can be defeated if a court finds that the income is "unnecessary for the reasonable requirements of the judgment debtor and his dependents." What this implies is that, if *all* the income is absolutely necessary for support, the creditors can still get 10%.[742] On the other hand, if *none* of the income is necessary creditors can get it all.

Different rules apply if the spendthrift trust falls under ERISA. ERISA income is entirely exempt, and it is not subject to the "unnecessary" clause that undoes the exemption for non-ERISA trusts. The suspension of the "unnecessary" clause is undoubtedly required by the broad preemption rule of *Mackey v. Lanier Collection Agency & Service, Inc*.[743]

b. Wages

Ninety percent of income derived from personal services is exempt.[744] This dovetails nicely with the statutes governing income executions, which are tied to obtaining 10% of income.[745] Technically, the 10% limit is suspended if the income is "unnecessary for the reasonable requirements of the judgment debtor and his dependents."[746] Nevertheless, the income execution rules do not permit the judgment creditor to exceed 10%. How can a creditor gain excess to a surplus over 10%? The answer is that the creditor can dip into the 90% by means of an installment payment order pursuant to § 5226.

It is possible that a creditor might pursue income, but not via an income execution. In *Cadle Co. v. Newhouse*,[747] *JD* had all his wages deposited in his wife's checking account. *JC* claimed these deposits were fraudulent conveyances and (presumably) filed a turnover proceeding against *AD* in order to recover the proceeds of the checking account. *JC* tried to argue that, since it did not proceed by income execution, it was not subject to the 10% limit, but the court found that § 5205(d)(2) gives an independent reason to limit *JC* to 10%. What the court failed to note, however, is that § 5202(d)(2) exempts earnings for "personal services rendered within sixty days before . . . an income execution is delivered to the sheriff . . . " Where *no* income execution is delivered to the sheriff, no earnings are exempt, and *JC* is entitled to 100% of earnings, if we read § 5202(d)(2) literally.

In spite of the literal words of the CPLR, the court remanded to discover how much of the wages were spent on necessaries. Undoubtedly, the spouse of *JD* would have personal liability for expenditures "unnecessary for the reasonable requirements of the judgment debtor and [her] dependents."[748] The transfer of the "necessary" portion of the wages was transfer of exempt property and therefore not susceptible of recovery as a fraudulent conveyance.[749]

The wage exemption applies to wages already in a bank account when the bank account is levied,[750] but translating this to a bankruptcy case is awkward. The problem is that the exemption is limited to "services rendered within sixty days before, and at any time after, an income execution is

---

[741] Camphill Special School, Inc. v. Prentice, 126 Misc. 2d 707, 483 N.Y.S. 2d 888, 889 (S. Ct. Onondaga Co. 1984). Nevertheless, where *JD* makes *no* showing, courts have discretion not to award 100% of salary to *JC*. Dickens v. Director of Fin. of the City of New York, 45 Misc. 2d 882, 258 N.Y.S.2d 211 (S. Ct. N.Y. Co. 1965).

[742] Smith v. ABC Co., 2005 N.Y. LEXIS 3467, at *6-*7 (Fam. Ct. Nassau Co., September 29, 2005).

[743] 486 U.S. 825 (1988); *see supra* text accompanying notes 732-34.

[744] Law firm draws are earnings for personal services, not profits, and hence exempt. Federal Deposit Insurance Corp. v. Wirth, 1991 Dist LEXIS 13706 (S.D.N.Y. 1991).

[745] CPLR § 5231(b).

[746] CPLR § 5204(d).

[747] 26 Fed. Appx. 69 (2d Cir. 2001).

[748] CPLR § 5205(d).

[749] United States v. Croft, 535 U.S. 274, 276 (2002).

