Critique of Money Judgment (Part Two: Liens on New York Personal Property)

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ARTICLES

CRITIQUE OF MONEY JUDGMENT
(PART TWO: LIENS ON NEW YORK PERSONAL PROPERTY)

DAVID GRAY CARLSON†

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† Professor of Law, Benjamin N. Cardozo School of Law. Thanks to Jeanne Schroeder, Stewart Sterk, Bill Widen, and Chuck Yablon for helping me to theorize parts of this Article. This is the second installment of a two-part study of judicial liens under New York law. The first installment was published in volume 82 of the St. John's Law Review at page 1291.
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 ready, in its fashion, to award a creditor with a judicial lien on the debtor’s assets (if any). Its creation is the transubstantive miracle by which mediocre in personam rights apotheosize into in rem right in the debtor’s property.
As important as the judicial lien is, 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 in personam liability outside of bankruptcy. When Wall Street can't pay, it files for chapter 11 protection (or obtains a federal bailout). 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. This has been called the very organizing principle of federal bankruptcy law. Yet the law of the judicial lien is underdeveloped 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 and dangerous for creditors. So if a creditor faces a contumacious debtor who simply declines to pay (common enough in divorce cases) and does not file for bankruptcy, recourse must often be had to the ungainly mechanisms by which courts liquidate assets of the debtor in order to "make" the judgment. Hence the necessity of this study of the New York judicial lien, the first ever since New York enacted the Civil Practice Law and Rules ("CPLR"), that un-Herculean effort that woefully failed to scrub clean the Augean stables of New York civil procedure.

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1 Lynn M. LoPucki, The Death of Liability, 106 YALE L.J. 1, 4 (1996) ("Unless that [money] judgment can be enforced, liability is merely symbolic.").
5 If the petition is rejected, the wronged debtor gets attorney fees, compensatory damages, and punitive damages. 11 U.S.C.A. § 303(i) (West 2005); see also Isabella C. Lacayo, Note, After the Dismissal of an Involuntary Bankruptcy Petition: Attorney's Fees Awards to Alleged Debtors, 27 CARDOZO L. REV. 1949, 1950–52 (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 Cohen, Supplementary Proceedings]. The phrase relates to the ancient name for the writ of execution—fieri facis or fi.f.a., 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). Am. Fin. Corp. v. Webster, Civil Action No. 034-08-1980, 1982 Del. C.P. LEXIS 3, at *2 (Del. Ct. C.P. Nov. 18, 1982).
In contemplating the collection 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, "[i]t 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."\(^8\) One author has proclaimed the lien arising from the writ of execution to be a "solemn and ancient farce."\(^9\) Yet, based on my study of forty-five years of jurisprudence in this area, it is my sad duty to report that the introduction of new articles 52 and 62 in 1963\(^10\) 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 does not palliate but compounds the absurdity. It is hardly an exaggeration to say that these portions of the CPLR are among the worst written statutes in the history of Anglo-American jurisprudence.

This Article, an installment of an unpleasant but necessary in-depth study of New York judicial liens,\(^11\) examines judicial liens on personal property arising from articles 52 and 62 of the CPLR. The focus is on the judicial lien as a personal property interest. Procedural niceties unconnected to judicial liens are largely neglected in the interest of space and personal inclination.\(^12\) My analysis divides judicial liens into two types.

\(^7\) Ehrlich-Bober & Co. v. Univ. 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 thousands of dollars in unpaid judgments in their files...[T]his...is the worst offender in failing to keep up with the facts of modern life." (remarks of Daniel H. Distler)).

\(^9\) Cohen, Supplementary Proceedings, supra note 6, at 1007.


\(^12\) 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
Part I discusses the execution lien and the closely analogous pre-judgment attachment lien.\textsuperscript{13} The execution lien is the “legal” remedy for the disease of money judgment. In Part II, I examine “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 the designated property from the bankruptcy estate. At all points of the analysis, the interaction of federal bankruptcy law and state law will be thoroughly examined. Part IV concludes with some modest suggestions for reform to make the system more rational and to mitigate the embarrassment that any patriotic New Yorker must feel upon contemplating the current state of articles 52 and 62 of the CPLR.

I. THE EXECUTION LIEN

A. Creation

The execution lien 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 transferee of the debt or property . . . .\textsuperscript{14}

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\textsuperscript{13} Pre-judgment attachment liens merge into execution liens once the judgment is entered. See Tenzer, Greenblatt, Fallon & Kaplan v. Abbruzzese, 57 Misc. 2d 783, 788, 293 N.Y.S.2d 634, 639-40 (Sup. Ct. Queens County 1968).

\textsuperscript{14} N.Y. C.P.L.R. 5202(a) (McKinney 2008). Although only a sheriff (an officer of the supreme court) is mentioned, delivery to marshals working for lesser or federal courts has like effect. See First Westchester Nat’l Bank v. Lewis, 42 Misc. 2d 1007, 1009, 249 N.Y.S.2d 537, 539 (Westchester County Ct. 1964); see also, N.Y. CITY CIV. CT. ACT § 701(b) (McKinney 2008) (“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 in this court; and they shall apply equally to both sheriffs and marshals.”). The marshal, however,
This peculiar sentence struggles to say that the lien is created the moment that a judgment creditor serves an execution on the sheriff. Notice that the above sentenceneglects to use the word lien. It merely says that the rights of a creditor in personal property (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.

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

The lien creditor’s power is to sell the debtor’s property. Classically, the creditor can sell what the debtor could have sold 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):

The 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...

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15 See 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 CPLR 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 CPLR 5202(a) anxiously dances around the word. See 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 article 9 of the UCC must never use the phrase. Incidentally, the CPLR at least twice utters the profane name of “liens.” N.Y. C.P.L.R. 5203(b), 5236(a).


18 See id. at 7.


20 N.Y. C.P.L.R. 5233(a).
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, the creditor may sell whatever interest the debtor had at the time the execution was delivered to the sheriff. 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 ("JD") pursuant to a writ of execution obtained by a 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 X's property, even though, on Wednesday, JD had no interest at all in it. Y obtains whatever interest JD had in the thing on Monday. Hence, the proper formulation is that a lien is the power of a creditor to sell whatever the debtor could have sold at the moment the creditor's lien was created. Meanwhile, JC's power is transferred to Y. Y therefore buys JD's equity interest and JC's lien. These two merge, leaving Y with absolute title in JD's thing. This is the proper formulation of the power of sale. Yet, under the literal terms of CPLR 5233(a), Y obtains nothing at all on Wednesday.

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's debtor (whom, in imitation of article 9 of the Uniform Commercial Code ("UCC"), I shall call the account debtor, or AD). In such cases, no sale is needed to liquidate the property into cash, the language in which debt is expressed. Once JC serves the

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21 U.C.C. § 9-102(a)(3) (2007) ("'Account debtor' means a person obligated on an account, chattel paper, or general intangible.").
execution on the sheriff and creates the lien, \( AD \), who owes a debt to \( JD \), must pay the sheriff instead of \( JD \).22

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 Restoration torpor to pass the famous Statute of Frauds.23 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 \textit{fieri facias}—which today we call a writ of execution, or simply an execution—created a lien.24

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 \textit{teste}), including execution on property.25 Hence, Shakespeare's comment about "lawyers in the vacation[,] for they sleep between term and term, and then they perceive not how Time moves."26

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 \textit{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.27 Obviously this played some havoc with a farmer's 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

22 N.Y. C.P.L.R. 5232(a). 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 \( AD \) under a third-party beneficiary theory, the court may convert the breach of contract action to a proceeding supplementary to judgment pursuant to CPLR 5225(b) or 5227. Port Chester Elec. Constr. Corp. v. Atlas, 40 N.Y.2d 652, 657, 357 N.E.2d 983, 987, 389 N.Y.S.2d 327, 331 (1976).
24 See 29 Car. 2, c. 3, § 15.
25 See Erwin’s Lessee v. Dundas, 45 U.S. 58, 75 (1846); Roth v. Wells, 29 N.Y. 471, 489 (1864).
27 See Bond v. Willet, 29 How. Pr. 47, 50 (1864).
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 $JD$.

Dispossessing $JD$ serves to notify the buyer of cows that perhaps something is amiss with regard to $JD$'s ownership of cows.

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 scabrous, plague-infested seventeenth century, which, pace Milton, Purcell, and Newton, scarcely deserves our high opinion. 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 in turn each of these mystifying and unsatisfactory exceptions.

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 $JD$ 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

\[28\] See 29 Car. 2, c. 3, § 15.
\[29\] E.g., MICH. COMP. LAWS ANN. § 600.6012 (West 2008).
\[30\] N.Y. C.P.L.R. 5202(a) (McKinney 2008).
\[31\] Id.
\[32\] Id. 5202(a)(1).
\[33\] Id. 5202(a)(2).
\[34\] Id. 5202(a)(1).
over earlier unperfected security interests, even though they
know they are harming the rights of a prior unperfected secured
party.\textsuperscript{35}

CPLR 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 \textit{JD}
is not the principal obligor.\textsuperscript{36} The reasoning is that \textit{JD}
ever received the loan proceeds; some third party did.\textsuperscript{37} 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, \textit{JD} always
obtains subrogation rights against the principal obligor, in
exchange for the suretyship promise.\textsuperscript{38} Therefore, courts err if
they think sureties receive nothing from the parties they assure.
Properly, secured parties (“SPs”) under suretyship contracts are
transferees for fair consideration.\textsuperscript{39} What they give in exchange
for their security interests is subrogation rights against the
principal obligor.\textsuperscript{40}

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.\textsuperscript{41} According to CPLR 6203, a lien is
created when the order of attachment is delivered to the sheriff,
but an alleged debtor (“\textit{D}”)\textsuperscript{42} 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.”\textsuperscript{43} The disjunctive suggests that bad faith

\textsuperscript{35} U.C.C. § 9-322(a) (2007). 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. DEBT. & CRED. LAW § 278(2) (McKinney 2008).
But no such lien is provided as a partial defense to the judicial lien under CPLR
5202(a)(1). JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE: C.P.L.R. ¶
5202.13 (2d ed. 2008).

\textsuperscript{36} Yelin, Kenner & Levy v. Simon, 75 Civ. 3880, 1979 U.S. Dist. LEXIS 11373,
at *22 (S.D.N.Y. June 28, 1979).

\textsuperscript{37} Id.

\textsuperscript{38} Contrary to popular belief, upstream guaranties are usually for fair
consideration because of subrogation. See Kenneth J. Carl, Fraudulent Transfer
Attacks on Guaranties in Bankruptcy, 60 AM. BANKR. L.J. 109, 113 (1986).

\textsuperscript{39} N.Y. C.P.L.R. 5202(a).

\textsuperscript{40} Carl, supra note 38, at 113.

\textsuperscript{41} N.Y. C.P.L.R. 6203.

\textsuperscript{42} In attachment cases, I will refer to the defendant as \textit{D}, not \textit{JD}, since the
plaintiff (“\textit{P}”) does not and may never have a money judgment.

\textsuperscript{43} N.Y. C.P.L.R. 6203 (emphasis added).
transferees for value are protected against the attachment lien (as is true with the execution lien), 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. New York's feeble pre-levy attachment lien has been justifiably condemned as "America's weakest lien."

Countermanding the weakness of the execution and attachment liens, at the same time the New York legislature enacted CPLR 6203, it also spoiled the uniformity of the Uniform Fraudulent Conveyance Act by adding section 273-a of the Debtor and Creditor Law:

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 CPLR 5202(a)(1) because the assignee ("X") who receives a transfer free of the execution lien

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44 In Adan v. Abbott, 114 Misc. 2d 735, 736, 452 N.Y.S.2d 476, 477 (Sup. Ct. N.Y. County 1982), D's lawyer on a murder rap claimed to take free of an attachment lien on book royalties, but the court held that the lawyer 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 55–93.

45 Actually, judgment creditors would seem to be eligible for protection under CPLR 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 CPLR 5202(a)(2) or 6203(1). See infra text accompanying notes 128–1129.


47 The new Uniform Fraudulent Transfer Act, however, adopts § 273-a as a good idea. UNIFORM FRAUDULENT TRANSFER ACT § 4(a) (1984); N.Y. DEBT. & CRED. LAW § 273-a (McKinney 2008).

replaces the value lost to JC by paying JD the consideration.\(^{49}\) But this is not so. Antecedent debt is included in the concept of fair consideration.\(^ {50}\) From JD's standpoint, the property conveyed to X is a dead loss if X is paid on antecedent debt.\(^ {51}\) Justification for lien weakness will have to be found elsewhere. Furthermore, JC at least had something—a lien. Once the lien disappears, JC has nothing but the faint hope of getting a new judicial lien on something else. Perhaps several justifications are needed. If X pays a fresh consideration, X deserves protection because the transaction is revenue-neutral for JC.\(^ {52}\) When 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. When X is in bad faith for a fair consideration, perhaps we must simply admit that we do not want to encourage a lawsuit from JC regarding what X did or did not know. Perhaps the legislature does not really believe that JC has much of a property interest just because her lawyer filled in a form and delivered it to the sheriff. The lien created by so scant an investment in diligence produces an invisible lien, which threatens commerce. Yet in this last instance, a bad faith X who takes a transfer from JD faces the risk that the transfer to X was for the purpose of hindering or delaying creditors, thus making it a deliberate fraud on creditors like JC.\(^ {53}\) If so, X may have to bear JC's legal fees under a non-uniform New York enactment.\(^ {54}\)

Law professors make their living by inducing the premises from the data of the rules. But the premises here induced cannot disguise the fact that deferral of the judicial lien to the moment

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\(^{49}\) WEINSTEIN ET AL., supra note 35, ¶ 5202.02, 5202.06, 5202.11, 5202.13.

\(^{50}\) N.Y. DEBT. & CRED. 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 153–162.

\(^{51}\) See WEINSTEIN ET AL., supra note 35, ¶ 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.”).

\(^{52}\) 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. It would, however, 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.

\(^{53}\) See N.Y. DEBT. & CRED. LAW § 276.

\(^{54}\) See id. § 276-a.
of levy would be a vast conceptual improvement in the law of judicial liens on personal property.

a. Subsequent Security Interests

CPLR 5202(a)(1) generates some merry confusion when read in conjunction with article 9 of the UCC. According to section 9-317(b) of the UCC, a secured party is subordinate to a person who becomes a lien creditor before the security interest is perfected. The UCC defines a 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 "or the like" catch-all phrase of the UCC.

Meanwhile, 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 JC. The two provisions are in contradiction. 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.

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56 Id. § 9-102(a)(52)(A).
57 N.Y. C.P.L.R. 5202(a) (McKinney 2008).
58 See N.Y. U.C.C. § 9-102(a)(52)(A) (McKinney 2008); U.C.C. § 9-102(a)(152)(A). 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 "or the like." See N.Y. U.C.C. § 9-102(a)(52)(A); U.C.C. § 9-102(a)(52)(A). Would it be so hard to look up what this means according to the CPLR?
59 See N.Y. C.P.L.R. 5202(a)(1).
61 Peter F. Coogan, Intangibles as Collateral Under the Uniform Commercial Code, 77 HARV. L. REV. 997, 999 (1964) ("[I]n fact, neither [the UCC nor the CPLR] seems to recognize the existence of the other.").
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.”62 If so, each statute gives a different answer.

In Yellin, Kenner & Levy v. Simon,63 Judge Thomas Griesa ruled that in the Second Scenario, SP loses.64 According to the seldom cited UCC section 13-103, when the UCC conflicts with some non-uniform legislation, the UCC must triumph.65 Under this license, Judge Griesa negated the exception to 5202(a) and decided the priority contest solely by reference to article 9,66 according to which SP was the loser.

Judge Griesa’s interpretation is correct under the 2001 amendments to article 9. Ironically, it 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.67 In

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62 N.Y. U.C.C. § 9-317(a)(2)(A). In Mantovani v. Fast Fuel Corp., 494 F. Supp. 72, 76 (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. If this passage states that the creation of a security interest is not a transfer of JD’s property, then it is of course sadly benighted. If it says that unperfected security interests cannot qualify for the 5202(a)(1) exception, it stands for the override by the UCC of 5202(a)(1). Mantovani is a masterpiece of confusion. There, the Internal Revenue Service (“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 mystifying passage quoted above responds to this “point” and can be dismissed, along with the argument, as absurd.


64 See id. at *17–18. To be precise, SP was a post-levy transferee. But SP was without knowledge of the levy and thus potentially comported with the second exception to 5202(a). Yellin, however, is also good authority for the meaning of CPLR 5202(a)(1), pertaining to pre-levy transfers.

65 See N.Y. U.C.C. § 13-103 (formerly § 10-103).


67 See id. at *20.
Judge Griesa’s view, JC was the winner under the terms of old UCC section 9-301—now unhappily renumbered as section 9-317(a)(2)—because JC became a lien creditor before SP perfected. According to 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 that JC delivers an execution to the sheriff before SP files a financing statement or otherwise perfects.

In contrast, SP argued that old section 9-301(b) applied only where JC became a lien creditor during an unperfected gap in SP’s security interest. According to this view, entirely correct prior to 2001, old section 9-301(b) had nothing to say when JC became a lien creditor entirely before SP’s security interest attached. Rather, insofar as the UCC is concerned, SP’s security interest could only attach to JD’s rights in the collateral—the equity left over in light of JC’s judicial lien. Because old section 9-301 governed unperfected security interests only—not pre-attachment events—the UCC did not conflict with the CPLR. SP was, therefore, entitled to prevail under CPLR 5202(a)(1).

To consider this valid argument more slowly, we start with the premise of section 9-201 of the UCC—article 9’s 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.”

68 See N.Y. U.C.C. § 9-317 (formerly § 9-301). In the Golden Age of article 9—prior to 2000—section 9-317 bore the noble number section 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.


70 See id.

71 N.Y. U.C.C. § 9-203(b)(2). The drafters of new article 9 call this the “nemo dat concept.” Id. § 9-317 cmt. 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, which means “no one giveth who hath not.”

72 See N.Y. U.C.C. § 9-301(1)(b).

73 Id. § 9-201 (emphasis added).
Except as otherwise provided in subsection (2),\(^74\) an unperfected security interest is subordinate to the rights of

\[
\ldots \\
(b) \text{a person who becomes a lien creditor before the security interest is perfected} \ldots \quad \vdots
\]

Notice that old section 9-301(1)(b) regulated unperfected security interests only.\(^75\) When an unperfected gap existed and a subsequent JC came into existence, \(SP\) was subordinated.\(^77\) On the other hand, when \(SP\) perfected and attached at the same time, article 9 could have no effect on the priority contest whatsoever. Old section 9-301(b) applied only if there was an unperfected gap.

If this argument is correct, as I believe it is, 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, \(JC\) could not claim protection of old section 9-301(b). Hence, there was no conflict—only the CPLR applied. Under the CPLR, \(SP\) should have won, even if \(SP\) never perfected.\(^78\)

\(^74\) Subsection (2) provided to purchase money \(SPs\) a grace period for perfecting. It commenced when \(JD\) received delivery of the collateral and ran for ten days. See id. § 9-301(2). Today this grace period has been stretched to twenty days. See id. § 9-317(e).

\(^75\) N.Y. U.C.C. § 9-301(1)(b) (McKinney 2000) (emphasis added) (current version at N.Y. U.C.C. § 9-317 (McKinney 2008)).

\(^76\) See id.

\(^77\) 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. See Stephens v. Perrine, 143 N.Y. 476, 481, 39 N.E. 11, 13 (1894). Under the notorious case of Moore v. Bay, 284 U.S. 4, 5 (1931), a bankruptcy trustee could subrogated 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 defanged the dragon of Moore. See Carlson & Shupack, supra note 46, at 319–20.