[750] In re Wrobel, 268 B.R. 342 (Bankr. W.D.N.Y. 2001).

delivered to the sheriff. . . "[751] In a typical bankruptcy case, no income execution has ever been delivered when the debtor files a voluntary bankruptcy petition. Nevertheless, the bankruptcy trustee, as of the day of the bankruptcy petition, is deemed to have the "rights and powers of (1) a creditor that obtains. . . a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists. . . "[752] So if we imagine that the trustee has served an ordinary execution to the sheriff on the day of the bankruptcy petition, we can see that the bank account survives the trustee's execution to the extent of the exemption in § 5205(d)(2).

In *In re Maidman*,[753] the debtor claimed cash (presumably in a bank account) in excess of $50,000, representing 90% the amount of wages earned within 60 days. This implies that the debtor's take-home pay for the year was about $333,333. The court allowed the debtor to exempt this amount under § 5205(d)(2). Overlooked, however, is the fact that the exemption does not cover amounts that "a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents."[754] The *Maidman* court should have required the debtor to prove[755] that the $50,000 was necessary to the debtor's reasonable requirements, a daunting task where the debtor's prodigious wallet was enlarded by $300,000 a year in post-bankruptcy earnings.[756] Incidentally, if we imagine the bankruptcy trustee serves an income execution (on an employer), the trustee could reach only 10% of wages, not the extra amount unnecessary to the debtor's requirements. But the wages have typically been deposited into a bank account. Therefore, in administering the hypothetical lien creditor test, the trustee hypothetically garnishes by serving an ordinary execution on the bank account, and from this garnishment the trustee obtains any amount not traceable to sixty days of wages, 10% of the sixty-day amount and any additional amount not necessary to the debtor's requirements.[757]

c. Bankruptcy-Only Exemptions

Trustees have tried to argue that, in bankruptcy cases, any monetary exemption mentioned in

---

[751] CPLR § 5205(d)(2). Technically, this implies that wages in a bank account are never exempt, if no creditor has served an income execution on the sheriff. Courts have chosen to ignore this feature of the statute. *See supra* text accompanying note 748.

[752] 11 U.S.C. § 544(a).

[753] 141 B.R. 571 (Bankr. N.D.N.Y. 1992).

[754] CPLR § 5205(d) (preamble).

[755] "Although Rule 4003(c) places the burden of proof on an objecting party to demonstrate that an exemption has not been properly claimed, Courts have uniformly held that once the objecting party presents a prima facie case that the exemption has been improperly claimed, the burden then shifts back to the debtor to come forward with evidence to demonstrate that the exemption is proper." In re Colbaugh, 250 B.R. 162, 166 n.9 (Bankr. W.D.N.Y. 2000).

[756] In the 2005 bankruptcy amendments, Congress pointed toward IRS standards to determine the reasonable expenses of a debtor's household. David Gray Carlson, *Means Testing: Bankruptcy's Failed Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223 (2007). These guidelines, designed by the IRS to squeeze debtors out of back taxes, presume very modest expenses are necessary to sustain existence. It will certainly be tempting to a bankruptcy court, and perhaps even state courts, to borrow these guidelines for determining how much in pre-petition wages is exemptible.

[757] In In re Colbaugh, 250 B.R. 162 (Bankr. W.D.N.Y. 2000), Judge John Ninfo issued the following instruction for debtors wishing to claim bank accounts exempt to the extent of the wages they contain:

> [T]his Court will: (1) require a debtor claiming an Earnings Exemption to: (a) provide proof of all earnings from personal services rendered within sixty days of the filing of the petition; and (b) if the Earnings Exemption is claimed in amounts on deposit in a financial institution, provide proof: (i) that the earnings were deposited into the account; and (ii) of the balance on deposit in the account on day sixty-one before the filing of the petition; (2) presume that any amount on deposit in the account at day sixty-one before the filing of the petition are the last amounts out of the account; (3) presume that ten percent of the debtor's earnings for services rendered within sixty days of the filing of the petition are the second to the last amounts out of the account; and (4) presume that any amounts deposited into the account within the sixty days before the filing of the petition from sources other than earnings for personal services rendered within sixty days of the filing of the petition are the third to last amounts out of the account. As a result, the Trustee and a debtor's estate will generally be entitled to the lesser of: (1) the amounts on deposit in the account on day sixty-one, ten percent of the debtor's earnings for services rendered within sixty days of the date of the filing of the petition and all non-earnings deposited into the account within sixty days of the filing of the petition; or (2) the amount on deposit in the account as of the date of filing.

Id. 166-67 (footnote omitted). Missing from this procedure is any acknowledgement that unnecessary funds belong to the trustee.

§ 5205 is limited by New York Debtor & Creditor Law § 282-84. A brief tour of this legislation is therefore necessary.

According to Bankruptcy Code § 522(b)(1), debtors may choose either exemptions under nonbankruptcy law or, alternatively, the miserly federal exemptions set forth in § 522(d). Yet § 522(d)(2) invites state legislators to deprive its citizens of the federal exemption. New York is among the states that have "opted out" of the federal exemptions. Its citizens may only choose the exemptions provided by nonbankruptcy law, including New York statutory law.[758]

New York's opt-out legislation goes on to authorize bankrupt debtors to take any exemption under CPLR § 5205 (personal property) and § 5206 (real property). It also permits the insurance exemptions described in New York Insurance Law § 3212. And finally, it authorizes "bankruptcy only exemptions." These exemptions are no good against the sheriff, because they are not listed in CPLR § 5205 or § 5206. They include an automobile worth $2400 or less (after liens are considered)[759] or certain choses in action not mentioned in CPLR § 5205.[760] Whether states are authorized to create bankruptcy-only exemptions not good against the sheriff has been questioned with some cause.[761] A recent New York case has upheld the constitutionality of it.[762] This constitutional question, however, is beyond our scope. So far, federal courts interpreting New York law are permitting debtors to claim bankruptcy-only exemptions pursuant to New York Debtor & Creditor Law § 282 and 283.[763]

Not only does New York purport to create bankruptcy-only exemptions, but it denies bankrupt New Yorkers some exemptions that would be good against the sheriff. According to Debtor & Creditor Law § 283(1), a debtor must aggregate CPLR § 5205(a) and certain annuity contracts under Insurance Law § 3212. The items in § 5205(a) are tangible items, such as wearing apparel and tools of the trade. The annuities to be aggregated are those purchased by the debtor within six months of bankruptcy.[764] Of these items, the debtor may have only $5,000 in total (or $10,000, in joint cases).[765]

Having limited debtors to $5,000 of the above items, Debtor and Creditor Law § 283(2) goes on to state that, where the debtor does not claim real estate, where the debtor has fully utilized the exemptions in § 5205(a) and annuities subject to the $5,000 limit, and where the value of personal property is less than $5,000, the debtor may have a bankruptcy-only exemption of cash to bring the total exemption up to $5,000. But the cash exemption described must not exceed $2,500. This provision is as confusing as it is unconstitutional. It has also spawned the claim of bankruptcy trustees that the bankruptcy-only cash exemption preempts any other claim to cash arising under § 5205. These claims have been rejected, however. If, for example, the debtor claims a bank account as proceeds of exempt wages, the claim is made under § 5205(d)(2). The $2,500 bankruptcy-only exemption is calculated by reference to § 5205(a) and annuities. It does not preempt the ability of the debtor to claim the bank account.[766]

---

[758] N.Y. Debtor & Creditor Law § 284.

[759] *Id*. § 282(1). According to subsection (2) various pensions may be exempted, but these are separately exempt in CPLR § 5205(c) and (d) and under federal law.

[760] These include awards under a crime victim's reparation law, wrongful death actions belonging to dependents of a deceased person (to the extent necessary for the support of the debtor), personal injury actions (to the extent of $7500, if not related to pain and suffering), and actions for the loss of future earnings (to the extent necessary for support). N.Y. Debtor & Creditor Law § 282(3).

[761] In re Wallace, 347 B.R. 626 (Bankr. W.D. Mich. 2006) (declaring Michigan's bankruptcy-only exemptions unconstitutional); Joseph Lamport, Note, *The Preemption of Bankruptcy-Only Exemptions*, 6 CARDOZO L. REV. 583 (1985) (suggesting New York Debtor & Creditor Law § 283 is unconstitutional).