\(^78\) See N.Y. C.P.L.R. 5202(a)(1) (McKinney 2008). In the Second Scenario, \(SP\) did not perfect and yet, on my reading of the pre-2000 UCC, \(SP\) still should have won under the exception in CPLR 5202(a)(1). Can this be justified? The answer is yes because old section 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 section 9-301(b) simply did not apply. This is easy to fathom in a case where \(SPs\) security interest attaches and is perfected simultaneously, as where \(SPs\) financing statement was filed prior to Monday in the First Scenario. But it is equally true if \(SP\) never perfected at all.
Yellin was a misinterpretation of old section 9-301(1)(b). Yet new UCC section 9-317(a)(2) basically ratifies the Yellin premise after the fact. According to new section 9-317(a)(2):

A security interest or agricultural lien is subordinate to the rights of:

... (2) except as otherwise provided in subsection (e), 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) is met and a financing statement covering the collateral is filed.

Section 9-317(a)(2) operates differently from old section 9-301(b). First, section 9-317(a)(2) makes no reference to unperfected security interests, as did old section 9-301(b). Rather, new section 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 section 9-317(a)(2) governs the Second Scenario. Ironically, this puts the UCC into conflict with

To see why, imagine that JC has a judgment for $100 and that JD has a thing worth $1,000. 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 B for a fair consideration. Clearly, JC no longer has a judicial lien on the thing; B owns it free and clear. But now suppose that SP takes an unperfected security interest in the thing in exchange for a $1,000 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 because 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. See N.Y. U.C.C. § 9-615(a)(3) (McKinney 2008). But surely all other aspects of JC's lien is just as destroyed as it is in the case where JC conveys an absolute interest to B.

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 section 9-301(b) applied only to persons who became lien creditors after attachment and before perfection. See U.C.C. § 9-301(1)(b) (2007).

Subsection (e) provides a grace period to purchase money SPs in which to perfect. The grace period commences when JD receives delivery of the collateral and runs for twenty days. See U.C.C. § 9-317(e) (2007).

See id. § 9-203. This section refers to the existence of a security agreement between JD and SP.

Id. § 9-317(a)(2) (emphasis added).

Id. § 9-317(a)(2)(A).
the CPLR, which means that SP loses! Although new article 9 was designed to reduce the power of JCs against SPs,\(^8\) here is one unintended consequence in which JCs were exalted over SPs.

New section 9-317(a)(2) therefore governs perfected security interests as well as unperfected ones.\(^8^4\) 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 section 9-317(a)(2)(B) give SP the victory. Under the UCC, filing without more is not perfection. Filing plus attachment is perfection.\(^8^5\) Prior to 2000, JC would have prevailed.\(^8^6\) Now SP wins because JC has not become a lien creditor before "one of the conditions specified in [section] 9-203(b)(3)" is met and a financing statement covering the collateral is filed.\(^8^7\) Here the *Yellin* premise, imported into new section 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 section 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.

\(^8^3\) *Id.* § 9-317 cmt. 4.

\(^8^4\) See *id.* § 9-317(a)(2)(B).

\(^8^5\) N.Y. U.C.C. § 9-308 (McKinney 2008).

\(^8^6\) According to section 9-317 of the UCC, 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. *Id.* § 9-317 cmt. 4.

\(^8^7\) Section 9-203(b)(3) refers to the security agreement. *Id.* § 9-203(b)(3).

\(^8^8\) *Id.* § 9-317(b)(2)(B).
This time JC clearly wins under section 9-317(a)(2) of the UCC. JC became a lien creditor before SP perfected. And because SP's unperfected security interest attached prior to JC's lien, SP cannot claim to be a post-lien transeree of JD under CPLR 5202(a)(1). On these facts, there is no conflict between the UCC and CPLR 5202(a)(2). Nevertheless, in Ruppert v. Community National Bank, 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 CPLR 5202(a)(1) is an exception to the principle stated in the preamble. So, properly, CPLR 5202(a)(1) is irrelevant; SP was first in time but subordinate to JC under section 9-317(a)(2) of the UCC. SP was a pre-execution transferee and had no right to the protection of CPLR 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:

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91 Id. at 167, 254 N.Y.S.2d at 343.

92 N.Y. C.P.L.R. 5202(a) (McKinney 2008).

93 As Ruppert held, when the sheriff released the collateral directly to SP, SP was not a transferee by virtue of obtaining possession. 22 A.D.2d at 167, 254 N.Y.S.2d at 343–44. 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 notes 316–317 and accompanying text.

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.

Prior to the 1972 amendments to article 9, 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. It created a “new” security interest that was junior to JC’s lien.

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. According to the 1966 amendments to the Internal Revenue Code, SP’s future advance would be protected only if the advance were good against a judicial lien creditor under state law. 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 section 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.

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

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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. SP makes no advance.

Tuesday: JC serves an execution on the sheriff.

Wednesday: SP makes a discretionary future advance and has a perfected security interest for the first time.

Thursday: The sheriff levies goods on behalf of JC.

In the Sixth Scenario, section 9-301(4) (1972) did not apply to protect the Thursday advance, because old section 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 that Yellin99 was a bad Erie guess at New York law).

New article 9 changes the premise of future advance priorities. First, under section 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, even though JC was first to obtain a lien. Second, according to new section 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.100

New section 9-323(b) no longer requires SP to have a perfected security interest before Tuesday in order to be senior for the Thursday advance. But there is something peculiar about new section 9-323(b). If we read it literally, it governs only advances made more than forty-five days after the judicial lien.101 It provides no rule at all for advances made the day after JC became a lien creditor.102 Nevertheless, through very subtle reasoning, it is possible to see that Wednesday's advance is senior to Tuesday's execution lien. In order to be senior, JC had

99 See supra text accompanying notes 63–83.
100 N.Y. U.C.C. § 9-323(b) (McKinney 2008).
101 Id.
102 See id.
to deliver the execution to the sheriff prior to the security agreement and prior to the filing of a financing statement (events that occurred on Monday). Since JC is junior in general, JC continues to be junior as to any advance made within forty-five days of Tuesday. If an advance is made by SP more than forty-five days after Tuesday and if SP knows of the judicial lien, section 9-323(b) subordinates SP. In other words, the 2000 amendments to article 9 institute the unitary view of security interests for forty-five days after the judicial lien. After forty-five days, article 9 changes the theory and reverts to the multiple theory. Article 9 now resembles the New York law of mortgages, which subordinates discretionary advances if made with knowledge of an intervening interest. Article 9, however, exalts bad faith discretionary advances made with knowledge of a third party, if made within forty-five days of judicial lien creation.

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

Seventh Scenario

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 section 9-323(b), SP should be junior since SP advanced funds more than forty-five days after JC became a lien creditor. Yet SP can claim to be the winner under section 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 section 9-323(b)

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103 Id.; see Carlson, supra note 95, at 150–51.
104 See U.C.C. § 9-323(b).
105 See N.Y. REAL PROP. LAW § 291 (McKinney 2008) (subsequent advances made with knowledge of prior interests is subordinated to that interest); 78 N.Y. JUR. 2D Mortgages and Deeds of Trust § 237 (2003).
overrides section 9-317(a)(2), but, of course, the statute nowhere makes this explicit. Nevertheless, it is often said that the particular statute overrules a conflicting general statute, and courts have learned to apply the official comments of the UCC as if they were really part of the statute. On this basis, courts will surely subordinate SP's advance in the Seventh Scenario.

c. Involuntary Transfers

Significantly, CPLR 5202(a)(1) does not use the word "purchaser," which connotes a voluntary buyer of personal property. Rather, the broader term of "transferee" is used. This is an unfortunate change from prior law. Former section 683 of the Civil Procedure Act 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" of the taxpayer "at the time the [tax] assessment is made." Yet the lien is unperfected as to any "judgment lien creditor" until the IRS perfects (by filing notice of the tax lien in

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108 Watt v. Alaska, 451 U.S. 259, 267 (1981); United States v. Chase, 135 U.S. 255, 260 (1890) ("[W]here 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.").
110 11 U.S.C.A. § 101(43) (West 2008) ("The term 'purchaser' means transferee of a voluntary transfer . . ."); N.Y. REAL PROP. LAW § 290(2) (McKinney 2008) ("The term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate."); U.C.C. § 1-201(32) ("Purchase includes taking by sale . . . or any other voluntary transaction creating an interest in property.").
112 Id. § 6322.
the local state UCC filing office). 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." 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 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 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. Ergo, JC prevails.

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." Execution liens in New York, at least prior to levy, have been deemed choate even though the execution lien covers all of JD's personal property. Perhaps JD's power to sell free of JC's lien points to

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113 *Id.* § 6323(a), (f).
114 26 C.F.R. § 301.6323(h)-1(g) (2008).
118 Don King Prods., 945 F.2d at 533 (emphasis added).
inchoateness. Nevertheless, in American Express Travel Related, Services Co. v. Kalish & Rice, Inc., a district court judge ruled that execution liens are choate as soon as the court officer (here a federal marshal) receives an execution. 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, the court held that the execution lien was choate by virtue of delivery of the execution in 1981. This delivery was still good enough to beat an IRS lien in 1985, even though there had never been a levy. One problem with Lerner is that execution liens supposedly die when returned at the end of sixty days. The court fails to explain how the execution could have survived for four years sans levée.

Not only does the word “transferee” include tax lien creditors, it also encompasses judicial lien creditors. Suppose JC₁ serves an execution on the sheriff and JC₂ serves an execution on the same sheriff. If we read the CPLR literally, JC₂ takes free of JC₁. Yet we learn in CPLR 5234(b) that JC₁ retains priority. Ergo, implicitly CPLR 5202(a)(1) defines “transferee” to mean any transfer, voluntary or involuntary, except a judicial lien creditor. Otherwise, CPLR 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

120 See generally United States v. Morrison, 247 F.2d 285, 287–90 (5th Cir. 1957) (equitable lien inchoate in part because subsequent purchasers could later take priority over it).
122 Under Federal Rule of Civil Procedure 64, the federal marshal is subject to the CPLR in any matter pertaining to a writ of execution. FED. R. CIV. P. 64.
123 See American Express, 693 F. Supp. at 1438.
125 See id. at 680–81. 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.
127 See infra text accompanying notes 239–247.
129 See id.
income tax is equated with an execution lien.\textsuperscript{130} Ergo, it cannot fall under the exception of CPLR 5202(a)(1), because of the aforementioned conflict with CPLR 5234(b). New York’s lien for sales tax does not equate with an execution.\textsuperscript{131} Ergo, the sales tax lien is entitled to the exception of CPLR 5202(a)(1).

Upon assessing any state 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 to levy upon and sell such person’s real and personal property.”\textsuperscript{132} The sheriff must file the warrant with the clerk of the supreme court for the county wherein the taxpayer resides.\textsuperscript{133} Once docketed, the warrant becomes the equivalent of a judgment.\textsuperscript{134} The warrant itself is the equivalent of an execution.\textsuperscript{135} The sheriff is authorized to levy, and the State Tax Commission has an execution lien (at least once the warrant is a judgment).\textsuperscript{136} The warrant, however, is not limited to a sixty-day life, as executions are.\textsuperscript{137} Rather, the sheriff may levy at any time.\textsuperscript{138}

Yet there is a difference between the lien under section 692(d) for income tax and the lien under section 1141(b) for sales tax. The income tax statute simply states that the tax commission has whatever rights a judgment would give as to personal property.\textsuperscript{139} In addition, the warrant itself is the execution.\textsuperscript{140} Accordingly, 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 section 1141(b), which creates a lien quite independently of the CPLR’s governance of executions.\textsuperscript{141}

\textsuperscript{130} See N.Y. Tax Law § 692(d) (McKinney 2008).
\textsuperscript{131} See id. § 1141(b).
\textsuperscript{132} Id. § 692(c).
\textsuperscript{133} Id. § 692(d).
\textsuperscript{134} See id. §§ 692(d)-(e) (state income tax); see also id. § 1141(b) (state sales tax).
\textsuperscript{135} See id. § 692(f).
\textsuperscript{137} See infra text accompanying notes 239–247.
\textsuperscript{139} N.Y. Tax Law § 692(d).
\textsuperscript{140} See id. § 1141(b).
\textsuperscript{141} Id.
In *Craner v. Marine Midland Bank (In re Craner)*, the state filed its warrant for sales tax moments before the bankruptcy. Under section 1141(b) it was per se senior to a subsequent hypothetical lien creditor. If the lien had been for income tax under section 692(d), the trustee’s hypothetical judicial lien status would have trumped the tax commission.

The Second Circuit has *Erie*-guessed that New York City tax liens arise when warrants are docketed; delivery of the warrant is not necessary to encumber the taxpayer’s property. 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. But section 573(2) of the New York Labor Law 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.

Unless there is a genius in this legislation that I have missed, these results raise the suspicion of unintended caprice and incomplete theorization of state tax liens.

d. Assignments for the Benefit of Creditors

Prior to the permanent institution of federal bankruptcy in 1898, debtors could commence a collective creditors’ proceeding by making an assignment for the benefit of creditors. Although initially contractual in nature, a history of private abuse led the New York legislature to govern the device by statute.

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143 *See* id. at 120.
144 *See* N.Y. Tax Law § 1141(b). It was also not a voidable preference because it was a statutory lien. *See* 11 U.S.C.A. § 547(c)(6) (West 2008).
145 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 infra* text accompanying notes 836–837.
149 N.Y. LABOR LAW § 573(2) (McKinney 2008).
151 *See, e.g.*, N.Y. DEBT. & CRED. LAW §§ 3–24 (McKinney 2008).
bankruptcy law has largely eclipsed the assignment for the benefit of creditors, but the procedure still exists and is even occasionally used.\textsuperscript{152}

According to the Court of Appeals in \textit{International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.},\textsuperscript{153} an assignment for the benefit of creditors is not a transfer for a fair consideration.\textsuperscript{154} This overlooks the fact that the assignment is for the benefit of creditors.\textsuperscript{155} Consideration for the transfer is the assignee’s obligation to transfer proceeds of the debtor’s property to the creditors.\textsuperscript{156} This should have been enough for the assignee to take free of the execution lien under CPLR 5202(a)(1). Venerable case law says otherwise, however.\textsuperscript{157} Prior to the CPLR, the difficulty was that old Civil Practice Act section 683 protected “purchasers,” which was construed to mean purchaser for a fresh consideration.\textsuperscript{158} 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.\textsuperscript{159} This implies that antecedent debt is fair consideration. So assignees for the benefit of creditors should be viewed as

\begin{footnotes}
\footnote{153 36 N.Y.2d 121, 325 N.E.2d 137, 365 N.Y.S.2d 808 (1975).}
\footnote{154 See id. at 125–26, 325 N.E.2d at 139, 365 N.Y.S.2d at 811.}
\footnote{156 See id.}
\footnote{157 See \textit{In re Betty Barton Frozen Food Corp.}, 35 Misc. 2d 1057, 1059, 231 N.Y.S.2d 969, 971 (Sup. Ct. Kings County 1962) (“[A]n assignee takes the property of the assignor subject to all equities and liens affecting his assignor prior to the assignment.”), modified, 20 A.D.2d 708, 247 N.Y.S.2d 247 (2d Dep’t 1964). At one moment in \textit{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 \textit{Alcor, Inc. v. Balanoff}, 45 A.D.2d 795, 357 N.Y.S.2d 160 (3d Dep’t 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.}
\footnote{158 Distler & Shubin, \textit{supra} note 8, at 477 n.94.}
\end{footnotes}
transferees for a fair consideration, since they take title 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.\(^{160}\) The *International Ribbon Mills* court cited to the definition of "fair consideration" in section 272(a) of the New York Debtor and Creditor Law, which requires satisfaction of debt.\(^{161}\) Inexplicably, the court overlooked section 272(b), which does indeed refer to the securing of antecedent debt.\(^{162}\) So both payment of and transfers on antecedent debt should count as fair consideration.

Complicating this view is that article 9 of the UCC defines a lien creditor as, among other things, "an assignee for the benefit of creditors."\(^{163}\) This implies that general assignees take free of unperfected security interests.\(^{164}\) 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 CPLR 5234 and 5202(a)(1) led us to suggest that the class of post-delivery transferees implicitly excludes the subsequent JCs. Assignees for the benefit of creditors do not appear in CPLR 5234.\(^{165}\) So they should be fully eligible for 5202(a)(1) protection, even if the UCC generally names them to be judicial lien creditors (at least in cases where SP priority is at stake).

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\(^{160}\) *Int'l Ribbon*, 36 N.Y.2d at 124, 325 N.E.2d at 138, 365 N.Y.S.2d at 810.

\(^{161}\) 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 . . .

N.Y. Debt. & Cred. Law § 272(a).

\(^{162}\) 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.

*Id.* § 272(b).


\(^{164}\) See *id.* § 9-317(b).

\(^{165}\) See N.Y. C.P.L.R. 5234 (McKinney 2008).
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 CPLR 5202(a), JC’s execution lien is no good against “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.”\(^{166}\) This exception introduces us to a new term: property “capable of delivery.”\(^{167}\) The phrase, undefined in the CPLR, captures the idea of \textit{tangible} property—property that can be picked up and carried off.\(^{168}\) Thus, where JD has property capable of delivery, the sheriff must levy on it “by taking the property into custody.”\(^{169}\) In contrast, property \textit{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.”\(^{170}\)

\(^{166}\) Id. 5202(a)(2).

\(^{167}\) Id.


\(^{169}\) N.Y. C.P.L.R. 5232(b). The sheriff must also serve a copy of the execution upon the dispossessed party. \textit{Id.} Furthermore, where the execution does not state that JD 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 CPLR 5222(e). \textit{Id.} 5232(c); \textit{see} Cais v. Pichler, 123 Misc. 2d 275, 276, 473 N.Y.S.2d 719, 721 (N.Y. Civ. Ct. N.Y. County 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. Kitson & Kitson v. City of Yonkers, 40 A.D.3d 758, 759, 835 N.Y.S.2d 670, 672 (2d Dep't 2007); FDIC v. Wirth, No. M18-302, 1991 U.S. Dist. LEXIS 13706, *6 (S.D.N.Y. Oct. 2, 1991).

\(^{170}\) N.Y. C.P.L.R. 5232(a); \textit{see also} id. 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. \textit{See} \textit{In re} Chelsea Pure Food Corp., 18 F.2d 112, 113 (S.D.N.Y. 1926); Distler & Schubin, \textit{supra} note 8, at 470.
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.

The sheriff who has levied property not capable of delivery has accomplished this by delivering the execution to AD. Under CPLR 5202(a)(2), JD has power to convey such property 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. The avoidance of some slight convenience to buyers outweighs the property rights of a JC who has prompted the sheriff to a diligent levy. Accordingly, JD has a post-levy power to sell free and clear, if the transferee paid a “fair consideration after it was levied upon without knowledge of the levy.”

Ironically, new article 9 reverses the result for the buyer of any payment intangible. This result follows because the revision to section 9-317(a) of the UCC accidentally deprives any secured party of the CPLR protections.

To make this point a little more slowly, article 9 covers security interests in general intangible property, and it traditionally covered those who bought absolute interests in accounts or chattel paper. Buyers of general intangibles were

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171 See N.Y. C.P.L.R. 5232(b).
172 U.C.C. § 9-313(a); see generally Jeanne L. Schroeder, Some Realism About Legal Surrealism, 37 WM. & MARY L. REV. 455 (1996) (discussing the concept of physical possession of property).
173 N.Y. C.P.L.R. 5232(a).
174 See id. 5202(a)(2).
175 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. U.C.C. § 9-310(a). This is easier for competing secured parties to find.
176 N.Y. C.P.L.R. 5202(a)(2).
177 U.C.C. § 9-102(a)(61) (“Payment intangible’ means a general intangible under which the account debtor’s principal obligation is a monetary obligation.”).
178 See supra text accompanying notes 79–93.
179 U.C.C. § 9-109(a)(1).
not under the UCC and, prior to 2000, such buyers were eligible to take free 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.\textsuperscript{81} 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. These, for the moment, are not yet article 9 transactions.