[762] In re Brown, 2007 Bankr. LEXIS 2486 (Bankr. N.D.N.Y. July 23, 2007).

[763] Dubroff v. First Nat'l Bank (In re Dubroff), 119 F.3d 75 (2d Cir. 1997).

[764] If, however, the annuity is described in Internal Revenue Code § 805(d) or is purchased with proceeds of an annuity bought prior to the six month period, it is not subject to the limitation in question. Unhappily, Internal Revenue Code § 805(d) is no longer in effect. In re Moore, 177 B.R. 437, 440 n.3 (Bankr. N.D.N.Y. 1994). As for the protection of rollover, *Moore* involved an eve-of-bankruptcy annuity purchased in part by rollover funds, part not. The court permitted the rollover portion to be entirely exempt. Only the non-rollover portion was subject to the $5,000 limit. *Id*. at 441. Furthermore, the $5,000 cap refers to the principal amount of the annuity, not to income distributions going forward.

[765] In re Sherman, 237 B.R. 551 (Bankr. N.D.N.Y. 1999).

[766] In re Maidman, 141 B.R. 571 (Bankr. N.D.N.Y. 1992).

d. Miscellaneous Income Exemptions

Payment to *JD* for support pursuant to an award in a matrimonial action is exempt.[767] Payments under a separation agreement are not,[768] but if the agreement is incorporated in a judgment of divorce, they become exempt.[769]

Proceeds of milk is 90% exempt if the judgment debtor owns the farm on which the milk was produced and if the milk was sold to a licensed dealer.[770] But where milk is sold through a cooperative and where the cooperative holds back proceeds as a kind of capital contribution eventually refundable, the capital contribution loses its exempt status.[771]

Security deposits payable to a landlord or to a utility company are exempt.[772] So is the right of a judgment debtor to accelerate life insurance payments or have the surrender value or to enter into a viatical settlement is exempt.[773] After 1997, New York's state college choice tuition savings program is exempt.[774]

Not all exemptions appear in the CPLR. For instance, the Social Services Law § 137 and § 137-a exempts all public assistance awards from execution. There are also federal exemptions, such as veteran[775] and social security[776] benefits.[777]

e. Son of Sam

Military pay of a non-commissioned officer, musician or private in the armed forces is entirely exempt, unless the judgment creditor is suing for support in a matrimonial action. Nevertheless, in *New York State Crime Victims Board v. Wendell*,[778] the court held that New York's Son of Sam law[779] overrides this exemption, in the case of retired sergeants. In this case, *JD*, imprisoned for a violent crime, was nevertheless entitled to retirement pay, which was viewed as not a pension or veteran's benefit (these would have been federally exempt) but rather payment deferred for past services. Military pay *can* be garnished, insofar as federal law is concerned.[780] *JD*, however, claimed that the pay was exempt under CPLR § 5205(e). The *Wendell* court found that § 5205(e) is overruled by the Son of Sam law. That law defines "funds" as "all funds and property received from any source. . . excluding. . . earned income."[781] The retired sergeant's pay, however, was not earned income. Earned income is defined as "income derived from one's own labor."[782] The *Wendell* court ruled that retirement pay was not earned income because it was "not derived from any current labor. . . "[783] Second, the point of defining "funds" was simply to determine who must notify that State Crime Victims Board that it was paying a convicted felon. The idea was that ordinary employers should not be put to the burden of reporting. This concern did not apply, apparently, in the case of military pensions.

---

[767] CPLR § 5205(d)(3).
[768] Koral v. Koral, 111 Misc. 2d 650, 655-53, 444 N.Y.S.2d 816, 181 (S. Ct. Nassau Co. 1981).
[769] Wagner v. Wagner, 143 Misc. 2d 1044, 544 N.Y.S.2d 705 (S. Ct. Monroe Co. 1989).
[770] CPLR § 5205(f).
[771] In re Stinson, 59 B.R. 914 (Bankr. W.D.N.Y. 1986).
[772] CPLR § 5205(g). The exemption is lost if the security deposit has been returned. In re Kleinman, 172 B.R. 764, 775 (Bankr. S.D.N.Y. 1994) (dictum).
[773] CPLR § 5205(i).
[774] *Id.* § 5205(j).
[775] 38 U.S.C. 3101(a).
[776] 42 U.S.C. § 407.
[777] A list of these non-CPLR exemptions can be found in WEINSTEIN ET AL., *supra* note 25, ¶ 5205.03.
[778] 12 Misc. 3d 801, 815 N.Y.S.2d 438 (S. Ct. Albany Co. 2006).
[779] N.Y. Executive Law § 632-a.
[780] 5 U.S.C. § 5520a(b).
[781] The law had originally been limited to income derived from depictions of the crime. But this was broadened after the Supreme Court struck down the law for discriminating against unpopular speech. Simon & Schuster, Inc. v. Members of N.Y. State Crim. Victims Bd., 502 U.S. 105 (1991).
[782] N.Y. Executive Law § 632-a(f).
[783] 12 Misc. 3d at 805, 815 N.Y.S.2d at 441. Currency is not a concept that appears in the statute.

Meanwhile, the court ruled that the Son of Sam law simply repealed all exemptions under § 5205, since the legislative history said in general that criminals should pay the victims of their crimes. While noting that CPLR § 5205 was designed to keep debtors from being paupers, the court observed that, since *JD* was in prison, the state would be covering the living costs of *JD* for some decades. Therefore, depriving *JD* of his pay was thought to be the intent of the legislature.

This result can certainly be questioned. The Son of Sam law achieves two basic pur-poses. First, it requires those who pay funds to the convict to report the fact to the Crime Victims Board. Second, it gives an extended statute of limitations to victims in order to pursue these funds.[784] It says nothing at all about exemptions. In contrast, CPLR § 5205 states that, where the prisoner obtains a money judgment for any reason, $1000 of the judgment is exempt from Son of Sam judgments.[785] Does not this provision show that § 5205 applies to convicts generally? Perhaps the *Wendell* decision testifies more to a vigorous hatred of convicted criminals than to legal reasoning according to neutral principles.

B. Non-Monetary Exemptions

Of less concern to litigants are the non-monetary exemptions in tangible things. Many of the items listed are quaint: a church pew,[786] the family bible,[787] a wedding ring,[788] an exhibition at a world's fair,[789] family pictures, and school books.[790] Some are gruesome: dental accessions,[791] wheelchairs,[792] a seeing-eye dog.[793] Would any *JC* be base enough to execute on such things?[794] Television, of course, is "a practical necessity of modern living."[795] Yet as late as 1976 it was not exempt property in NY.[796] Today, the impecunious debtor may choose which of his many television sets shall be considered exempt.[797]

Some of the items listed must be "necessary" to the debtor. These include fuel for the stove,[798] food[799] for pets[800] and family,[801] working tools, professional libraries and professional furniture.[802]

---

[784] *See* Robinson v. Cusack, 2007 U.S. Dist. LEXIS 50073, at *4-*6 (July 11, 2007).

[785] This exemption does not apply to mere settlements of a civil suit. Hernon v. Zaffuto, 196 Misc. 2d 602, 763 N.Y.S.2d 442 (S. Ct. Albany Co. 2003).

[786] CPLR § 5205(a)(3). The leading treatise proclaims, "the provision is of dubious utility." WEINSTEIN ET AL., *supra* note 25, ¶ 5205.15.

[787] CPLR § 5205(a)(3).

[788] *Id*. § 5205(a)(5). Engagement rings, however, are not exempt. In re Tiberia, 227 B.R. 26 (Bankr. W.D.N.Y. 1998). Jewelry in general is not exempt. In re Sherman, 237 B.R. 551 (Bankr. N.D.N.Y. 1999).

[789] N.Y. Pers. Prop. Law § 250.