The post-levy attachment lien has greater weakness than the post-levy execution. According to CPLR 6214(a), all levies are paper levies.\textsuperscript{82} 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.”\textsuperscript{83} In general, article 62 mercifully avoids the article 52 distinction between property capable or not capable of delivery. A paper levy under CPLR 6214(a) is supposed to culminate in payment or delivery of personal property to the sheriff.\textsuperscript{84} 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.”\textsuperscript{185}

Although the attachment lien is even feebler than the execution lien, the new UCC deprives any buyer of or lender on a payment intangible of CPLR protections.\textsuperscript{186} 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.\textsuperscript{187}

\textsuperscript{81} Id. § 9-102(a)(47), (61), (65) (2003).
\textsuperscript{82} See N.Y. C.P.L.R. 6214(a) (McKinney 2008).
\textsuperscript{83} Id. 6203(2).
\textsuperscript{84} According to CPLR 6214(c), “[w]here 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 ninety-day period (allowing for court extensions). N.Y. C.P.L.R. 6214(e). A plaintiff may also insist that the sheriff seize property right off the bat. Id. 6215. But the plaintiff must furnish a satisfactory indemnity. Id. 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.” Id. 6211(b).
\textsuperscript{185} Id. 6203(2).
\textsuperscript{186} For the definition of a payment intangible, see U.C.C. § 9-102(a)(61).
\textsuperscript{187} See N.Y. C.P.L.R. 5202(a).
\textsuperscript{187} See id.
3. Defeasibility and the Bankruptcy Estate

We have seen that New York makes defeasible most of its judicial liens on personal property. Prior to levy, both the execution and attachment liens can be defeated by transfers to bad faith transferees, if they have given fair consideration. 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. 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, 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 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. Suppose a bankrupt debtor conveys property to a bona fide transferee after the bankruptcy petition. Does CPLR 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.
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, CPLR 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 better than that because she is also a successor to whatever rights D had. Accordingly, the Renoir is the property of the bankruptcy estate on Monday under section 541(a)(1) of the Bankruptcy Code. X is an "entity... in possession... of property that the trustee may use, sell, or lease under section 363 [of the Bankruptcy Code],"194 within the meaning of section 542(a); accordingly, X must turn over the Renoir to the trustee.195

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.196 According to section 549(a) of the Bankruptcy Code:

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.197

Actions under section 549(a), if required, are subject to the defense of section 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 that—

(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...198

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 CPLR 5202(a)(1) is a generally applicable law that permits post-levy transfers to be effective against a judicial lien creditor who "acquire[d] rights"199 in the Renoir before X perfected an interest in the Renoir. If so, then not only is the

195 See Carlson, supra note 3, at 566.
196 See Olsen v. Zerbetz (In re Olsen), 36 F.3d 71, 72 (9th Cir. 1994).
199 Id. § 546(b)(1)(A).
section 549(a) action defeated, but X is also immune from bankruptcy's automatic stay.\textsuperscript{200}

Courts have attempted to restrict the use of section 546(b)(1) on premises not actually invoked in the statute. One court insisted that section 546(b)(1) applies only if X has an unperfected lien prepetition which is perfected postpetition.\textsuperscript{201} Another court required a state statute to have an overt "relation back" device on the face of the statute.\textsuperscript{202} Still another court required a pre-petition unsecured claim before a section 546(b)(1) defense could be asserted.\textsuperscript{203} 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?\textsuperscript{204}

The best way to view the Tenth Scenario is to recognize that the trustee does not need section 549(a) of the Bankruptcy Code to recover the painting from X.\textsuperscript{205} Rather, D simply has no power to convey free and clear of the bankruptcy estate.\textsuperscript{206} Although D purported to convey the Renoir to X, D is in effect a thief with

\textsuperscript{200} Id. § 362(b)(3).
\textsuperscript{201} See Lincoln Sav. Bank, FSB v. Suffolk County Treasurer (In re Parr Meadows Racing Ass'n), 880 F.2d 1540, 1546–47 (2d Cir. 1989).
\textsuperscript{202} See Makoroff v. City of Lockport, 916 F.2d 890, 892–95 & n.1 (3d Cir. 1990).
\textsuperscript{203} See In re AR Accessories Group, Inc., 345 F.3d 454, 458–59 (7th Cir. 2003).
\textsuperscript{204} See, e.g., Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199, 1205 (2007) ("In rejecting Travelers' claim for contractual attorney's fees, the Court of Appeals did not conclude that the claim was 'unenforceable' under § 502(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 . . . .'").
\textsuperscript{205} Ironically, if X, without knowledge of the bankruptcy, gives the painting to a museum, then section 542(c) of the Bankruptcy Code validates the museum's property interest, requiring the trustee to bring the section 549(a) action, which can be brought notwithstanding section 542(c). According to section 542(c), if X "has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor," X may "transfer property of the estate . . . in good faith . . . to an entity other than the trustee, with the same effect as to the entity making such transfer . . . as if the case under this title . . . had not been commenced." 11 U.S.C. § 542(c) (2000). Nevertheless, the museum plausibly has a section 546(b)(1) defense against section 549(a) avoidance. See 11 U.S.C.A. § 546(b)(1) (West 2006).
\textsuperscript{206} When this is true, a trustee has no need of avoidance under § 549(a) to retrieve property possessed by third parties under color of title. See Carlson, supra note 95, at 118–21.
void title. Rather than relying on avoidance under section 549(a) of the Bankruptcy Code, the trustee can simply seek a turnover order against \( X \), who is in possession of property of the bankruptcy estate.\(^{207}\) 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. Section 544(a) of the Bankruptcy Code refers to the "rights and powers" of a judicial lien creditor, not to duties and liabilities.\(^{208}\) 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 a mere successor takes subject to \( SP \). But as a hypothetical judicial lien creditor, the trustee is senior to \( SP \).\(^{209}\)

Such a theory has bad side effects, however. Suppose \( D \) owns a house and goes bankrupt. If the bankruptcy trustee now owns the house outright, then \( D \) is a trespasser and owes rent to the trustee. If, however, the trustee merely owns the house as a lien creditor, then \( D \) is not a trespasser until the trustee actually sells the house.\(^{210}\) A theory that makes bankruptcy trustees the fee simple owners of \( D \)'s prepetition property cannot explain why \( D \) owes no rent for occupying the house after the bankruptcy.\(^{211}\) Nevertheless, this bad side effect (all debtors have to pay rent to

\[^{207}\text{See 11 U.S.C. § 542(a) (2000).}\]
\[^{208}\text{11 U.S.C. § 544(a) (emphasis added).}\]
\[^{209}\text{U.C.C. § 9-317(a)(2) (2007).}\]
\[^{210}\text{The trustee needs court approval to sell out of the ordinary course of business. 11 U.S.C.A. § 363(b) (2000 & Supp. V. 2005).}\]
\[^{211}\text{One court holds that \( D \) does not owe rent because \( D \) and the bankruptcy trustee are cotenants (where \( D \) has a homestead exemption). In re Szekely, 936 F.2d 897, 903 (7th Cir. 1991). This rationale palpably does not work. If the trustee is a cotenant, then he has a right of possession equal to that of \( D \). But this is surely not the case. The trustee would surely be viewed a trespasser if the trustee were to break into the house late at night (without court approval). See generally Vladimir Elgort, Note, Do Debtors Owe Rent to Their Bankruptcy Trustee for Remaining in the Home After Filing and Prior to Foreclosure, Notwithstanding a Homestead Exemption?, 23 CARDOZO L. REV. 2253, 2271–73 (2002).}\]
bankruptcy trustees) is the logical price of preventing the CPLR from devastating bankruptcy law in cases filed in New York.

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 JD's personal property is located in Erie County but JC serves an execution on the sheriff of Suffolk County. Does JC have a lien on JD's property in Erie County?

Prior to the enactment of the CPLR, the law was clear on this point. According to section 679(1) of the former New York Civil Practice Act, "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. 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.

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 of the officers." Article 62 requires that an order of attachment be "directed to the sheriff of 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 . . . ." This restriction, however, does not apply to executions.

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212 N.Y. C.P.L.R 679 (1921).
213 See infra notes 755-756 and accompanying text.
214 N.Y. C.P.L.R. 5234(b).
215 Id. 6211(a).
Do these references thus imply that no limitations exist with regard to ordinary executions in all other circumstances? The answer is unknown.\footnote{216}

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.\footnote{217} So if a JC serves an execution on the sheriff on Monday and the debtor buys a thing on Wednesday, the lien arises on Wednesday, not on Monday.\footnote{218}

As always, contingency baffles the courts. In \textit{Corwin Consultants, Inc. v. Interpublic Group of Companies},\footnote{219} the IRS arguably filed notice of a tax lien\footnote{220} with regard to a non-compete contract JD had with a corporation requiring that JD “earn” the payment by not competing. Thereafter, JC served an execution on the sheriff.\footnote{221} The court ruled that the IRS had a lien on the executory contract only when JD earned the money by not competing.\footnote{222} It then held that the IRS was senior to JC.\footnote{223} 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.\footnote{224} 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.\footnote{225} This is a principle we shall revisit when we analyze whether wage garnishments can be voidable preferences in federal bankruptcy proceedings.\footnote{226}

\footnote{216} The leading treatise assumes that these territorial restrictions exist. See \textit{WEINSTEIN ET AL.}, supra note 35, ¶¶ 5202.02, 5202.06.\footnote{217} See United States v. Fleming, 474 F. Supp. 904, 908 (S.D.N.Y. 1979).\footnote{218} See \textit{id.} at 907–08 (finding that lien attached to property only when debtor purchased valuable coins).\footnote{219} 375 F. Supp. 186 (S.D.N.Y. 1974), \textit{rev’d on other grounds}, 512 F.2d 605 (2d Cir. 1975).\footnote{220} The case was reversed on the question of whether the IRS filed its notice in the proper location. See \textit{Corwin Consultants}, 512 F.2d at 609.\footnote{221} \textit{Corwin Consultants}, 375 F. Supp. at 189.\footnote{222} See \textit{id.} at 193.\footnote{223} See \textit{id.} It is not clear from the case whether JC perpetuated the execution lien with a levy or by extending the sixty-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.\footnote{224} See United States v. Fleming, 474 F. Supp. 904, 908 (S.D.N.Y. 1979).\footnote{225} See \textit{In re Owen}, No. 90-CV-659, 1990 WL 198386, at *3 (N.D.N.Y. Nov. 28, 1990) (holding that a pre-petition levy of an executory contract established a lien valid against a bankruptcy estate).\footnote{226} See \textit{infra} text accompanying notes 876-887.
B. Duration

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

1. The date the judgment was entered, if entered in the supreme, county or family court. 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.
2. The court in which it was entered.
3. The amount of the judgment.
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.

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227 Failure to comply justifies the sheriff in refusing to levy under the execution. See Freedom Disc. Corp. v. McMahon, 38 A.D.2d 947, 948, 331 N.Y.S.2d 489, 490 (2d Dep't 1972) (income execution).
228 There is a hint in Kitson & Kitson v. City of Yonkers, 40 A.D.3d 758, 760, 835 N.Y.S.2d 670, 672 (2d Dep't 2007), that an error in the date of judgment renders the execution and any levy thereunder void.
229 N.Y. C.P.L.R. 5230(a) (McKinney 2008). Rule 64 of the Federal Rules of Civil Procedure permits executions to be delivered to a federal marshal, but the rule also requires that New York state law govern the execution. See Money Judgment Part I, supra note 11, at 1299. 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, it is routinely held that the federal marshal cannot levy on real estate, as the federal judgment must first be registered in state court. See id.
230 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. See Fireman's Fund Ins. Co. v. Plaza Oldsmobile, Ltd., 596 F. Supp. 657, 663 (E.D.N.Y. 1984), vacated sub nom. D'Ambra v. Fireman's Fund Ins. Co., 766 F.2d 95, 95 (2d Cir. 1985) (upholding the execution nevertheless).
231 The amount of interest need not be listed. This, the sheriff must calculate. 11 WEINSTEIN ET AL., supra note 35, ¶ 5230.11.
232 N.Y. C.P.L.R. 5230(a).
233 Entry means that the clerk enters the judgment in an alphabetical index. Id. at 1297. Docketing cannot occur until the winning side files the judgment roll. Id. Where an execution is served before proper entry, the execution becomes effective only when entry of the judgment is achieved. Hathaway v. Howell, 54 N.Y. 97, 103 (1873).
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.” Thus, as is true with restraining notices, 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 unless a levy of property not capable of delivery has occurred. (Oddly the levy of property capable of delivery is not mentioned.) The time may be extended “in writing” 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.”

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. Early
cases suggest the sixty day period is for the benefit of the creditor, who has the right to expect prompt enforcement, but, of course, termination of the lien much benefits JD or perhaps junior JCs. 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.

If the rule were otherwise, JC\textsubscript{1} could serve an execution with no research as to the location of assets. JC\textsubscript{2} could do the research, only to see JC\textsubscript{1} enriched. The death of JC\textsubscript{1}'s execution lien therefore prevents JC\textsubscript{1} from free-riding on JC\textsubscript{2}'s research.

Yet counter-examples exist to suggest the execution lien survives return of the execution. In \textit{International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.},\textsuperscript{242} 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.\textsuperscript{243} 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.\textsuperscript{244} Perhaps the 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

\textsuperscript{240} See, e.g., \textit{Ansonia Brass}, 103 N.Y. at 508, 9 N.E.2d at 238; \textit{Excelsior Needle Co. v. Globe Cycle Works}, 48 A.D. 304, 309, 62 N.Y.S. 538, 540 (4th Dep't 1900).

\textsuperscript{241} 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, 195, 219 N.Y.S. 541, 544 (4th Dep't 1927); \textit{Excelsior Needle}, 48 A.D. at 309–10, 62 N.Y.S. at 540–41. There is no hint that this continues to be the rule under the CPLR.

\textsuperscript{242} 36 N.Y.2d 121, 325 N.E.2d 137, 365 N.Y.S.2d 808 (1975).

\textsuperscript{243} 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 153-165.

\textsuperscript{244} \textit{Int'l Ribbon}, 36 N.Y.2d at 124, 325 N.E.2d at 138, 365 N.Y.S.2d at 810.
Another example is *In re City of New York*, where the city had condemned *JD*'s 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 in *City of New York* was entirely after the return of the execution.

### C. Levies

A levy can only occur during the life of an execution. 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. Attorneys may not. Nevertheless, some federal counter-examples exist. Both these cases also involved turnover orders, so in the end it is not clear whether the court was relying on a levy or on a turnover order to generate a lien for *JC*.

*JC* may, however, arrange to be appointed a receiver, in which case *JC* would have the power to sell *JD*'s property.

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245 A like result is appropriate for interpleader cases. See supra note 283.
247 Id. at 603, 289 N.Y.S.2d at 682.
248 Id.
251 Id. 5328.
255 N.Y. C.P.L.R. 5228(a); see Ernest Lawrence Group, Inc. v. Gov't Careers Ctr., No. 99 Civ. 3807 (DC), 2000 U.S. Dist. LEXIS 15988, at *4 (S.D.N.Y. Nov. 2, 2000);
though JC must waive receiver fees as a condition of her appointment.\footnote{256}

If a levy of property has occurred during the life of the execution, the lien continues so long as the levy does.\footnote{257} While the levy continues, the sheriff has no duty to return the execution.\footnote{258} Or if the execution is returned nevertheless, the levy sustains JC's lien.\footnote{259} Although CPLR 5230(c) suspends the sheriff's duty to return the execution only if the sheriff levies property \textit{not} capable of delivery,\footnote{260} only one court has been tempted to announce a different rule for property capable of delivery.\footnote{261}

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\footnote{257}{See Oppel v. Di Gangi, 84 A.D.2d 549, 549–50, 443 N.Y.S.2d 177, 177 (2d Dep't 1981).}

\footnote{258}{See Ruppert v. Cmty. Nat'l Bank, 22 A.D.2d 165, 167, 254 N.Y.S.2d 341, 343–44 (1st Dep't 1964) (unperfected secured party prevailed over JC where the sheriff released the levy and killed the execution lien).}

\footnote{259}{Kennis v. Sherwood, 82 A.D.2d 847, 848, 439 N.Y.S.2d 962, 965 (2d Dep't 1981).}

\footnote{260}{Am. Express Travel Related, Servs. Co. v. Kalish & Rice, Inc., 693 F. Supp. 1436, 1438 (S.D.N.Y. 1988). One court has suggested in dictum that, where levy is by seizure of property capable of delivery, JC (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. N.Y. State Comm'n of Taxation & Fin. v. Bank of N.Y., 275 A.D.2d 287, 289, 712 N.Y.S.2d 543, 545 (1st Dep't 2000).}

\footnote{261}{In Vance Boiler Works v. Co-operative Feed Dealers, Inc., 46 Misc. 2d 654, 260 N.Y.S.2d 303 (Sup. Court Wayne County 1965), a very early CPLR case, JC\textsubscript{1} and JC\textsubscript{2} sequentially delivered executions to the sheriff. The sheriff "levied" by serving JD with executions. Properly, these were levies of neither property capable nor nor property incapable of delivery. More than sixty days then passed. The court nevertheless remarked: Insofar as such execution may be held to relate to "property capable of delivery by taking the property into his [Sheriff's] custody without interfering with the lawful possession of pledgees and lessees" as to any property encompassed therein the levy became void 60 days after service of the execution upon the debtor, since petitioner obtained no extension of the effective time thereof and did not in fact take specific property into his custody. Id. at 655–56, 260 N.Y.S.2d at 303–04 (citations omitted) (citing Walker v. Henry, 85 N.Y. 130, 135 (1881)). The Vance Boiler court was quite confused. Executions lapse must be returned sixty days after issuance, not sixty days after they are served on}
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.\textsuperscript{262} I will call this a "paper levy." A paper levy on JD is never permitted with regard to executions, though it is permitted for pre-judgment attachment, where all levies are paper levies.

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 or custody of the person served.\textsuperscript{263}

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.\textsuperscript{264} So, for example, in \textit{State Tax Commission v. Blanchard Management Corp.},\textsuperscript{265} JD, itself a judgment creditor, had validly levied a debt owed by AD (a bank).\textsuperscript{266} JC then levied AD without informing AD that AD's customer's bank account had been levied by JD.\textsuperscript{267} The court absolved AD of the duty to figure out the connection between the levied customer and JD.\textsuperscript{268} As a result the levy failed.\textsuperscript{269}

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

\textsuperscript{262} N.Y. C.P.L.R. 5232(a).
\textsuperscript{263} Id.
\textsuperscript{264} Id. 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. \textit{See} Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895, 900 (2d Cir. 1985).
\textsuperscript{265} 91 A.D.2d 501, 456 N.Y.S.2d 364 (1st Dep't 1982).
\textsuperscript{266} Id. at 501–02, 456 N.Y.S.2d at 365.
\textsuperscript{267} \textit{See} id.
\textsuperscript{268} \textit{See} id. at 502, 456 N.Y.S.2d at 365–66.
\textsuperscript{269} \textit{See} id. at 502, 456 N.Y.S.2d at 366.
controls. If knowledge of present property is absent, there is no levy of after-acquired debt/property.\textsuperscript{271}

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\textsuperscript{272}. In short, the levy is the equivalent of a restraining notice under CPLR 5222(b). The injunctive effect, however, lapses ninety days after the levy.\textsuperscript{273} The injunctive effect can be further extended by motion beyond ninety days.\textsuperscript{274} Indeed, the motion to extend can be made even after the levy has died.\textsuperscript{275} Courts seem to assume that the lapse of the injunctive effect is the same thing as the lapse of the execution lien.\textsuperscript{276} Indeed, it is fair on this basis to view garnishment as injunctive in nature, consistent with its history.\textsuperscript{277}

\textsuperscript{270} See N.Y. C.P.L.R. 5232(a) (McKinney 2008) ("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 unit and execute any document necessary to effect the transfer or payment.").