[790] CPLR § 5205(a)(3).

[791] *Id*. § 5205(d)(1).

[792] *Id*. § 5205(d)(1); *see* Manufacturers & Traders Trust Co. v. Pope, 124 Misc. 2d 681, 477 N.Y.S.2d 287 (S. Ct. Erie Co. 1984) (car could not be considered a wheelchair).

[793] CPLR § 5205(d)(1).

[794] *See* Allan Axelrod, *Was Shylock v. Antonio Properly Decided?*, 39 RUTGERS L. REV. 143 (1986) (finding no instances).

[795] Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 142, 423 N.E.2d 320, 329, 440 N.Y.S.2d 843 (1981).

[796] In re De Martini, 414 F. Supp. 69 (S.D.N.Y. 1976). See L. 1976 ch. 697, eff. August 23, 1976 (adding television set to list of exemptions).

[797] In re Wattson, 1980 Bankr. LEXIS 4460 (Bankr. s.D.N.Y. 2007).

[798] CPLR § 5205(a)(1).

[799] Food is also limited to what can be used in 60 days.

[800] *Id*. § 5205(a)(4). There is a separate exemption for the food necessary for a "team" (presumably of oxen or water buffalo). CPLR § 5205(a)(7). The Advisory Committee waxed indignant over the fact that pre-CPLR law allocated ninety days of food for the team but only sixty for the family. It angrily demanded that the team be deprived of thirty days worth of hay. Weinstein, *supra* note 1, at 91. Other than this one reform, the drafters of CPLR § Article 52 felt uncomfortable making substantive recommendations as to what property deserves to be exempt. *Id*. at 89-90.

[801] *Id*.; *see* McCarthy v. McCabe, 131 A.D. 396, 115 N.Y.S. 829 (3d Dept. 1909) ("It is not all the meat, groceries and vegetables provided for family use, but so much as a prudent man would ordinarily keep on hand for family use").

[802] CPLR § 5205(a)(7). A "team" is exempt. This includes a wagon for the oxen to pull. A wagon is still "necessary" if it is awaiting repair for six weeks. Wolf v. Farley, 16 N.Y.S. 168 (Ct. Common Please N.Y. CO. 1891); *see* Northern N.Y. Trust Co. v. Bano, 151 Misc. 2d 684, 273 N.Y.S.2d 694 (S.Ct. Jefferson Co. 1934) (motorized truck is not a "team").

Wearing apparel and household furniture[803] must be necessary,[804] complicating the ability of a debtor to preserve the sable wrap and Louis XIV furniture.

Some of the items are subject to a monetary limit. Only books not exceeding fifty dollars are exempt, and even these must be kept *and* used as part of the family library.[805] Only watches less than $35 are exempt.[806] Tools cannot be worth more than $600.[807] Domestic animals *and* their food for sixty days cannot exceed $450 in value.[808]

Suppose Fido, the family dog, is levied by the sheriff together with his pet food and yields $500 at an execution sale. Does *JD* get to keep $450 of the proceeds? We have seen that, for monetary exemptions, courts have indeed permitted *JD* to have the proceeds thereof.[809] There is a dictum to suggest that proceeds theory should be honored in general. In *Sailors' Snug Harbor in the City of New York v. Tax Commission of the City of New York*,[810] the court, in a case involving real estate exempt from taxes, said:

> The basic problem is not different in tax cases from other forms of partial exemption, e.g., the exemption from execution afforded a homestead; *or household furniture* (CPLR 5202, 5206). The usual rule in those situations is that the lien is enforceable to the extent value of property to which the lien attaches exceeds the exemption. [¶] If there is a sale the owner is entitled to the amount of the exemption.[811]

Perhaps this is enough to establish a general proceeds principle in New York law, at least when a judicial sale generates the proceeds.