\textsuperscript{271} But see Capital Ventures Int'l v. Republic of Arg., 282 F. App'x 41, 42 (2d Cir. 2008) (holding that plaintiff is entitled to attachment order with regard to empty bank account). An empty bank account is still property, presumably, because the bank remains contractually obligated to honor checks should any further funds be deposited.

\textsuperscript{272} N.Y. C.P.L.R. 5232(a). In Wordie v. Chase Manhattan Bank, N.A., 140 A.D.2d 435, 529 N.Y.S.2d 1 (2d Dep't 1988), AD responded to a levy by sending the sheriff a check. The check was lost, and AD sent paperwork for replacing it to JC's attorney who never completed it. See id. at 435–36, 529 N.Y.S.2d at 1–2. AD was held not to have violated the CPLR 5232(a) injunction. See id. at 436, 529 N.Y.S.2d at 2.

\textsuperscript{273} N.Y. C.P.L.R. 5232(a) ("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 . . . 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.").

\textsuperscript{274} Id. A motion to extend need not be decided, only moved for, within the life of the levy. See Knapp v. Barron, 83 F.R.D. 75, 77 (S.D.N.Y. 1979) (pre-judgment attachment).

\textsuperscript{275} See Kitson & Kitson v. City of Yonkers, 10 A.D.3d 21, 26, 778 N.Y.S.2d 503, 507 (2d Dep't 2004); infra text accompanying notes 296-302.

\textsuperscript{276} James Talcott Factors, Inc. v. Blatter (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, N.Y. C.P.L.R. 6214(b) and (e) separately end the levy in all aspects if there is no payment, delivery, extension, or turnover proceeding within the life of the levy, see id. 6214(e).

\textsuperscript{277} In the nineteenth century, debt could be garnished only through a supplemental proceeding resulting in an injunctive order. Isadore H. Cohen, Collection of Money Judgments in New York: Third Party Orders, 35 COLUM. L. REV. 1196, 1203 (1935) [hereinafter Cohen, Third Party Orders].
The filing of a turnover action automatically extends a levy so long as the turnover action continues.\textsuperscript{278} It equally extends the life of the pre-judgment levy pursuant to an order of attachment.\textsuperscript{279} Extension by commencement of a turnover proceeding is a key concept under the CPLR. Where \textit{AD} is validly garnished and refuses to pay or hand over property not capable of delivery, the sheriff does not intervene to enforce \textit{AD}'s obligation. Rather, \textit{JC} is expected to start a turnover proceeding.

There is a story behind this aspect of the paper levy. The story has to do with the fact that, in the nineteenth century, equity liens—those arising from receiverships or turnover orders—related back to the time the equity proceeding was commenced.\textsuperscript{280} In this era, the idea that levies might extend to intangible property was entirely rejected. Instead, \textit{JC} was expected to bring a supplementary proceeding against third parties in order to collect debts.\textsuperscript{281} 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.\textsuperscript{282} 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 \textit{without} a levy\textsuperscript{283} creates a lien only when "a judgment creditor has secured an order for delivery of ... a debt ... or ... personal property."\textsuperscript{284} Compensating for this regrettable deferral, the sheriff was

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\textsuperscript{279} See \textit{N.Y. C.P.L.R.} 6214(e). In the pre-judgment context, the turnover proceeding is governed by CPLR 6214(d). In federal court, a motion to the court can be substituted for the special proceeding required in CPLR 6214(d). See \textit{Foreign Exch. Trade Assocs. v. Oncetur, S.A.}, 591 F. Supp. 1496, 1501 n.9 (S.D.N.Y. 1984).

\textsuperscript{280} \textit{Cohen}, \textit{Third Party Orders, supra} note 277, at 1208-09.

\textsuperscript{281} See \textit{id.} at 1198.

\textsuperscript{282} See Ch. 835, § 687-a, 1952 N.Y. Laws 2.


\textsuperscript{284} \textit{N.Y. C.P.L.R.} 5202(b).
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.

If commencement of the turnover proceeding precedes the levy, it will sustain the life of a subsequent levy. In Clarkson Co. v. Shaheen, JC commenced a turnover proceeding, which did not create a lien. Thereafter, JC served an execution on the sheriff and obtained a levy. Following JC's levy, JC obtained its own levy. Hoping for priority, JC protested that a turnover proceeding commenced before a levy could not extend the life of JC's execution lien. But the court ruled for JC under CPLR 5232(a)'s eighth sentence:

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

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.” The passive voice, so unpopular with law review editors, saved JC'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, JC served an

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285 See id. 5232(a).
286 Compare id. 5232(b) (allowing the sheriff to physically take property capable of delivery), with id. 5232(a) (allowing the sheriff to only execute the levy).
287 See id. 5225(b).
289 See id. at 639–40.
290 See id. at 639.
291 See id. at 638.
292 See id. at 638–39.
295 Id. (citing N.Y. CIVIL PRAC. LAW § 5232 (McKinney 1962)).
296 275 A.D.2d 287, 712 N.Y.S.2d 543 (1st Dep't 2000).
execution and the sheriff levied. \(^{297}\) While the levy was still enjoying its ninety-day life, \(JC\) served a second execution on the sheriff, who purported to levy a second time. Waiting until the first levy was dead and, even though the second levy was less than ninety days old, \(AD\) released the funds to \(JD\). \(^{298}\) 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 the judgment debtor or prejudice other judgment creditors."\(^{299}\)

The \textit{Bank of New York} court would have allowed a second levy after the first levy was utterly dead. \(^{300}\) But \textit{Kitson & Kitson v. City of Yonkers} \(^{301}\) does not even permit this. According to \textit{Kitson}, \(JC\) can never levy again. Rather, the execution creditor must move to revive the defunct levy \textit{nunc pro tunc}. \(^{302}\)

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\(^{297}\) \textit{Id.} at 288, 712 N.Y.S.2d at 544.

\(^{298}\) \textit{Id.}

\(^{299}\) \textit{Id.} at 289--90, 712 N.Y.S.2d at 545 (citation omitted) (citing \textit{WEINSTEIN ET AL., supra} note 35, ¶ 5232.14--15).

\(^{300}\) \textit{Id.} at 289, 712 N.Y.S.2d at 545; \textit{accord} \textit{Vance Boiler Works v. Coop. Feed Dealers, Inc.}, 46 Misc. 2d 654, 260 N.Y.S.2d 303 (Sup. Ct. Wayne County 1965). In \textit{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. \textit{See supra} note 261. The levy was therefore for the benefit of both \(JC_1\) and \(JC_2\). When the levy died after ninety 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.

\(^{301}\) 10 A.D.3d 21, 778 N.Y.S.2d 503 (2d Dep't 2004).

\(^{302}\) \textit{See id.} at 26, 778 N.Y.S.2d at 507--08. \textit{Kitson} overrules an early pronouncement in \textit{Freedom Discount Corp. v. Clune}, where \(JC\) obtained a default judgment on July 8, 1966. 32 A.D.2d 833, 302 N.Y.S.2d 465 (2d Dep't 1969). \(JD\) sought relief from the judgment, but the court ambiguously gave \(JD\) the right to answer the complaint. \textit{Id.} at 834, 302 N.Y.S.2d at 466. The default judgment was not formally revoked until two years later. \textit{Id.} 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. \textit{Glassman v. Hyder}, 23 N.Y.2d 354, 360, 244 N.E.2d 259, 262, 296 N.Y.S.2d 783, 787--88 (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 \(JC\). \textit{Freedom Disc. Corp.}, 32 A.D.2d at 834, 302 N.Y.S.2d at 466--67. \(JD\) then obtained an order requiring the
These nunc pro tunc motions provoke yet another strange story. They were invented in the era of *Seider v. Roth*.[303] 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.[304] A lapse of the ninety-day attachment levy, however, was thought to be a jurisdictional bar to the *Seider*-style quasi in rem action.[305] To preserve judicial business, courts permitted nunc pro tunc motions to extend the levy.[306] This nunc pro tunc practice could never have occurred under the statutes that preceded the CPLR.[307] The United States Supreme Court has since put a well-justified 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.[308] Nevertheless, *Seider*'s ghost lingers on in the form of nunc pro tunc motion practice to haunt New York civil procedure.

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. *Id.* at 834, 302 N.Y.S.2d at 467. The court smiled upon this "second" levy. *Id.*; cf. *Andrias v. Nat'l Sur. Corp.*, 98 Misc. 2d 292, 293, 413 N.Y.S.2d 820, 821 (Sup. Ct. App. T. 1st Dep't 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).

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304 *Id.* at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.
305 See *Cenkner v. Shafer*, 61 Misc. 2d 807, 808, 306 N.Y.S.2d 634, 636 (Sup. Ct. Herkimer County 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. N.Y. C.P.L.R. 6203 (McKinney 2008). 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 is this not enough to justify a judgment quasi in rem?
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.” Presumably this means that the intervening third party is entitled to priority over JC if JC obtains nunc pro tunc relief.

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

- **March 19:** P delivers an order of attachment to the sheriff.
- **June 19:** P’s levy lapses.
- **July 2:** The sheriff purports to levy again for P under the March 19 order of attachment.
- **July 3:** JC delivers an execution to the sheriff.
- **July 5:** The Supreme Court extends P’s first levy nunc pro tunc.
- **July 6:** The sheriff levies the bank on behalf of JC.

It should have been straightforward that P 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.

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309 Kitson & Kitson v. City of Yonkers, 10 A.D.3d 21, 26, 778 N.Y.S.2d 503, 508 (2d Dep’t 2004). In Amoco, 605 F.2d at 652, 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. *Id.* at 650. 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 an order of attachment or execution are permitted. Only nunc pro tunc extensions are permitted, followed by turnover actions. *Kitson,* 10 A.D.3d at 26, 778 N.Y.S.2d at 507.

310 766 F.2d 95 (2d Cir. 1985).


312 N.Y. C.P.L.R. 5234(b).
Under this distribution rule, the sheriff must prefer $P$, even where $P$'s levy has lapsed and has never been renewed. Though the operative levy was pursuant to $JC_2$'s subsequent execution, $P$'s priority under the order of attachment still perdured. $P$ loses seniority under the last sentence of CPLR 5234(b) only if the sheriff has returned the order of attachment prior to the operative levy on behalf of $JC$. This last sentence is odd. A sheriff has a duty to return executions. But no duty exists to return orders of attachment. To the contrary, according CPLR 6211(a)’s 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), 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 $P$, in spite of the lapsed levy. Lapse meant only that, if $AD$ had paid $JD$, $AD$ could not be held liable for doing so.

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313 Id. 5230(c).
314 Id. 6211(a).
315 Id. 5230(c).
316 Contra Corwin Consultants, Inc. v. Interpublic Group of Cos., Inc., 375 F. Supp. 186, 192 (S.D.N.Y. 1974), rev’d on other grounds, 512 F.2d 605, 611 (2d Cir. 1975). In Corwin, $P$ had served an order of attachment on the sheriff. Later $JC$ 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, $JC$ commenced an action in state court, under CPLR 5239, to determine priorities. Id. at 189–90. 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 $P$ had forfeited its priority because the levy lapsed. Id. at 190. The holding is odd because the sheriff never levied at all for $P$ 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 $P$ properly should have had priority, if indeed CPLR 5234(b) were relevant. N.Y. C.P.L.R. 5234(b).

How should the case have been decided? Since this was a federal levy, section 6342(a) of the Internal Revenue Code requires that, after expense of sale, the money goes to the IRS for its tax lien. 26 U.S.C.A. § 6342(a)(1) (West 2008). No reference here is made to senior liens. Yet the levy does not deprive senior lien creditors of their priority. See United States v. Nat'l Bank of Commerce, 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.A. § 6323(a). The IRS was itself a post-lien, pre-levy transferee within the meaning of CPLR 5202(a)(1) and CPLR 6203(1). N.Y. C.P.L.R. 5202(a)(1), 6203(1).
Overlooking this admittedly fine point, Judge Ellsworth Van Graafieland ruled that P had priority by virtue of the July 2 re-levy. 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 R.R. v. Tompkins 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, either Bank of New York or Kitson states the rule: Overlapping or perhaps subsequent levies are not permitted. On Kitson’s holding, only the first levy counts, and it must be extended on a nunc pro tunc basis.

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

But this we must ignore, as state law is preempted by Internal Revenue Code section 6323(a). See supra text accompanying notes 111-116. Therefore, JC1 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. JC2 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. See N.Y. C.P.L.R. 5234 (a).

This precise answer was rejected by the district court, on the ground that JC1’s priority lapsed when the levy lapsed. See Fireman’s Fund Ins. Co. v. Plaza Oldsmobile Ltd., 596 F. Supp. 657, 662–63 (E.D.N.Y. 1984), vacated, 766 F.2d 95, 97 (2d Cir. 1985). This ignores the direct command of CPLR 5234(b)’s last sentence, which states that only if the sheriff has returned the order of attachment does JC1’s priority lapse. N.Y. C.P.L.R. 5234(b); see Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 653 (2d Cir. 1979) (where order of attachment pre-existed the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1609, and where the levy lapsed after the Act, the order of attachment was still valid; any other ruling “mistakes the levy for the order of attachment”).

 Accord Amoco, 605 F.2d at 653 (“[B]ut the order granting the attachment was never itself rendered void. It subsisted so that a new levy . . . could be made under it.”).

318 304 U.S. 64, 78 (1938).

319 Kitson & Kitson v. City of Yonkers, 10 A.D.3d 21, 26, 778 N.Y.S.2d 503, 507–08 (2d Dep’t 2004). 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, JC’s levy died. JC2 then obtained an execution lien. JC1 started a turnover proceeding in which JC2 intervened. JC1’s turnover commencement did not revive his earlier levy—at least not at JC2’s expense. JC2 was held to have the senior lien, but JC2 was an intervening party between the death of JC1’s levy and the commencement of the turnover proceeding. Id. at 26, 778 N.Y.S.2d at 508.
have been transferred or paid to the sheriff,"³²¹ 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.”³²² JC's therefore have reason to expand the notion of what it means for AD 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.³²³

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.³²⁴ So a garnishment on a Brooklyn branch fails to encumber a bank account opened in Manhattan.³²⁵ 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 its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had

³²¹ N.Y. C.P.L.R. 5232(a).
³²² Id. 6214(e). Once the sheriff has the property, the sheriff must “hold and safely keep” it. Id. 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.
³²⁵ See Det Bergenske Dampskibsselskab v. Sabre Shipping Corp., 341 F.2d 50, 53 (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. See Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862 (2d Cir. 1981); see also Sokoloff v. Nat'l City Bank, 239 N.Y. 158, 169, 145 N.E. 917, 920 (1924). But see Abuhamda v. Abuhamda, 236 A.D.2d 290, 654 N.Y.S.2d 11 (1st Dep't 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. See Wells Fargo Asia Ltd. v. Citibank, N.A., 852 F.2d 657, 660 (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 Exch. Trade Assocs., Inc. v. Oncetur, S.A., 591 F. Supp. 1496, 1501–02 (S.D.N.Y. 1984).
been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce....

At best, the separate-branch rule should be limited to garnishing bank accounts. Arguably, it should be viewed as outmoded with regard to branches located entirely within the United States. In any case, the rule should never be applied with regard to discrete property as to which a bank is bailee. 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. The branch rule should be limited strictly to the phenomenon of check-clearing.

329 The separate entity theory for banks is sometimes rejected for various reasons not related to attachment of bank accounts. See First Nat’l City Bank of N.Y. v. IRS, 271 F.2d 616, 618–19 (2d Cir. 1959) (bank records); see also Yayasan Sabah Dua Shipping SDN BHD v. Scandinavian Liquid Carriers Ltd., 335 F. Supp. 2d 441, 448 (S.D.N.Y. 2004) (“virtual” branch in Cayman Islands was physically located entirely in New York); Gavilanes v. Matavosian, 123 Misc. 2d 868, 872, 475 N.Y.S.2d 987, 990 (Sup. Ct. Queens County 1984) (subpoena of bank records).
330 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. Dumpson v. Empire City Sav. Bank, 44 Misc. 2d 8, 10, 252 N.Y.S.2d 811, 814 (Sup. Ct. N.Y. County 1964); Brezenoff v. Franklin Sav. Bank (Reddington), 108 Misc. 2d 626, 627, 438 N.Y.S.2d 171, 172 (N.Y. Civ. Ct. N.Y. County 1981) (citing Dumpson v. Empire City Sav. Bank, 44 Misc. 2d 8, 252 N.Y.S.2d 811 (Sup. Ct. N.Y. County
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, has proved foetid pools of confusion and contradiction.

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. This morbid dread of contingency is entirely outmoded—the product of obsessional anxiety and low self-esteem. Article 9 of the UCC sees no reason why contingent debts cannot be collateral. Yet New York courts have a woeful history of equating contingent debt with no debt at all. This anxiety has invaded the CPLR to no good end.

1964)); see Oppenheimer v. Dresdner Bank A.G., 50 A.D.2d 434, 439-40, 377 N.Y.S.2d 625, 631 (2d Dep't 1975) (stating that 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. N.Y. C.P.L.R. 5201(c)(4) (McKinney 2008); id. 5232(b). JC could, however, pursue the bank in a turnover proceeding. Id. 5227; Kazanjian v. Jamaica Sav. Bank, 105 Misc. 2d 228, 229, 432 N.Y.S.2d 62, 63 (Sup. Ct. N.Y. County 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. N.Y. C.P.L.R. 5209, 6204. Presumably this holds even if the negotiable instrument ends up in the hands of a holder in due course.

See Wabco Trade Co., Div. of World Standard Exp. v. S.S. Inger Skou, 508 F. Supp. 94, 96 (S.D.N.Y. 1980), rev'd, 663 F.2d 369 (2d Cir. 1984) (quoting Baumgold Bros. Inc. v. Schwarzschild Bros., 276 A.D. 158, 163, 93 N.Y.S.2d 658, 661-62 (1st Dep't 1949)) (stating that once casualty loss occurred, the insurer's obligation to indemnify is garnishable). A disputed debt was equated with a contingent debt in JPMorgan Chase Bank, N.A. v. Motorola, Inc., 47 A.D.3d 293, 301, 846 N.Y.S.2d 171, 177 (1st Dep't 2007) (quoting N.Y. C.P.L.R. 5201(a)). Such a holding is questionable in light of the the second sentence of CPLR 5201(a), which provides, "A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state." C.P.L.R 5201(a).

See U.C.C. § 9-102(a)(2) (2007) (defining "account" as "right to payment of a monetary obligation, whether or not earned by performance").

Meanwhile, contingent property other than debts can be levied. According to CPLR 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 means not subject to a condition precedent.

CPLR 5232(a) authorizes a paper levy with regard to debts or "property not capable of delivery," thereby implying that intangible property might exist which is not a debt. Such property includes AD's obligation to pay which is not certain to become due.

Significantly, only AD can be the subject of a paper levy pursuant to CPLR 5232(a). Where there is no third party to garnish, property not capable of delivery cannot be levied at all. Copyright is an example. Any such property can be reached only by turnover order under CPLR 5225(a) where the court 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 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. See id. at 433, 141 N.E.2d at 577, 161 N.Y.S.2d at 69. 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. See Eisenberg v. Mercer Hicks Corp., 199 Misc. 52, 54, 101 N.Y.S.2d 662, 665 (Sup. Ct. N.Y. County 1950). Nevertheless, JC prevailed, justly engendering the disgust of the great Grant Gilmore.


N.Y. C.P.L.R. 5232(a). See id. See id.

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."\(^{344}\) Without a court order, the sheriff may not sell property not capable of delivery simply because such property is invisible.\(^{345}\)

When it comes to pre-judgment attachment, the distinction between property capable and not capable of delivery mercifully falls away.\(^{346}\) Article 62 assumes that all levies are to be paper levies.\(^{347}\) Third parties can be served with the order of attachment with regard to debts or "any interest of the defendant in personal property."\(^{348}\) A paper levy is also permitted against debtors in possession of any personal property.\(^{349}\) This is so whether or not the property is capable of delivery. So, absurdly, a copyright may be levied prior to judgment but not after.

As commercial lawyers and speculative philosophers know,\(^{350}\) all debts are property. But if this is so, then is not CPLR 5201(a) swallowed whole by CPLR 5201(b)? This is what the Court of Appeals seemed to hold in ABKCO Industries, Inc. v. Apple Films, Inc.\(^{351}\) 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.\(^{352}\) According to CPLR 6202, "[a]ny debt or property against which a money judgment may be enforced is subject to attachment."\(^{353}\) AD had promised to remit profits to D, if any,

\(^{344}\) Id. 5233(a).


\(^{346}\) Property capable of delivery is mentioned in CPLR 6214(c), which directs the sheriff to take custody after the levy. See N.Y. C.P.L.R. 6214(c). But seizure is not the levy. Delivery of paper is.

\(^{347}\) See N.Y. C.P.L.R. 6214(a).

\(^{348}\) Id.

\(^{349}\) Id.


\(^{351}\) See ABKCO Indus., Inc. v. Apple Films, Inc., 39 N.Y.2d 670, 674, 350 N.E.2d 899, 901, 385 N.Y.S.2d 511, 512–13 (1976); see also Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 23 (2d Cir. 1999) ("ABKCO virtually erases the distinction in § 5201 between 'debt' and 'property' by line re-characterizing—as '[p]roperty against which a money judgment may be enforced'—debt that otherwise are placed out of reach by § 5201(a)'s requirement that the debt being pursued be either past due or certain to become due upon demand.").

\(^{352}\) ABKCO, 39 N.Y.2d at 672, 350 N.E.2d at 900, 385 N.Y.S.2d at 512.

\(^{353}\) N.Y. C.P.L.R. 6202.
from a film. That profits would accrue seemed a safe bet, as D owned a film featuring the Beatles. Yet the amount, if not the existence, of 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 CPLR 5201(b). Thus, the whale of CPLR 5201(b) seemed to swallow whole the Jonah of CPLR 5201(a).

It is still true, however, that CPLR 5201(b) property must be "property which could be assigned or transferred." These are showings on which JC bears the burden of proof. But if this can be shown, JC can garnish a renter's right to buy cooperative shares, a divorcing spouse's right to receive the proceeds of real estate in which he has no present interest, his own obligation to pay the judgment debtor, or a factor's obligation to remit proceeds from accounts receivable—even though a factor's right of charge-back existed.

The Court of Appeals came to regret its ABKCO decision soon enough. In Supreme Merchandise Co. v. Chemical Bank,
P sought to levy D's letter of credit. 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 contingent property of D. The trial court "understandably relied" 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.

*April 17*: D having sold or perhaps pledged a draft on AD to B1, B1 presents the draft to AD and AD accepts it. B1 had no knowledge of the order of attachment.

*April 27*: D having sold or perhaps pledged a draft on AD to B2, B2 presents the draft to AD and AD accepts it. B2 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, B1-2 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." Properly, even if the first levy had been valid, B1-2 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." The

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365 See id. at 425–26, 503 N.Y.S.2d at 9–10.
366 N.Y. C.P.L.R. 6203(2) (McKinney 2008). With regard to the second levy, the court held it no good because acceptance of B1-2's drafts constituted the extinguishment of D's rights. This principle, no doubt right, would aid the bank where B1-2 are bad faith post-levy transferees, but since the first levy was held no good, B1-2 would be pre-levy bad faith transferees. Such transferees take free of the lien created by the order of attachment. Id. 6203(1).

Letter of credit law distinguishes between a transfer of the letter and assignment of the proceeds of the letter. Algemene Bank Nederland, N.V. v. Soysen Tarim Urunleri Dis Ticaret Ve Sanayi, A.S., 748 F.Supp. 177, 181–82 (S.D.N.Y. 1990). If the letter is transferred, only the transferee has the right to present documents. Id. at 182. If the proceeds are assigned, only the original beneficiary may present documents. Id. In either case, whatever the transferee or assignee gets from the original beneficiary is
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 not "property." Rather, it was a contingent debt which, under CPLR 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.\textsuperscript{367}

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.\textsuperscript{368}

Thus, miraculously the Jonah of CPLR 5201(a) was coughed up by the whale of CPLR 5201(b), because it could not digest the case of the letter of credit.

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.\textsuperscript{369} In ABKCO, D's right in the debt/property was "contingent solely as to value, which depended on events beyond its own control,"\textsuperscript{370} that is, the popularity of the Beatles, which, at the time, exceeded that of Jesus.\textsuperscript{371} 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 CPLR free of the attachment lien. Ultimately, this distinction makes no difference in attachment cases.

\textsuperscript{367} Supreme Merch., 70 N.Y.2d at 349–50, 514 N.E.2d at 1360–61, 520 N.Y.S.2d at 736–37.

\textsuperscript{368} Id. at 350, 514 N.E.2d at 1360–61, 520 N.Y.S.2d at 736–37 (emphasis omitted).

\textsuperscript{369} Id. at 350, 514 N.E.2d at 1361, 520 N.Y.S.2d at 737.

\textsuperscript{370} Id.

\textsuperscript{371} Jen Waters, Gospel of the Fab Four: Book Details Spiritual Side of Beatles, WASH. TIMES, Aug. 30, 2006, at A02 ("And the band they created, John would later claim, became ‘more popular than Jesus.’").
As a later court put it, the rights to a letter of credit are "not the property of the beneficiary thereunder for purposes of attachment." 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 letters of credit were just special—a kind of legal miracle of the sort Jonah needed to be saved from the whale.

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 B1-2]—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).

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372 Thus, earlier Erie guesses by federal courts were vindicated. See, e.g., Diakan Love v. Al-Haddad Bros. Enters., 584 F. Supp. 782 (S.D.N.Y. 1984).

373 Brenntag Int'l Chems., Inc., v. Bank of India, 175 F.3d 245, 252 (2d Cir. 1999).

374 2 Jonah 2:10 ("And the Lord spoke to the fish, and it vomited out Jonah upon the dry land.").

375 Supreme Merch., 70 N.Y.2d at 351, 514 N.E.2d at 1361, 520 N.Y.S.2d at 737 (emphasis omitted); see also Ferrostaal Metals Corp. v. S.S. Lash Pacifico, 652 F. Supp. 420, 424 (S.D.N.Y. 1987) ("[C]entral 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.").
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."\(^{376}\)

*Supreme Merchandise* holds open the possibility that, when debts are "too contingent," they are not property under CPLR 5201(b).\(^{377}\) So post-ABKCO examples persist of courts disallowing levies of contingent debts. For example, choses in action might be too contingent to levy upon and sell.\(^{378}\) A promise to hold \(D\) harmless from a harm not yet manifested is too contingent for a levy.\(^{379}\) 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.\(^{380}\)

One side effect of *Supreme Merchandise* is the final overruling of *Seider v. Roth*,\(^{381}\) that scandalous chapter in American jurisprudence reviewed earlier.\(^{382}\) *Seider* virtually guaranteed any New Yorker a local forum for any cause of action, provided the defendant had insurance from a national company.\(^{383}\) It was not long, however, before the constitutional rug was yanked from beneath the jurisdictional feet of *Seider*. After *Shaffer v. Heitner*,\(^{384}\) any defendant in a quasi in rem

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\(^{376}\) Id. at 352 n.*, 514 N.E.2d at 1362, 520 N.Y.S.2d at 738 (citation omitted).

\(^{377}\) Id. at 349, 514 N.E.2d at 1360, 520 N.Y.S.2d at 736.


\(^{380}\) Sochor v. Int'l Bus. Machs. Corp., 60 N.Y.2d 254, 259–60, 457 N.E.2d 696, 698–99, 469 N.Y.S.2d 591, 593–94 (1983). In *Sochor*, the possibility was left open that if the debtor had actually 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, 988–89, 337 N.Y.S.2d 817, 818 (Sup. Ct. App. T. 1st Dep't 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." Id.


\(^{382}\) See supra text accompanying notes 303-308.

\(^{383}\) *Seider*, 17 N.Y.2d at 111, 216 N.E.2d at 312, 269 N.Y.S.2d at 99 (allowing attachment to a contractual obligation of insurer).

lawsuit must have the same minimum contacts with the forum state as would justify the assertion of personal jurisdiction.\textsuperscript{385}

But does \textit{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, $JC_1$ docketes a judgment on some unrelated claim. $JC_1$ then induces the sheriff to garnish $AD$. According to \textit{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.\textsuperscript{386} The effect of this provision is to give a security interest in the insurance policy to $JC_2$ that is good against $JC_1$.\textsuperscript{387} Yet this does not entirely solve the dilemma. \textit{Seider} involved the

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\textsuperscript{386} N.Y. INS. LAW § 3420(b) (McKinney 2008).

Of what does this consist? AD typically chooses and pays the attorney that defends JD and pays that attorney. Yet any fee payable by AD to the attorney is garnished in advance by JC. Indeed, under CPLR 5232(a) (fifth sentence), “the garnishee is forbidden to . . . pay . . . any [garnished] debt.” Knowing this, the attorney no doubt will selfishly 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 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.” The phrase “into custody” has been defined to include the sheriff padlocking a store and posting notice that its contents had been levied.

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388 See Seider, 17 N.Y.2d at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.
390 N.Y. C.P.L.R. 5232(a).
392 See id. at 351, 514 N.E.2d at 1361, 520 N.Y.S.2d at 737.
393 Rush v. Savchuk, 444 U.S. 320, 328–30 (1980) (finding 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” (emphasis omitted)).
395 C.P.L.R 5232(b).
396 See In re Alcor, Inc., 45 A.D.2d 795, 795, 357 N.Y.S.2d 160, 161 (3d Dep’t 1974); see also Marrano v. State, 80 Misc. 2d 768, 770, 364 N.Y.S.2d 751, 754 (Ct. Cl. 1975) (holding no rent claims can arise from such a padlocking).
Posting without padlock\textsuperscript{397} and padlock without posting\textsuperscript{398} have sufficed. So has an oral declaration, coupled by an inventorying of the personal property levied.\textsuperscript{399} According to an ancient case:

[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.\textsuperscript{400}

An even simpler test is that a levy occurs when the sheriff intends to levy and does some overt act to express the intent.\textsuperscript{401} A levy occurs if the sheriff (but for legal process) would be guilty of trespass upon the chattel.\textsuperscript{402}

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.\textsuperscript{403} Another court saw no

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{399} See Sheridan Farms, Inc. v. Federico, 48 Misc. 2d 599, 599, 265 N.Y.S.2d 922, 922-23 (Sup. Ct. App. T. 1st Dep't 1965) (citing Bond v. Willett, 31 N.Y. 102 (1864)); \textit{see also} In re Gilbert, 127 N.Y.S.2d 533, 539 (Utica City Ct. 1953) (quoting \textit{Bond}, 31 N.Y. at 102).
\item \textsuperscript{400} In re Gilbert, 127 N.Y.S.2d at 538-39 (quoting \textit{Bond}, 31 N.Y. at 102) (internal quotation marks omitted).
\item \textsuperscript{401} See Stallknecht v. Gilbert Appliance Corp., 144 Misc. 626, 628, 259 N.Y.S.2d 189, 191 (Monroe County Ct. 1932).
\item \textsuperscript{402} See Rodgers v. Bonner, 45 N.Y. 379, 382 (1871) (citing Camp v. Chamberlain, 5 Denio 198 (N.Y. Sup. Ct. 1848)).
\item \textsuperscript{403} See Yeh v. Seakan, 119 Misc. 2d 681, 683, 464 N.Y.S.2d 627, 629 (Sup. Ct. Oneida County 1983).
\end{itemize}
\end{footnotesize}
problem in the levy of a luxury cooperative apartment to enforce a $350 judgment. 404

a. Leased Property

A sheriff may not levy by seizure if it interferes with the possession of a lessee or a pledgee. 405 The reference to a lessee presumably assumes JD is the lessor, not the lessee. 406 Where JD is lessor, the reference could have been omitted, since JD has no present right of possession. So neither does the sheriff. 407 When JD is the lessor, JD only has the right to receive rent during the lease 408 and the “residual interest” 409 (AD’s obligation to return the leased property at the end of the lease). 410 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. 411 Separately, the rent obligation property would appear to be 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

406 Cf. Gleich v. Rose, 294 A.D.2d 177, 177, 741 N.Y.S.2d 683, 683 (1st Dep’t 2002) (implying that where JD is lessee, sheriff may levy by seizure).
408 Id. § 2A-103(1)(m) (“‘Leasehold interest’ means the interest of the lessor or the lessee under a lease contract.”).
409 Id. § 2A-103(1)(q) (“‘Lessor’s residual interest’ means the lessor’s interest in the goods after expiration, termination, or cancellation of the lease contract.”).
410 Id. § 2A-525 (explaining lessor’s right of possession if lessee defaults).
411 Two cases hold that property capable of delivery becomes undeliverable when in the hands of a third party. See 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, 412 (Bankr. E.D.N.Y. 1995) (citing Knapp v. McFarland, 462 F.2d 935, 940, 942 (2d Cir. 1972)).
property are reified into what article 9 calls chattel paper. The chattel paper would then be separate from the leased thing.

With regard to JD’s future right to possess the leased thing, this future right is property capable of delivery (that is, no paper levies), if we follow the classic, now outmoded, case of Feldman v. National City Bank (In re Leasing Consultants). There, the Second Circuit Erie-guessed that a future possessory interest in a thing is not distinguishable from the thing under New York law. The decision is not based on some unique article 9 principle 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. 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 Erie-impaired intuitions of the Second Circuit. Since SP was claiming a security interest on goods in New Jersey, SP should have filed yet one more time—in New Jersey,

412 U.C.C. § 9-102(a)(11) (defining chattel paper as “records that evidence... a lease of specific goods”).
414 Id.
415 Id. at 369.
416 Id.
417 U.C.C. § 9-313(a).
418 Leasing Consultants, 486 F.2d at 369.
419 Id.
420 Id. at 371–72.
against D (who did not even live there).\textsuperscript{421} 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.\textsuperscript{422} As a result, \textit{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.\textsuperscript{423} But the underlying property premise of \textit{Leasing Consultants} still remains: A claim to a future possessory right of a thing is the same as claiming the thing-in-itself.\textsuperscript{424} Transporting this dubious 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 CPLR 5232(b). Yet the sheriff is not permitted to interfere with the rights of the lessee.\textsuperscript{425} Meanwhile, a paper levy under CPLR 5232(a) is not permitted because JD's right is in a thing capable of delivery.\textsuperscript{426} CPLR 5232(a) applies only if the property is not capable of delivery.\textsuperscript{427} In short, the Second Circuit's \textit{Erie} guess 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? \textit{Leasing Consultants} left this question open.\textsuperscript{428}

\textsuperscript{421} 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.

\textsuperscript{422} U.C.C. §§ 9-201(a), 9-501(a)(1); see also C. Scott Pryor, \textit{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).

\textsuperscript{423} See Pryor, supra note 422, at 272.

\textsuperscript{424} See \textit{Leasing Consultants}, 486 F.2d at 372.

\textsuperscript{425} N.Y. C.P.L.R. § 5232(b) (McKinney 2008).

\textsuperscript{426} Id. 5232(a).

\textsuperscript{427} Id. 5232(b).

\textsuperscript{428} 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
Confusing the matter is Glassman v. Hyder, which was 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 article 62 of the CPLR, 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 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 CPLR 5201(b). But, as the building was in New Mexico, rent-as-property could only be reached by means of a New Mexico judicial lien. In other words, rent was real estate, and it was to be found in New Mexico. Translated to our present context, rent cannot be distinguished from the thing rented. 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 different. 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, whoever possesses the

that the $60,000 represented only the future right of possession. Leasing Consultants, 486 F.2d at 373–74.

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 CPLR 5232(a)'s second sentence picks up all rent as debt, once the rent becomes unconditionally due and owing. See Money Judgment Part I, supra note 11 at 1363-65.
reversion has the right to collect the rent. 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).

On the other hand, under the ancient common law of personal property leases, the lease was considered a bailment. 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, a payment default permitted termination of the bailment, but there was no necessary connection between the rent stream and the thing rented. If true, the way is open for a court to view the rent stream as contingent 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. If JD borrows from SP and allows SP possession of the chattel paper, SP is perfected. The UCC, however, innovated on this score. Prior to the UCC, possession of the lease was not essential to owning the rent stream. 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.\footnote{Article 9 applies to sales of chattel paper as well as to security interests in it. See U.C.C. § 9-109(a)(3).} 

On the other hand, the UCC does govern if SP claims the rent income.\footnote{Id. § 9-604(a).} 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

For our purposes, pledges are not so very different from leases. A lessee is entitled to possession so long as she does not breach the lease. A pledgee is likewise entitled to possession until the property is redeemed.\footnote{A pledgee, however, may not use the collateral beneficially, as a lessor could, unless the parties agree otherwise. See id. § 9-207(b)(4).} Regardless of what CPLR 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\footnote{See supra text accompanying notes 413–428.} 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.\footnote{See U.C.C. § 9-623.} Meanwhile, JD’s right to a surplus after a foreclosure sale\footnote{See id. § 9-615(d)(1).} could be viewed as a contingent debt of SP to JD. As such, it is property not capable of delivery leviable against SP as AD of JD.

The interaction of CPLR 5232(b) with pledges was addressed in Knapp v. McFarland.\footnote{462 F.2d 935 (2d Cir. 1972).} In Knapp, JD and X owned a Virginia building and were involved in litigation. Pending the outcome, they sold the building for cash and put the funds in escrow with
AD₁ in Maryland. AD₁ used the proceeds to buy a treasury bill for the benefit of the litigants. The treasury bill was purchased from AD₂ in New York.⁴⁵¹

In its analysis, the Knapp court made two fundamental errors. First, it imagined that AD₁ was a pledgee, not a bailee. Second, the court imagined that the treasury bill was a certificated security—that is, JD had pledged to AD₁ an identifiable piece of paper which AD₂ held in its vault as collateral agent for AD₁.⁴⁵² In fact, AD₁ probably held only a security entitlement in AD₂’s jumbo treasury bill or perhaps in AD₂’s book-entry with the Federal Reserve Bank.⁴⁵³ If so, the sheriff was levying property not capable of delivery. Let us continue to play along with the court’s misconceptions, however.

These two misconceptions, taken as true, 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.”⁴⁵⁴ Instead, the sheriff simply served the execution on AD₂ without taking possession of the allegedly certificated security.

Later, enforcement of JC’s judgment was suspended when JD posted a supersedeas bond pending appeal.⁴⁵⁵ 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 $11,000 be sustained, notwithstanding the supersedeas bond.⁴⁵⁶ JD countered that, since the sheriff had not seized the alleged certificate that AD₂ supposedly held the sheriff had not levied

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⁴⁵¹ See id. at 936.
⁴⁵² See id. at 940.
⁴⁵⁴ Knapp, 462 F.2d at 941 (emphasis omitted).
⁴⁵⁶ 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 AD₂ (Chemical Bank) was then located. Nice work if you can get it!
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 [AD₂] 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.