Generally, cars are not exempt from execution in New York,[812] though we have seen that New York purports to grant a bankruptcy-only exemption for cars.[813] Possibly cars are tools of the trade, which are exempt under CPLR § 5205(a)(7). But the car must be entirely central to the trade, such as a taxi to a taxi driver.[814] Mere usefulness of a car to the trade is not enough.[815]

The exempt property listed in CPLR § 5205(a) is nevertheless not exempt against a creditor claiming the purchase price of the item.[816] So, for example, if *JD* buys a family bible[817] on credit from *JC*, the sheriff can levy the bible on behalf of *JC* but not on behalf of any other creditor. In contrast, there is no similar exception with regard to the tangible property listed in CPLR § 5205(h)–wheelchairs, seeing-eye dogs and the like.

The meaning of the purchase money exception has never been explored in the New York courts. One potent question is whether a credit card debt represents the purchase price of property bought with the card. Here the answer must be no. Credit card debt is not debt for the price of an item. Rather, it is a debt to pay back an advance of credit by the credit card issuer. A comparison of CPLR § 5205(a) to Article 9 of the UCC drives home this point. Article 9 defines a "purchase-money obligation" as "an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or use of the collateral if the value is in fact so used."[818] The CPLR

---

[803] Hobby equipment, however, is not furniture at all. In re Sherman, 237 B.R. 551 (Bankr. N.D.N.Y. 1999),

[804] *Compare* Conklin v. McCauley, 41 A.D. 452, 58 N.Y.S. 879 (2d Dept. 1899) (in replevin action against marshal, jury could decide pianos were necessary) *with* Lader v. Gordon, 88 N.Y.S.2D 758 (1st Dept. 1949) (debtor must prove piano is necessary); *see also* In re Wattson, 1980 Bankr. LEXIS 4460 (Bankr. S.D.N.Y. 2007) (wine vault, throw rug not "necessary" household furniture).

[805] CPLR § 5205(a)(2).

[806] *Id*. § 5205(a)(1).

[807] *Id*. § 5205(a)(7).

[808] *Id*. § 5205(a)(4).

[809] *See supra* text accompanying notes 713-20.

[810] 26 N.Y.2d 444, 259 N.E.2d 910, 311 N.Y.S.2d 486 (1970).

[811] 26 N.Y.2d at 449, 259 N.E.2d at 912, 311 N.Y.S.2d at 489 (emphasis added and citations omitted).

[812] Cais v. Pichler, 123 Misc. 2d 275, 473 N.Y.S.2d 719 (Civ. Ct. N.Y. Co. 1984).

[813] N.Y. Debtor & Creditor Law § 282(1); *See supra* text accompanying notes 760-62.

[814] Thorpe Elec. Supply v. Burr, 104 Misc. 2d 994, 995, 429 N.Y.S.2d 386 (S. Ct. Co. Albany Co. 1980).

[815] Thorpe Elec. Supply v. Burr, 104 Misc. 2d 994, 995, 429 N.Y.S.2d 386 (S. Ct. Co. Albany Co. 1980).

[816] CPLR § 5205(a) ("except where the judgment is for the purchase price of the exempt property . . . ").

[817] *Id*. § 5205(a)(2).

[818] UCC § 9-103(a)(2).

exception invokes only "price of the collateral," not the "enabling loan" portion of the UCC definition. Credit card debt is strictly on the enabling loan side of the UCC definition. Only credit extended by the seller is immune from the exemptions listed in CPLR § 5205(a).

Of course, the merchant who sells the family bible on credit could take a security interest in the bible under Article 9. So could an enabling lender, including a credit card issuer. In either case, the security interest is, of course, good against any of the property listed in § 5205.[819] But where the merchant takes no security interest, the merchant has no lien until the execution is served on the sheriff following a money judgment. Once the lien comes into existence, it is a unique lien that attaches to the family bible, to which no other execution lien could attach.

In addition to the purchase money exception, there is also an exception for judgments obtained by "a domestic, laboring person or mechanic. . . "[820] So the plumber or the gardener, if she gets a money judgment, could execution on the family bible, the pet dog or the wedding ring (though not the wheelchair or dental work).