Of course, service of the execution is the proper way to levy property not capable of delivery. Yet Judge Mansfield did not go so far to proclaim JD's future interest in the alleged certificate to be property not capable of delivery. 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! Why should the sheriff get a fee if he did no act that could have benefited JC?

Entirely mysterious is Judge Mansfield's implication, in the above-quoted passage, that a restraining notice, served on AD₂ by JC's attorney, somehow plays a role in establishing the levy. All a restraining notice does is to order AD₂ not to convey away the certificate. 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 AD₂ is enjoined against alienating...

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457 Knapp, 462 F.2d at 942.
458 Id. at 941.
459 N.Y. C.P.L.R. 5232(a).
460 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, 462 F.2d 935). The sheriff had no power to direct a pledgee to surrender possession. A paper levy implies such a direction. N.Y. C.P.L.R. 5232(a). But Knapp holds that the levy did not involve property not capable of delivery.
461 Knapp, 462 F.2d at 942-43.
462 N.Y. C.P.L.R. 5222(b).
463 Id. 5232(a).
the thing, somehow this all adds up to a paper levy for which the sheriff deserves compensation.\textsuperscript{464}

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 \textit{Leasing Consultants} prevents \textit{JD}'s future interest in a certificate to be property not capable of delivery.\textsuperscript{465} A future interest in a thing is the thing, according to that opinion.\textsuperscript{466} But if we really had a genuine pledge before us (which we do not), then \textit{AD}_2 (as agent of \textit{AD}_1) owed \textit{JD} a contingent debt—\textit{JD}'s right to a surplus in case of a foreclosure sale. As property not capable of delivery, it could be paper-levied under CPLR 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. On this view (and on the premise that \textit{AD}_2 was a pledgee holding \textit{JD}'s property capable of delivery), \textit{AD}_2 had a contingent duty to pay a surplus to \textit{JD}. But can the sheriff levy a sub-bailee once removed from \textit{JD} for this surplus?\textsuperscript{467} 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."\textsuperscript{468} 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."\textsuperscript{469} So, as long as \textit{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.\textsuperscript{470} And, we

\textsuperscript{464} Knapp, 462 F.2d at 940.
\textsuperscript{466} See \textit{supra} text accompanying notes 413–427.
\textsuperscript{467} \textit{AD}_1 could terminate \textit{AD}_2's bailment at any time, in which case \textit{AD}_2's obligation to pay the surplus to \textit{JD} would disappear.
\textsuperscript{468} N.Y. C.P.L.R. 5232(a).
\textsuperscript{469} Id. 105(i).
\textsuperscript{470} Unless article 8 overrules it in this regard. On this possibility, see \textit{supra} text accompanying notes 514–519.
should add, there was no possible surplus, since $AD_{1.2}$ were bailees, not pledgees.\textsuperscript{471}

Judge Mansfield thought the certificate, not the surplus, was the thing levied.\textsuperscript{472} Yet 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 approached a correct result. There was property not capable of delivery after all!\textsuperscript{473}

Nevertheless, CPLR 5201(c)(4), as it then existed, would still have prohibited the levy of $AD_2$. According to CPLR 5201(c)(4) as then in effect:

Where property or a debt is evidenced by a negotiable instrument[,] . . . a negotiable document of title or 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 in the case of a security which is transferrable 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.\textsuperscript{474}

\textsuperscript{471} The Second Circuit Court of Appeals may have extended Knapp's principle in Koehler v. Bank of Bermuda, Ltd., 544 F.3d 78 (2d Cir. 2008), where AD's subsidiary (as AD's agent) was served with an execution and a restraining notice. (The opinion indicates that JC, not the marshal, served the execution, which means that there was no proper levy.) JC sought to encumber certificated shares pledged to AD and held in AD's Bermuda vault. JC followed up by commencing a turnover proceeding. \textit{Id.} at 81. Ultimately, the Second Circuit certified the question whether an AD can be compelled to deliver property capable of delivery into the state which is located outside the state. \textit{Id.} at 88. And it is very unclear whether the court thought it was relying on the injunctive effect of a levy or on the turnover procedure. If the levy was valid, it was valid only on the authority of Knapp. It is possible, however, that the court did not rely upon the levy but rather on a turnover order, which creates a lien independently of a levy.

\textsuperscript{472} Knapp v. McFarland, 462 F.2d 935, 941 (2d. Cir 1972).

\textsuperscript{473} See \textit{id.}

Old UCC section 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 AD2 could not be the garnishee. Only AD1 (in Maryland) was. Only on the basis of AD1 did JD appear as an owner. So even if we overlook the Knapp court's two misconceptions, perhaps 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, AD2 was no pledgee and so owed no contingent debt to pay a surplus. Rather, AD2 was the bailee for AD1 (and sub-bailee to JD). 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 AD2 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 pledged securities poses special complexity because it is possible that article 8 of the UCC overrules the CPLR. Accordingly, we turn next to the interaction of New York 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 typically 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

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476 This conclusion presupposes that the treasury bill, if certificated, would have been a negotiable instrument. It certainly was neither a negotiable document, see id. § 1-201(15), nor a certificate of stock.

477 See Knapp, 462 F.2d at 937.


customers or other brokers.\textsuperscript{480} The typical American shareholder is therefore many times removed from the jumbo certificate located in DTC's closely guarded vault in New York City.\textsuperscript{481}

Article 8, much revised in 1994,\textsuperscript{482} calls the shareholder's remote interest in a jumbo certificate a security entitlement.\textsuperscript{483} According to section 8-112(c) of the UCC:

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).

"Legal process" is not a term the UCC defines, but New York 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.\textsuperscript{484} Each of these establishes a judicial lien on personal property.\textsuperscript{485} If a debtor has granted a security

\textsuperscript{480} See id. at 316–18.
\textsuperscript{481} See id. at 317–20.
\textsuperscript{482} See generally Jeanne L. Schroeder, \textit{Is Article 8 Finally Ready This Time?: The Radical Reform of Secured Lending on Wall Street}, 1994 COLUM. BUS. L. REV. 291 (2004) (discussing the 1994 changes to article 8).
\textsuperscript{483} U.C.C. § 8-102(17) (2007) (defining security entitlement as "the rights and property interest 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. \textit{Id.} § 8-102(a)(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 physically handle the transfer of certificated shares. See Mooney, \textit{supra} note 479, at 317 n.23. 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, \textit{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)." U.C.C. § 8-112(b).

\textsuperscript{484} See U.C.C. § 8-112.
\textsuperscript{485} See N.Y. C.P.L.R. 5202 (McKinney 2008).
interest in the security entitlement, section 8-112(d) of the UCC 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.\textsuperscript{486}

This provision applies only where the securities intermediary (that is, the broker) has attorned to—that is, has agreed to follow only the instructions of—\textit{SP}. The UCC calls attornment “control.”\textsuperscript{487} Control is a mode for perfecting article 9 security interests.\textsuperscript{488}

Section 8-112(c) requires that “legal process” be directed only to the broker with whom the debtor has dealt.\textsuperscript{489} In \textit{Knapp v. McFarland},\textsuperscript{490} the sheriff levied \textit{AD}\textsubscript{2} on the theory that \textit{AD}\textsubscript{2} was supposedly holding paper for \textit{AD}\textsubscript{1}, which \textit{JC}\textsubscript{1} in turn held for \textit{JD}.\textsuperscript{491} In truth, \textit{AD}\textsubscript{1} invested the cash in a pro rata share of \textit{AD}\textsubscript{2}’s treasury bill and therefore had a security entitlement. Under modern section 8-112(c), enacted in 1984, only \textit{AD}\textsubscript{1} could be garnished to reach this property—not \textit{AD}\textsubscript{2}. Nevertheless, even at the time \textit{Knapp} was decided, we saw that the CPLR had a rule requiring that remote brokers could not be garnished, one of many rules the \textit{Knapp} court overlooked.\textsuperscript{492} Today, CPLR 5201(c)(4) simply cross-references to article 8, which now takes up the rule the CPLR had introduced.\textsuperscript{493}

Suppose \textit{JC} properly levies a broker with whom \textit{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” (that is, debts owed to \textit{JD}) and “transfer all such property” (that is, \textit{JD}’s property not capable of

\begin{footnotesize}
\textsuperscript{486} U.C.C. § 8-112.
\textsuperscript{487} \textit{Id.} § 8-106(d)(2) (Control exists when “the securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder.”).
\textsuperscript{488} \textit{Id.} § 9-314(a).
\textsuperscript{489} \textit{Id.} § 8-112(c).
\textsuperscript{490} 462 F.2d 935 (2d Cir. 1972).
\textsuperscript{491} \textit{Id.} at 937.
\textsuperscript{492} \textit{See supra} text accompanying notes 474-476.
\textsuperscript{493} For a different result even before the enactment of section 8-112(c) of the UCC, see \textit{Fidelity Partners, Inc. v. First Trust Co. of New York}, 58 F. Supp. 2d 55, 57 (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).
\end{footnotesize}
delivery in control of JD's broker). The broker's obligation to JD—a securities account certainly cannot be called a debt. A debt is defined in New York as an amount due or certain to become due. Therefore, the broker holds property (not debt) of JD and so must transfer the property to the sheriff.

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

[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, section 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 CPLR 5225(c), "[t]he 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? 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.

494 N.Y. C.P.L.R. 5232(a) (McKinney 2008).
495 A securities account is defined as "an account to which a financial asset is or may be credited in accordance with an agreement under which the person 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." U.C.C. § 8-501(a).
496 See N.Y. C.P.L.R. 5201(a).
497 U.C.C. § 8-501(b).
498 N.Y. C.P.L.R. 5225(c).
499 Id. 5233(a).
This section requires that the sheriff must sell it at a public auction.\textsuperscript{500} 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 levied property must be visible to of those attending the auction. A security entitlement, however, is quite invisible (though the broker's records could be viewed). Fortunately, pursuant to CPLR 5233(c), the court can order a different sales procedure.\textsuperscript{501} But presumably this puts everyone to the trouble of a court hearing.

CPLR 5233(b) also imposes notice requirements with regard to the sale.\textsuperscript{502} 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 are a useless formality. Given the fact that the auction via the stock market is supposed to be highly efficient,\textsuperscript{503} 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 CPLR 5240.\textsuperscript{504} This too, however, will require a hearing.


\textsuperscript{501} See N.Y. C.P.L.R. § 5233(c) (allowing for an immediate sale of property when the case requires).

\textsuperscript{502} Id. 5233(b).


\textsuperscript{504} 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.

N.Y. C.P.L.R. 5240. No similar provision exists in article 62, governing prejudgment attachment. Nevertheless, at least one 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). See Corporacion Nacional del Cobre de Chile v. Hirsch, 242 A.D.2d 183, 185, 673 N.Y.S.2d 681, 683 (1st Dep't 1998). In comparison, the Second Circuit ruled that there is no discretion to deny attachment because the court doubts whether the
CPLR 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 poorly 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, attachment or other legal process.

We may pause to consider some curiosities produced by CPLR 5201(c)(4). First, garnishees are defined as non-debtors in possession of debtor property. Yet CPLR 5201(c)(4) says that anyone in possession (including JD) is to be the garnishee. But to what end? Paper levies of garnishees under CPLR 5232(a) are limited to property not capable of delivery, yet CPLR 5201(c)(4) insists that certificated securities are to be considered capable of

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levied asset is valuable. See Capital Ventures v. Argentina, 443 F.3d 214, 220–22 (2d Cir. 2006).

506 N.Y. C.P.L.R. 5233(c).

507 See id. 5233.

508 Id. 5201(c)(4). This section overrules the view that certificated shares could not be reached by writ of execution. See Ajax Craftsmen, Inc. v. Whinston, 269 N.Y. 7, 12, 198 N.E. 611, 613 (1935).

509 N.Y. C.P.L.R. 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.”).

509 See id. 5201(c)(4).
delivery. Paper levies of property capable of delivery are permitted as part of pre-judgment attachment, however.\textsuperscript{510} Here it makes sense to identify the debtor as a garnishee.

In addition, CPLR 5201(c)(4) seems to be saying that UCC section 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 \textit{without interfering with the lawful possession of pledgees}.\textsuperscript{511}

According to CPLR 5232(b), the sheriff may \textit{not} levy pledged shares, even if there is a valuable debtor equity in them.\textsuperscript{512} Arguably the UCC imposes a different rule. According to section 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).\textsuperscript{513}

Does this section not authorize the sheriff to take possession even from a pledgee? If so, CPLR 5232(b) is overruled, because, as we have seen, whenever the UCC conflicts with a non-UCC provision, the UCC prevails.\textsuperscript{514} And, independently, CPLR 5201(c)(4) specifically exalts article 8 over the CPLR.\textsuperscript{515}

Complicating our analysis further is section 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.\textsuperscript{516}

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

\textsuperscript{510} See id. 6214(a).

\textsuperscript{511} Id. 5232(b) (emphasis added).

\textsuperscript{512} See id. In dictum, the court in Cohen v. First National City Bank, 49 Misc. 2d 141, 267 N.Y.S.2d 146 (N.Y. Civ. Ct. N.Y. County 1966), says otherwise, but it assumes that the statute says sheriff may not interfere with the senior secured party's security interest. See id. at 145, 267 N.Y.S.2d at 151. In fact, the statute says that the sheriff may not interfere with the possession of the senior secured party.

\textsuperscript{513} U.C.C. § 8-112(a) (2007).

\textsuperscript{514} Id. § 10-103; see supra text accompanying notes 63-65.

\textsuperscript{515} See N.Y. C.P.L.R. 5201(c)(4).

\textsuperscript{516} U.C.C. § 8-112(d).
process. There we learn that the sheriff may not seize pledged certificated securities under CPLR 5232(b). Yet this is preempted by section 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*. 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 AD had an intangible security entitlement). Here is how Judge Mansfield described the relation of section 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 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.

In other words, Judge Mansfield holds that section 8-112(a) is compatible with CPLR 5232. The meaning of section 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 section 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 section 8-112(a) of the UCC authorizes it. True, section 8-112(d) covers pledged securities. So we may

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517 See id.
518 See N.Y. C.P.L.R. 5232(b).
519 See U.C.C. § 8-112(a).
521 See *supra* text accompanying notes 450-477.
522 *Knapp*, 462 F.2d at 942.
523 See U.C.C. § 8-112(a).
524 See id.
concede that the specific overrules the general—in the case of pledges, only section 8-112(d) governs, not section 8-112(a). Yet section 8-112(d) requires us to know what “legal process” is. Well, legal process includes the levy pursuant to execution. Furthermore, section 8-112(a) of the UCC 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, 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). Unlike post-judgment levy, pre-judgment paper levies are perfectly valid with regard to certificated securities. Among the things a CPLR 6214(a) levy signifies is an injunction prohibiting the garnishee from disposing of JD’s property. Whereas section 8-112(a) states that the “interest of a debtor in a certificated security may be reached by a creditor only by actual seizure,” section 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.

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525 See supra note 108.
526 See U.C.C. § 8-112(d).
527 See id. § 8-112(a).
528 See supra text accompanying note 183-185.
530 See id. at 963.
531 N.Y. C.P.L.R. 6214(b) (McKinney 2008) (“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 person other than the sheriff . . . .”).
532 U.C.C. § 8-112(a) (2007).
533 Id. §§8-112(e).
Location of the certificate outside New York might prove an impediment to pre-judgment attachment. *Koehler v. Bank of Bermuda, Ltd.*,\(^{535}\) illustrates the problem, even though it was a post-judgment case. In *Koehler*, JC arranged for a levy of SP, to whom JD had pledged shares.\(^{536}\) SP kept the shares in Bermuda, but SP eventually confessed to being present in New York for *Shaffer v. Heitner* purposes.\(^{537}\) As we have seen, the propriety of this levy is questionable; no matter where the shares are located, it is not clear that pledged certificated shares can be paper-levied in New York.\(^{538}\) Nevertheless, a paper levy is appropriate in the pre-judgment context, so that, however wrong the case is for post-judgment remedies, *Koehler* can be viewed as a test case for the attachment lien.

After the alleged levy, the *Koehler* court signed an ex parte order commanding SP to bring the shares from Bermuda to New York.\(^{539}\) Later, the court regretted its action and rescinded it on two grounds. First, JD and JC had settled, which had the effect of satisfying the underlying judgment.\(^{540}\) 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 situs of the stock, the court reasoned, was Bermuda.\(^{541}\) But so what? A levy of the order of attachment constitutes a command to SP to deliver all of D's property in the possession of AD to the sheriff.\(^{542}\) Similarly, a valid paper levy of property not capable of delivery pursuant to an execution constitutes an injunction to turn over such property to the sheriff.\(^{543}\) 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 CPLR 5225(b). The “levy” was indeed extended

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534 See 4 U.C.C. Rep. Serv. (CBC) at 964.
536 See id. at *6.
537 See id. at *8.
538 See supra text accompanying notes 446-447.
539 See *Koehler*, 2005 WL 551115 at *1.
540 This holding was later reversed on appeal. *Koehler* v. Bank of Bermuda, Ltd., 544 F.3d 78 (2d Cir. 2008).
541 See *Koehler*, 2005 WL 551115 at *11.
542 N.Y. C.P.L.R. 6214(b) (McKinney 2008).
543 See id. 5232(a).
by the commencement of a turnover proceeding. Turnover proceedings themselves generate equity liens. So properly conceived, Koehler has to be viewed as an equity lien case, not an execution lien or attachment lien case. On this basis, 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. Why should it make a difference that AD is so ordered?

There is nevertheless troubling dictum in ABKCO Industries, Inc. v. Apple Films, Inc., 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.

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). The dubious lesson of Koehler and the ABKCO dictum, incidentally, is that JDs and ADs should keep certificated shares across the bridge in New

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544 Letter from Brian G. West to author (February 26, 2008) (on file with author).
545 See United States v. Ross, 302 F.2d 831, 834 (2d Cir. 1962) (tax lien case).
546 One procedural curiosity is that the district court purported to give an ex parte turnover order. CPLR 5225(b), however, requires a special proceeding to be commenced. Nevertheless, ex parte restraining notices can be issued. But this lasts only one year, and there is no explicit authority to extend the effect of the notice. Id. 5222(b). The litigants, however, did not challenge the authority of the district court to issue an ex parte order. Significantly, AD returned the shares to JD in violation of the ex parte order; JC’s action is for damages for violating the court order. Of course, if the order is ultra vires, AD would not owe damages. Perhaps the court’s ex parte turnover order can be justified as a temporary restraining order within the meaning of Rule 65(b) of the Federal Rules of Civil Procedure.
548 Id. at 672, 350 N.E.2d at 900, 385 N.Y.S.2d at 512.
549 Id. at 676, 350 N.E.2d at 901, 385 N.Y.S.2d at 513.
Jersey, as that will cost JC the trouble of starting a New Jersey proceeding.

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 JCs at state law, since bankruptcy trustees have, as of the day of the bankruptcy petition, all the powers of JCs. Any attempt by the UCC to attack bankruptcy trustees directly would likely be struck down on constitutional grounds. Therefore, the sheriff had to take a beating really aimed at the bankruptcy trustee.

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. “Investment property” is defined to include certificated securities and security entitlements. 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). 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.

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554 U.C.C. § 9-312(a) (2007).
555 Id. § 9-102(a)(49).
556 See supra notes 502-506 and accompanying text.
The impediment is that the definition of “control” is tied to the concept of a purchaser.\textsuperscript{557} A “purchase” is a “voluntary transaction creating an interest in property.”\textsuperscript{558} Judicial lien creditors are not purchasers.\textsuperscript{559} 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 perfected-by-filing security interest.\textsuperscript{560}

According to CPLR 5225(c), a court “may order any person to execute and deliver any document necessary to effect payment or delivery.”\textsuperscript{561} Presumably, JD may be ordered to sign a security agreement for the benefit of JC, but this would not make JC a purchaser as JDs’ action cannot be considered voluntary under these circumstances.

6. Negotiable Instruments

CPLR 5201(c)(4) proclaims negotiable instruments property capable of delivery. Therefore the sheriff must levy by seizure.\textsuperscript{562} The same puzzles about pledgees will play out with regard to negotiable instruments.

Negotiability differentiates between bearer paper and paper requiring special indorsement.\textsuperscript{563} 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.\textsuperscript{564} The buyer, however, can

\textsuperscript{557} U.C.C. § 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. See id. § 8-106.

\textsuperscript{558} Id. § 1-201(32). A purchaser, not surprisingly, is “a person who takes by purchase.” Id. § 1-201(33).

\textsuperscript{559} FDIC v. Malin, 802 F.2d 12, 20 (2d Cir. 1986) (real estate case).

\textsuperscript{560} This actually occurred in Citibank, N.A. v. Prime Motor Inns Ltd. (In re Citibank), 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, who received the consensual assignment of a payment intangible, stupidly forgot to perfect, so that JC’s priority was snatched away. Id. at 744, 780 N.E.2d at 503–04, 750 N.Y.S.2d at 818–19.

\textsuperscript{561} N.Y. C.P.L.R. 5225(c) (McKinney 2008).

\textsuperscript{562} Id. 5232(b).

\textsuperscript{563} Id. 5225(c).

\textsuperscript{564} 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) (McKinney 2008); Argiriou & Finkel v. Marcante Luncheonette II, Inc., 64 Misc. 2d 660, 663–64, 315 N.Y.S.2d 448, 452 (Sup. Ct. Kings County 1970). Nevertheless, the
never be a holder in due course, if there is some adverse claim superior to the buyer's or a maker-issuer's defense, the adverse claim or defense will prevail.

If, on the other hand, the debtor's endorsement 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. If the maker-issuer does not pay, the buyer can sue the maker-issuer for payment.

While the law of the levied negotiable instrument is not difficult, a regrettable opinion exists within the New York oeuvre. In In re Flax, 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. 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.

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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).

See N.Y. U.C.C. § 3-302(3)(a) (McKinney 2008); see also U.C.C. § 3-302(c) (2007).

See N.Y. U.C.C. § 3-302(3)(a); U.C.C. § 3-302(c); see also N.Y. U.C.C. § 3-306(a)-(b); U.C.C. § 3-306.

See N.Y. C.P.L.R. 5225(c); N.Y. U.C.C. § 3-201(1); see also Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., 41 A.D.3d 25, 35, 836 N.Y.S.2d 4, 11 (1st Dep't 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 JD'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. Int'l Bus. Machs. Corp., 60 N.Y.2d 254, 260, 457 N.E.2d 696, 699, 469 N.Y.S.2d 591, 594 (1983).

See N.Y. U.C.C. § 3-413(1).


See id. at 410.


Nevertheless, the Flax court ruled that the levy had dissolved.\textsuperscript{573} JC was unjustly demoted to the indignity of an unsecured creditor.\textsuperscript{574} First, the Flax court incomprehensibly assumed that the sheriff had levied property not capable of delivery, so that CPLR 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 CPLR 5232(a), even if it applied. The sheriff has no duty whatever to obtain signatures. This the buyer at the execution sale can do.\textsuperscript{575} Rather, CPLR 5232(a) indicates that, if property is transferred to the sheriff, the levy does not lapse.\textsuperscript{576} This rather supports JC’s claim to be a secured creditor in the bankruptcy.

Meanwhile, a non-negotiable note is property not capable of delivery.\textsuperscript{577} Yet it might still be an instrument under the article 9 definition.\textsuperscript{578} Prior to 2000, an SP claiming instruments was considered unperfected unless it had possession of them. Therefore, it became possible for JCs 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.\textsuperscript{579} After 2000, however, filing with regard to instruments (including negotiable instruments) became good enough to beat judgment creditors with any instrument, negotiable or not.\textsuperscript{580}

\begin{footnotes}
\item[573] See Flax, 179 B.R. at 412.
\item[574] See id.
\item[575] See Monitor Co. v. Confianza Furniture & Appliance Corp., 142 N.Y.S.2d 140, 142–43 (Sup. Ct. Kings County 1955) (buyer of pledged certificates sold at an execution sale entitled to inspect the books of the issuer, because JD had this right).
\item[576] See N.Y. C.P.L.R. 5232(a) (McKinney 2008).
\item[577] See id. 5201(c)(4) (only negotiable instruments are capable of delivery).
\item[578] See U.C.C. § 9-102(a)(47) (2007) (“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 ordinary course of business is transferred by delivery with any necessary indorsement or assignment.”).
\item[580] U.C.C. § 9-312(a). Note should be made of the scandalous opinion in Highland Capital Management, LP v. Schneider, 8 N.Y.3d 406, 410, 866 N.E.2d 1020, 1023, 834 N.Y.S.2d 692, 695 (2007), which threatens to transform all promissory notes into article 8 securities. In Highland, sellers of promissory notes backed out of an oral commitment to sell. Under article 8, there is no statute of frauds. So the plaintiffs successfully argued that, since ownership of the notes could
\end{footnotes}
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 _JD_. 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 _JD_. Even service upon a limited partner binds the general partnership interest of a _JD_. The capital account of a partner, however, may not be levied. This capital is partnership property and is, in effect, like any other asset of the partnership, which creditors of individual partners cannot generally reach. 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

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581 See N.Y. P'SHIP LAW § 54(1) (McKinney 2008). A court may also appoint a receiver of the judgment debtor's partnership interest. See id.

582 See Princeton Bank & Trust Co. v. Berley, 57 A.D.2d 348, 355, 394 N.Y.S.2d 714, 719 (2d Dep't 1977); see also N.Y. C.P.L.R. 5201(c)(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.”).


584 See MacDonald v. MacDonald, 226 A.D.2d 594, 595, 641 N.Y.S.2d 347, 348 (2d Dep't 1996).

585 See Princeton Bank, 57 A.D.2d at 356, 394 N.Y.S.2d at 719 (real estate of partnership immune from execution by creditor of a partner).
In this respect, the charging order is quite identical to the turnover order under CPLR 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 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.

A similar provision for pre-judgment attachment exists. 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."

CPLR 5209 has its dark side. It protects banks that honor garnishments, even though the bank account contains exempt funds. The burden is on JD to come forward and claim that the levy affects exempt property. This effect of CPLR 5209 has become a cause celebre. Collection agents with judgments against the elderly have begun to garnish bank accounts that

588 See N.Y. C.P.L.R. 6204.
obviously contain nothing but social security funds—exempt under federal law. The strategy is that the elderly person is too intimidated or confused to seek a refund from the collecting agent. Under New York law, a debtor must be given notice that property to be levied might be exempt. This notice includes the address of JC's attorney. These rules mitigate but do not remove the risk that a bank will indifferently pay exempt funds to the sheriff before JD can interfere. The matter is no doubt ripe for legislative reform.

CPLR 5209 has a design flaw: It applies only if, at the time of payment, JD still has a property interest in the payment intangible that AD owes. Suppose JD absolutely transfers to SP AD's obligation to pay, but SP has authorized JD to collect from AD as agent of SP. AD is then garnished. If AD pays the sheriff after the assignment, CPLR 5209 can be of no help, if we read it literally. CPLR 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, JD obtained a judgment against AD and immediately assigned it absolutely to SP. Because the payment intangible in question was secured by a judgment, the

694 See N.Y. C.P.L.R. 5222(e) (McKinney, 2008).
695 See id. 5222(a).
696 A class action has recently been certified to challenge the use of restraining notices with regard to bank accounts containing only electronically deposited social security funds. See Sims v. Bank of Am. Corp., No. 06-CV-5991(CPS)(JMA), 2008 U.S. Dist. LEXIS 11972 (E.D.N.Y. Feb. 19, 2008).
697 See N.Y. C.P.L.R. 5209.
698 See id.
700 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 ...." Id. at 781 n. *, 461 N.E.2d at 299, 473 N.Y.S.2d at 162. This "recourse" is consistent with the absoluteness of assignment. It is in the nature of a warranty of the product sold.
UCC did not apply. 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." This slides over the fact that, by its terms, CPLR 5209 applies only if AD is paying to the sheriff "a debt he owes the judgment debtor." 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 section 9-406(a) of the UCC:

[A]n 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.

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 of antecedent debt. Therefore, since 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 section 9-406(a) is part of the

602 61 N.Y.2d at 780, 461 N.E.2d at 299, 473 N.Y.S.2d at 162. If AD has notice of the assignment, then CPLR 5209 or CPLR 6204 does not protect AD from having to pay the assignee. Cont'l Cas. Co. v. Metro. Sav. & Loan Ass'n, 46 Misc. 2d 456, 459-60, 259 N.Y.S.2d 612, 616 (N.Y. Civ. Ct. N.Y. County 1965).
603 N.Y. C.P.L.R. 5209.
604 U.C.C. § 9-406(a). An account is an obligation for goods or services, for a policy of insurance, for any kind of suretyship, for energy provided, for hire of a vessel, for a credit card, and for lottery winnings, but does not account obligations for rights evidenced by chattel paper, commercial tort claims, deposit accounts, investment property, letter of credit rights, or money advanced. Id. § 9-102(a)(2). Chattel paper is a security agreement or lease of personal property. Id. § 9-102(a)(11). A payment intangible is defined as a "general intangible under which the account debtor's principal obligation is a monetary obligation." Id. § 9-102(a)(61); see also id. § 9-102(a)(42).
common law in New York. In other words, $JD$ still has an interest in a payment intangible, if $JD$ retains the right to collect it as agent of $SP$.

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. Article 9 now applies both to the sale and the hypothecation of “payment intangibles.”

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 $SP$. What if, however, $SP$ 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.” 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.

These principles were overlooked in Lincoln Rochester Trust Co. v. S.C. Marasco Steel, Inc., where $AD$ knew of and “consented to” $SP$’s perfected security interest when a sheriff levied for $JC$. $AD$ paid $JC$ directly. It is not clear whether consent meant that $AD$ had undertaken to pay $SP$ and no one else. If $JD$ had authority to collect, $AD$ should have been able to

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605 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—74 (1984).
607 U.C.C. § 9-102(b) (1972).
608 See id.
610 Id. § 9-406(a).
611 See id. § 9-607(a)(1).
613 Id. at 296, 320 N.Y.S.2d at 867.
discharge its obligation to JD by paying JC directly. CPLR 5209 says this expressly. Yet AD was made to pay again. CPLR 5209 was nowhere cited.

Modern constitutional restrictions on pre-judgment 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, 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.

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

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615 The court did note that actions under CPLR 5239 are brought too late if a sheriff or receiver disburses funds. Here AD paid JC directly. So a CPLR 5239 proceeding was indeed not too late. But AD should have prevailed on the face of CPLR 5209.
616 N.Y.C.P.L.R. 6204.
617 198 U.S. 215 (1905).
618 Id. at 227.
619 See id. at 227–28.
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*,\(^{620}\) attachment is worthy of full faith and credit elsewhere only if \( D \) has minimum contacts in the adjudicating state.\(^{621}\) 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).\(^{622}\) For this reason, 6204's scope is adversely affected by the modern innovation in *Shaffer*.\(^{623}\)

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\(^{621}\) See id. at 212.

\(^{622}\) To obtain an order of attachment, \( P \) must post an indemnity bond, but this bond need only issue for the benefit of \( D \). See N.Y. C.P.L.R. 6214(b), (e) (McKinney 2008). 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.

\(^{623}\) CPLR 5209 and 6204 purport to discharge \( AD \) when \( AD \) pays the sheriff or \( JC \) pursuant to execution or order. See id. 5209, 6204. But they do not immunize \( JC \) from restitutory claims when \( AD \) pays by error. In *Banque Worms v. BankAmerica Int'l*, 77 N.Y.2d 362, 570 N.E.2d 189, 568 N.Y.S.2d 541 (1991), the Court of Appeals proclaimed that the "discharge for value rule" from Restatement of Restitution section 14 was the law of New York, not the rule of mistaken payment. *Id.* at 366, 570 N.E.2d at 191, 568 N.Y.S.2d at 543. According to this rule:

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, 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.

**RESTATEMENT OF RESTITUTION § 14(1) (1937).**

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. 77 N.Y.2d at 364–66, 570 N.E.2d at 190–91, 568 N.Y.S.2d 542–42. 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*, No. 89 Civ. 7987 (JFK), 1997 U.S. Dist. LEXIS 7662, at *10–11 (S.D.N.Y. June 2, 1997), the court *Errie*-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. *Id.* at *11–12. 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.\(^6\)

   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.\(^6\) Under turnover procedure, a court may order *JD* or *AD* to turn personal property of any sort over to the sheriff.\(^6\)

   Could a sheriff proceed directly to sale without a levy or a turnover order? Pre-CPLR case law says no.\(^6\) Indeed, if there is to be a sale under these circumstances, it would have to be done promptly, as the execution lien supposedly dies when the execution is returned at the end of sixty days (unless extended).\(^6\)

   CPLR 5233, governing sales, presents only an indirect obstacle to the sale-without-levy. CPLR 5233(a) requires that the "property shall be present and within the view of those attending the sale unless otherwise ordered by the court."\(^6\) 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.\(^6\)

   Property not capable of delivery or debts are eligible for paper levy.\(^6\) CPLR 5232(b) contemplates that debts should be

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\(^6\) See N.Y. C.P.L.R. 5232(b).

\(^6\) See, e.g., id. 5225.

\(^6\) See id.


\(^6\) N.Y. C.P.L.R. 5233(a) (last sentence).

\(^6\) Id.; see also Manhattan Taxi Serv. Corp. v. Checker Cab Mfg. Corp., 253 N.Y. 455, 459, 171 N.E. 705, 706 (1930) (suggesting court has discretion to alter the rule that property must be in view, but invalidating the sale where it was not).

\(^6\) N.Y. C.P.L.R. 5232(a) ("All property not capable of delivery . . . shall be subject to the levy.").
paid to the sheriff.\footnote{Id. ("The person served with the execution shall forthwith... pay all such debts upon maturity, to the sheriff or to the support collection unit...".).} 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."\footnote{Id. 5233(a).} A court would have to "order otherwise" the sale of invisible property.

Sale must be by auction.\footnote{See id. Receivers are not necessarily subject to this rule. But see Levitin v. Homburger, 932 F. Supp. 508, 512 (S.D.N.Y. 1996) (court ordered receiver to sell general partnership pursuant to CPLR 5233).} Rules for advertisement are set forth.\footnote{See N.Y. C.P.L.R. 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. See Wholesale Serv. Supply Corp. v. Rubin, 27 A.D.2d 957, 957, 279 N.Y.S.2d 403, 404 (2d Dep't 1967).} A sale can occur after the sixty-day life of an execution. This is because, by case law, the sheriff's duty to return the execution is suspended by the levy with regard to property capable of delivery\footnote{See id. 5232(a).} (by statute with regard to property not capable of delivery).\footnote{See N.Y. C.P.L.R. 5233(d).} Levies of property capable of delivery are perpetual,\footnote{See Morgan v. Maher, 60 Misc. 2d 642, 644, 303 N.Y.S.2d 575, 578 (Sup. Ct. Nassau County 1969) (in real estate sale, sheriff could not reject high bid because it was too low without showing that excessive debtor equity would be lost).} though the levy of property not capable of delivery terminates after ninety days (unless extended).\footnote{93 Misc. 2d 1012, 403 N.Y.S.2d 181 (Oneida County Ct. 1978).}

The sheriff has much (but not total) discretion in scheduling and designing the sale.\footnote{Thereafter, a fine is collected via execution issued to the sheriff. N.Y. CRIM. PROC. LAW § 420.20 (McKinney 2008).} If property cannot be sold, the sheriff is invited to apply to the court "for a determination whether the property can legally be sold."\footnote{Id. 5233(d).} This provision was added in light of People v. Lo Ji Sales, Inc.,\footnote{See Kennis v. Sherwood, 82 A.D.2d 847, 848, 439 N.Y.S.2d 962, 965 (2d Dep't 1981).} 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,\footnote{Cf. Ansonia Brass & Copper Co. v. Conner, 103 N.Y. 502, 510–11, 9 N.E. 238, 239–40 (1886).} 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 that, in the era of the Internet, can only strike us as quaint. The solution reached by the Lo Ji court is now ratified by CPLR 5233(d). 644

Sales can be reversed. For example, if the sheriff sells to an infant, the infant may rescind the sale for want of capacity. 645 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."646 This suggests that other reasons—such as, JD having 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. 647 This is odd, in that, when the sheriff sells, she does not warrant any amount of title. 648 Caveat emptor is usually the rule at the sheriff's auction. 649

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. 650 X as owner of the equity

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645 Gen. Motors Acceptance Corp. v. Stotsky, 60 Misc. 2d 451, 455, 303 N.Y.S.2d 463, 467-68 (Sup. Ct. Suffolk County 1969) (infant was nineteen years old).
646 N.Y. C.P.L.R. 5237. One such irregularity would be that JD has died and JC has not obtained permission from the surrogate court to proceed. Id. 5208.
650 Stotsky, 60 Misc. 2d at 454, 303 N.Y.S.2d at 467 (ordering the sheriff's sale overturned, however, 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. N.Y. C.P.L.R. 5202(b).
is now deemed a nonrecourse\textsuperscript{651} article 9 debtor\textsuperscript{652} with the present right to possess, to redeem in case of SP's repossession,\textsuperscript{653} and to receive a surplus after the sale.\textsuperscript{654}

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 collateral from the sheriff before the sale\textsuperscript{655} and from X after the sale.\textsuperscript{656} If SP repossesses from the sheriff, JC is entitled to any surplus from the foreclosure sale.\textsuperscript{657}

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.\textsuperscript{658} 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 action.\textsuperscript{659}

In Teddy's Drive-In, Inc. v. Cohen,\textsuperscript{660} a tax compliance officer enforcing a state tax warrant (equivalent of a sheriff under an execution) levied encumbered equipment.\textsuperscript{661} 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.\textsuperscript{662} The Teddy's court held that the officer was guilty of the tort of conversion.\textsuperscript{663} The court is not clear on

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\item \textsuperscript{651} 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.
\item \textsuperscript{652} U.C.C. § 9-102(a)(28)(A) (2007) (defining debtor as "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor").
\item \textsuperscript{653} Id. § 9-623(a).
\item \textsuperscript{654} Id. § 9-615(d)(1).
\item \textsuperscript{655} William Iselin & Co. v. Burgess & Leigh, Ltd., 52 Misc. 2d 821, 823, 276 N.Y.S.2d 659, 662 (Sup. Ct. N.Y. County 1967).
\item \textsuperscript{656} U.C.C. § 9-609.
\item \textsuperscript{657} Id. § 9-615(a)(3). JC must make a demand for the surplus "before distribution of the proceeds is completed." Id. § 9-615(a)(3)(A).
\item \textsuperscript{659} See Tompkins v. Fonda Glove Lining Co., 188 N.Y. 261, 265, 80 N.E. 933, 934 (1907).
\item \textsuperscript{660} 47 N.Y.2d 79, 390 N.E.2d 290, 416 N.Y.S.2d 782 (1979).
\item \textsuperscript{661} See id. at 81, 390 N.E.2d at 290, 416 N.Y.S.2d at 783.
\item \textsuperscript{662} See id. at 81, 390 N.E.2d at 291, 416 N.Y.S.2d at 783.
\item \textsuperscript{663} See id. at 82, 390 N.E.2d at 291, 416 N.Y.S.2d at 783.
\end{itemize}
\end{footnotesize}
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.\(^6\) 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 sheriff has refused it.\(^5\)

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.\(^6\)

*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—should not SP’s recovery be limited to the amount of the loan? One must, however, contend with the ancient notion of *jus tertii*. According to the Court of Appeals in *Valentine v. Long Island Railroad Co.*\(^6\):

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.\(^6\)

This rule suggests that the sheriff must pay $100. The sheriff is a bailee (coupled with an interest) and SP is the bailor. 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 . . . ."669 Ergo, based on this exception, 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.670 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. 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 section 9-315(a) of the UCC:

(1) a security interest . . . continues in collateral notwithstanding sale . . . ; and
(2) a security interest attaches to any identifiable proceeds of collateral.671

So JC does not own the $20 surplus after all. CPLR 5234(a) commands the sheriff to distribute these proceeds to JC, but JC and also the sheriff672 commit the tort of conversion if they convert SP's cash to their own use. This is the notorious and unacceptable "two for one" effect that article 9 provides when collateral is sold subject to a security interest.673

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669 Id. at 126–27, 79 N.E. at 851.
672 United States v. Yonkers Child Care Ass'n, 566 F. Supp. 1509, 1511 (S.D.N.Y. 1983) (sheriff liable for distributing to JC moneys on which the IRS had a senior lien).
673 David Gray Carlson, Bulk Sales Under Article 9: Some Easy Cases Made Difficult, 41 ALA. L. REV. 729, 741 (1990). That this effect exists is exacerbated by new section 9-615(g) of the UCC, 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;
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 never owned the $20 that SP received. Subrogation presumably frowns on JC paying SP with SP's own money. There is no good solution to this problem, which must be laid at the doorstep of article 9's regrettable two-for-one rule.