These exceptions raise a conceptual difficulty in bankruptcy cases. In bankruptcy, exempt property initially goes into the bankruptcy estate, but the debtor is invited to reclaim exempt property.[821] What if a purchase money claim or a plumber's claim exists, which the property listed in CPLR § 5205(a) could satisfy? Does this interfere with a debtor's right to take exemptions from the bankruptcy estate?

The answer is probably no. Although the bankruptcy trustee could increase the general dividend if she could liquidate the exempt property in order to pay the purchase money lender or the mechanic, there seems to be no provision for it in the Bankruptcy Code. For example, a trustee "may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim . . . "[822] But *JD* has never transferred the family bible. She has merely claimed it as an exemption. So there is no prospect for "avoiding" the exemption.

Anomalously, the automatic stay of bankruptcy prevents the mechanic from executing on the family bible[823] but once the exemption is actually granted, the automatic stay no longer applies to the exempt property.[824] The mechanic is now free to pursue the bible. Yet the mechanic's claim may well be dischargeable. One of the effects of discharge is that the mechanic's money judgment is voided.[825] Another is that the mechanic is enjoined against ever enforcing the debt following the discharge.[826] So a timing difficulty arises. If the debtor files for exemptions before the discharge, the mechanic can get the family bible. If, however, the debtor waits till late in the case to ask for the exemption, then the mechanic will lose her claim before she can get the bible. The trustee has some opportunity for gamesmanship. The trustee can proceed to sell the bible, with court permission.[827] This may force the debtor to make the exemption claim, which, if the discharge has not been given, empowers the mechanic to get the bible after all. Such interesting maneuvers have not appeared in any reported case.

Conclusion

In this article, I have surveyed the New York judicial lien on personal property. What is revealed is a cacophony of medieval law and bad policy choices made worse by illogical and unthoughtful case law. Among the unfortunate features of the modern CPLR, first adopted in 1963, is

---

[819] The Court of Appeals has ruled that the exemption statutes do not imply that security interest on exempt items are against public policy. State v. Avco Fin. Serv., Inc, 50 N.Y.2d 383, 406 N.E.2d 1075, 429 N.Y.S.2d 181 (1980).
[820] CPLR § 5202(a).
[821] 11 U.S.C. § 522(*l*).
[822] *Id*. § 544(b)(1).
[823] *Id*. § 362(a)(2).
[824] *Id*. § 362(c)(1).
[825] *Id*. § 524(a)(1).
[826] *Id*. § 524(a)(2).
[827] *Id*. § 363(b).

the retention of the Statute of Frauds model version of the execution lien, in which the lien is created when an execution is delivered to the sheriff. Conceptually, the law would be simpler if the execution lien were deferred to the time of levy. On the other side of the ledger, the CPLR defers the equity lien until a turnover order or appointment of a receiver has been secured by the creditor. It would have been better if the legislature had perpetuated the pre-CPLR rule that commencement of the equity proceeding–not its conclusion–signals the birth of the lien. Such a decision would have accorded with the notion of *in custodia legis*, which the Second Circuit has asserted as a principle that supersedes the CPLR. The CPLR also makes insalubrious distinctions between property capable of and not capable of delivery, which creates havoc in the case of pledges. It also distinguishes between debts and property. The New York courts have attempted to obliterate this last distinction, but it lingers on and may even be required under the Full Faith and Credit of the Constitution. Finally, New York has failed to coordinate Article 9 of the UCC with the CPLR. As a result, secured creditors are denied post-lien protection under CPLR § 5202(a)(1) or (2) or under § 5202(b). And Article 9's "two-for-one" proceeds rule makes it impossible for the sheriff to hold a sale of property encumbered by a senior sheriff interest.

None of this can be defended. Yet it can be tolerated. The CPLR is now 45 years old. It may not be admirable or elegant but it is not so bad that commercial lawyers are unable to muddle through it. And this is precisely why the CPLR, in its absurdity, has survived. The best that can be said of the clanking, unsightly machinery of money judgment enforcement in New York is that it has not entirely broken down.