Sales procedure is particularly mystifying when SP is a pledgee. In the case of pledged property, the sheriff may not levy at all. Yet, perhaps the sheriff can sell under CPLR 5233, since CPLR 5233 does not expressly require there to be a levy. 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 section 8-112(a) of the UCC overrides CPLR 5232(b)'s anti-levy rule. Or perhaps a court has ordered SP to turn over the property to the sheriff under CPLR 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.

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U.C.C. § 9-615(g). 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.

N.Y. C.P.L.R 5233(b) (McKinney 2008).


See U.C.C. § 8-112(a).

N.Y. C.P.L.R. 5225(b) (“[W]here it is shown... that [JC]'s rights to the property are superior to those of [AD], the court shall require [AD] to pay the money, or... to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff.”).
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.

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

Executions may be delivered to different court officers, such as a marshal for the federal court or a lower court. In such cases, there is a “first to levy” rule. The first officer to levy establishes priority for all her “clients” who have served

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678 Taxes do not include any capital gain tax that will be realized because of the execution sale. Roberson v. Roberson, 45 A.D.3d 1494, 1494–95, 846 N.Y.S.2d 528, 529 (4th Dep't 2007).
679 See N.Y. C.P.L.R. 5234(a).
680 See id.
681 See id.
683 See N.Y. C.P.L.R. 5234(b); id. 5241(h). The priority for family support executions was added in 1993. Ch. 59, § 16, 1993 N.Y. Laws 360 (McKinney). In enforcement of child support obligations, New York has established support collection units in every social services district. N.Y. SOC. SERV. LAW § 111-h(1) (McKinney 2008). 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, see N.Y. C.P.L.R. 5222(a), and executions to the sheriff or to itself, see id. 5230(b). The support collection unit may also levy upon property, just as a sheriff would. See 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 County, 2007 U.S. Dist. LEXIS 8721 (E.D.N.Y. Feb. 7, 2007) (describing support collection units generally).
684 In New York City, the mayor is authorized to appoint up to eighty-three marshals for the civil court. See N.Y. CITY CIV. CT. ACT § 1601(1) (McKinney 2008).
685 See N.Y. C.P.L.R. 5234(b).
executions on her. The slow-footed officer who did not manage to levy must apply, hat in hand, to the swifter officer for the abject ors and leftovers. This rule, however, applies only if the property is "levied upon within the jurisdiction of all the officers." 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: "[E]xcept 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.

The rule of dueling sheriffs reflects the notion of in custodia legis. 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.

A final rule mediates between those who claim under executions and those who claim equity liens—liens arising from turnover orders and receiverships. The first event between the levy under an execution and the filing of the turnover order or

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686 See id.
687 See id. ("and thereafter shall be applied in satisfaction of the executions or orders of attachment delivered 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 the order of such demands").
688 Id.
689 See id.
690 Id.
691 See id.
692 In re Estate of Livingston, 30 Misc. 2d 71, 74, 211 N.Y.S.2d 897, 901 (Sur. Ct. N.Y. County 1961), aff'd, 14 A.D.2d 264, 220 N.Y.S.2d 434 (1st Dep't 1961) ("Once levied upon the property is deemed to be in custodia legis.").
693 See Garro v. Republic Sheet Metal Works, Inc., 284 A.D. 660, 663, 134 N.Y.S.2d 151, 154-56 (4th Dep't 1954) ("If [sic] 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 section 680 of the Civil Practice Act, the first creditor to serve an execution was the winner, even if the second creditor's sheriff was the first to levy. Ace Food Corp. v. Rochlin, 23 Misc. 2d 274, 274-75, 200 N.Y.S.2d 891, 892 (Sup. Ct. Queens County 1960). A first-to-levy rule did exist for the justice courts—courts not of record. See Distler & Schubin, supra note 8, at 467. On courts not of record, see N.Y. JUD. LAW § 2 (McKinney 2008) (any court not enumerated therein is not a court of record).
694 N.Y. C.P.L.R. 5202(b).
appointment of a receiver establishes priority.\footnote{Id. at 5234(c). In Citrus Bowl, Inc. v. Colonial Farms, Inc., 47 Misc. 2d 220, 222, 262 N.Y.S.2d 258, 260 (Sup. Ct. Queens County 1965), aff'd, 27 A.D.2d 942, 278 N.Y.S.2d 989 (2d Dep't 1967), rev'd on other grounds, 22 N.Y.2d 832, 239 N.E.2d 730, 293 N.Y.S.2d 100 (1968), a receiver preceded any levy by JCs and so had priority. JC 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].

31 U.S.C. § 3713 (2000). 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. Citrus Bowl, 47 Misc. 2d at 222, 262 N.Y.S.2d at 260. On appeal, however, the United States won priority over JC on the basis of the timing of its lien. See Citrus Bowl, 22 N.Y.2d at 834, 239 N.E.2d at 730, 293 N.Y.S.2d at 100.\footnote{See First Nat'l Bank of Amsterdam v. Shuler, 153 N.Y. 163, 172, 47 N.E. 262, 264-65 (1897) (appointment of receiver).} \footnote{City of N.Y. v. Panzirer, 23 A.D.2d 158, 162, 259 N.Y.S.2d 284, 287 (1st Dep't 1965).}

So where JC obtains a lien by serving the sheriff with an execution, and where JC obtains (and the clerk files) a turnover order or the appointment of a receiver, JC has priority even though JC had the first lien. These orders have been called an “equitable levy.”\footnote{Graze v. Bankers Trust Co., 45 Misc. 2d 610, 611, 257 N.Y.S.2d 483, 485 (Sup. Ct. N.Y. County 1965); H & H Poultry Co. v. Lafayette Nat'l Bank, 45 Misc. 2d 480, 481, 257 N.Y.S.2d 182, 183 (Sup. Ct. N.Y. County 1965). Even if the levy is senior, the receiver might equitably be given control of the property, so long as JC's seniority from the earlier levy is respected. Lankenau v. Coggeshall & Hicks, 350 F.2d 61, 66-67 (2d Cir. 1965).}

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.”\footnote{First Nat'l Bank of Amsterdam v. Shuler, 153 N.Y. 163, 172, 47 N.E. 262, 264-65 (1897) (appointment of receiver).}

The last sentence of CPLR 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.\textsuperscript{699}

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.\textsuperscript{700} Why the equity lien holder should lose out after sixty days 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 an occult wisdom residing within this sentence, it has eluded me.

\section*{F. Setoffs}

\textit{AD} may have the power to offset \textit{JD}'s obligation to pay \textit{AD} because \textit{JD} owes \textit{AD} for a mutual debt.\textsuperscript{701} Execution liens potentially come into conflict with this right. To give \textit{AD}'s right of setoff a high degree of protection, the legislature has enacted section 151 of the Debtor and Creditor Law.\textsuperscript{702} Courts, however, 

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\textsuperscript{699} N.Y. C.P.L.R 5234(c).
\textsuperscript{700} See id. 5234(a); \textit{Panzirer}, 23 A.D.2d at 162, 259 N.Y.S.2d at 267–88.
\textsuperscript{701} “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.” In re Westchester Structures, Inc. v. Hellman Elec. Corp., 181 B.R. 730, 739 (Bankr. S.D.N.Y. 1995).
\textsuperscript{702} According to this provision:
Every debtor shall have the right upon:
\begin{itemize}
\item [(c)] the application for the appointment, or the appointment, of any receiver of, or of any of the property of a creditor;
\item [(d)] the issuance of any execution against any of the property of a creditor;
\item [(e)] the issuance of a subpoena or order, in supplementary proceedings, against or with respect to any of the property of a creditor; or
\item [(f)] the issuance of a warrant of attachment against any of the property of a creditor,
\end{itemize}
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
have failed to see how limited section 151 really is. In many cases, AD’s setoff right needs no protection and would continue to exist even if section 151 had never been enacted. As a result, section 151 has sometimes been misinterpreted.

The common law makes setoff of a mutual debt a defense against an obligation to pay. 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, suppose AD (a bank) owes JD for the amount of a checking account ($100). Later, AD lends JD $75, payable on demand. AD now has a setoff opportunity—a 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 instead 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 levies against AD, JC can only take whatever JD had—a right contingent on AD not declaring the setoff. So, after the levy, it is open for AD to assert the setoff against JC, thereby reducing the debt from $100 to $25. 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

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.

N.Y. DEBT. & CRED. § 151 (McKinney 2008).

Where AD is a bank, AD must notify JD of the setoff on the same business day. N.Y. BANKING LAW § 9-g(2) (McKinney 2008).

See infra notes 706-710 and accompanying text.

See Green v. Disbrow, 79 N.Y. 1, 9 (1879).

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. 1 GRANT GILMORE & DAVID GRAY CARLSON, GILMORE AND CARLSON ON SECURED LENDING: CLAIMS IN BANKRUPTCY § 4.02[G] at 309 (2d ed. 2000).


See id.

Baker v. Nat’l City Bank of Cleveland, 511 F.2d 1016, 1018 (6th Cir. 1975) (“[T]he ... 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.”).
the remaining $25. Where the setoff opportunity precedes the lien, section 151 of the Debtor and Creditor Law is not needed to vindicate AD’s power to declare a setoff in lieu of paying the sheriff.\textsuperscript{709}

Suppose, on these facts, that JD deposits an additional $50 with AD. This deposit is instantly made conditional on AD’s right of setoff.\textsuperscript{710} JC obtains no senior lien on this new deposit. In these cases, AD has no need of section 151 to protect its right of setoff.\textsuperscript{711}

Section 151 adds content in two circumstances. First, it enables setoff when AD’s claim against JD is not yet mature, whereas AD’s obligation to JD is fully mature. One thing section 151 achieves is to permit AD to assert a setoff of mature debt against unmatured debt.\textsuperscript{712} Some old cases had asserted otherwise.\textsuperscript{713} To be distinguished is contingent debt, which AD

\textsuperscript{709} These are the facts of In re Industrial Commissioner v. Five Corners Taverns, Inc., 47 N.Y.2d 639, 393 N.E.2d 1005, 419 N.Y.S.2d 931 (1979), where the court wrote as if section 151 was absolutely central to the result.

\textsuperscript{710} See Cibro Petroleum Prods., Inc. v. Fowler Finishing Co., 92 Misc. 2d 450, 452, 400 N.Y.S.2d 322, 324 (Sup. Ct. Albany County 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, 820, 578 N.Y.S.2d 1013, 1016 (Sup. Ct. Bronx County 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. Id. at 820, 578 N.Y.S.2d at 1016.

\textsuperscript{711} Sepinuck, supra note 706, at 77 (“[C]ourts have almost uniformly held that the setoff rights of a garnishee defeat the rights of the garnishor.”).

\textsuperscript{712} See Siegel v. New York, 262 A.D. 388, 390, 28 N.Y.S.2d 958, 961 (3d Dep’t 1941).

\textsuperscript{713} See Appleton v. Nat’l Park Bank of N.Y., 211 A.D. 708, 711, 208 N.Y.S. 228, 231 (1st Dep’t 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 did the debtor, whose right to exempt property is derivative of the trustee’s right. The court, however, held otherwise and ruled that exemptions under New York law are valid against the common law right of set off. This must be counted as a bad \textit{Erie} guess indeed of the law of New York. Exemptions are good against judicial liens, not setoff opportunities. \textit{Cf.} N.Y. BANKING LAW § 9-g(1) (McKinney 2008) (no setoff against social security proceeds).
may never owe. While unmatured debt may be set off, contingent debt may not be.\footnote{714}{714 Trojan Hardware Co. v. Bonaquisti Constr. Corp., 141 A.D.2d 278, 282, 534 N.Y.S.2d 789, 791 (3d Dep't 1988); Sepinuck, supra note 706, 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. 141 A.D.2d at 279, 534 N.Y.S.2d at 789. 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. Id. at 280, 534 N.Y.S.2d at 790. The court upheld summary judgment for JC against AD in a CPLR 5225(b) turnover action. Id. at 282, 534 N.Y.S.2d at 791.}

Let us now take another scenario where section 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 section 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.\footnote{715}{715 Section 151 of the Debtor and Creditor Law 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, section 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 section 151 is to authorize AD to assert a setoff where AD's claim is still contingent and where no common law setoff opportunity existed at the moment of the levy.\footnote{716}{716 Wolcott v. Sullivan, 1 Edw. Ch. 399 (N.Y. Ch. 1832), aff'd, 6 Paige Ch. 117 (N.Y. Ch. 1836).}
The nature of setoff and the role of section 151 was misconceived in *United States v. Sterling National Bank & Trust Co.*, 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*.

*June 9, 1971:* The IRS serves notice of levy on *AD*, pursuant to 6331(a) of the Internal Revenue Code.

*July 2:* *AD* purports to manifest a 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.

The *Sterling* court properly held for the IRS, which had a lien 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.

The analysis of the *Sterling* court, however, was unsatisfactory. 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, [JD] was entitled to write checks up to the full amount in the account. Clearly then all the funds in [JD]'s checking account were his property at the time that the IRS served the bank with notice of levy.

Read carefully, the *Sterling* court seems to be saying that section 151 of the Debtor and Creditor Law does not apply to liens.

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717 494 F.2d 919 (2d Cir. 1974).
718 See id. at 920–21.
719 See id. at 921.
720 See Bank of Nevada v. United States, 251 F.2d 820, 825 (9th Cir. 1957). The matter would have been different if the setoff opportunity pre-existed the creation of the tax lien. See United States v. Harris, 249 F. Supp. 221, 223 (W.D. La. 1966).
721 See *Sterling*, 494 F.2d at 922.
722 Id.
created by federal law, which is fair enough. But the court also says that section 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, and the IRS succeeds only to that. 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.

The Sterling misconception soon blossomed into error. In Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co., JC obtained a federal maritime attachment lien. In non-admiralty federal cases, ordinary attachments are issued pursuant to state law. Maritime attachments, however, are thoroughly federal in nature. In Aurora, however, AD owed JD and JD owed AD at

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723 See id.
724 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.


725 Sterling was wrongly decided for a reason not related to the discussion in the text. According to section 6323(b)(10) of the Internal Revenue Code, the tax lien is no good against a savings deposit, share, 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.

I.R.C. § 6323(b)(10) (2000). Although the taxpayer'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 that this provision only applies to consensually created security interests, which a setoff right could never be. The lower court suggested that, if the bank had taken possession of a passbook, the bank's right of setoff would have been good against the IRS. See United States v. Sterling Nat'l Bank, 360 F. Supp. 917, 926 (S.D.N.Y. 1973). Yet what good would that do if the bank cannot have a contractual lien on its own obligation to the taxpayer? In truth, section 6323(b)(10) seems tailor-made to a bank's right of setoff, and the bank should have prevailed on its basis.

726 85 F.3d 44 (2d Cir. 1996).
727 See _id._ at 46.
728 FED. R. CIV. P. 64.
the time of the garnishment.\textsuperscript{729} So, regardless of what section 151 means, \textit{JC} should have taken subject to \textit{AD}'s senior right of setoff. The \textit{Aurora} court ruled that New York Debtor and Creditor Law was preempted, and therefore, \textit{JC} ought to have a lien on the entire amount \textit{AD} had owed \textit{JD}, as if no setoff opportunity existed.\textsuperscript{730} But even if we concede that section 151 is preempted, \textit{JC} still only obtained \textit{AD}'s conditional right of payment.\textsuperscript{731} Even without section 151, the setoff opportunity pre-existed and should have been assertable against the maritime attachment lien.\textsuperscript{732}

The New York courts have also misunderstood the scope of section 151. In \textit{Aspen Industries, Inc v. Marine Midland Bank},\textsuperscript{733} the New York Court of Appeals read section 151 as authorizing \textit{AD} to pay \textit{JD} in spite of a restraining notice, so long as \textit{AD}'s claim against \textit{JD} exceeds \textit{JD}'s claim against \textit{AD}.\textsuperscript{734} In \textit{Aspen}, \textit{AD} (a bank) had a very large claim against \textit{JD} relative to \textit{JD}'s small checking account balance.\textsuperscript{735} \textit{JD} continued to deposit funds.\textsuperscript{736} Properly, \textit{AD} had a setoff right regardless of section 151 of the Debtor & Creditor Law.\textsuperscript{737} But it did not use the setoff right.\textsuperscript{738} Rather, it honored \textit{JD}'s checks.\textsuperscript{739} The Court of Appeals ruled that since \textit{AD could} have set off the entire checking account, it did not cause any damage to \textit{JC} when, in violation of the

\begin{footnotesize}
\begin{enumerate}

\item\textsuperscript{729} See \textit{Aurora Mar. Co.}, 85 F.3d at 46.
\item\textsuperscript{730} See \textit{id.} at 47.
\item\textsuperscript{731} See \textit{id.} at 46–47.
\item\textsuperscript{732} The lower court in \textit{Aurora} thought that section 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 section 151, under the circumstances, was not in conflict with the admiralty attachment lien. \textit{JC} prevailed simply because \textit{AD} had not manifested the setoff before \textit{JC} obtained the lien. See \textit{Aurora Mar. Co. v. Abdullah Mohamed Fahem & Co.}, 890 F. Supp. 322, 328–29 (S.D.N.Y. 1995). This is exactly the wrong reading of section 151. Under this reading, \textit{AD} never has a right of setoff against \textit{JC} unless \textit{AD} manifests the setoff before \textit{JC}'s lien. The opposite is true. \textit{AD} has a right to setoff no matter when \textit{JC}'s lien arises. See \textit{In re Indus. Comm'r v. Five Corners Taverns}, 47 N.Y.2d 639, 645, 393 N.E.2d 1005, 1008, 419 N.Y.S.2d 931, 934 (1979). The lower court acknowledged \textit{Five Corners} but thought it applied only to liens under New York law, not to federal liens.

\item\textsuperscript{733} 52 N.Y.2d 575, 421 N.E.2d 808, 439 N.Y.S.2d 316 (1981).
\item\textsuperscript{734} See \textit{id.} at 580–83, 421 N.E.2d at 811–12, 439 N.Y.S.2d at 319–20.
\item\textsuperscript{735} See \textit{id.} at 577–78, 421 N.E.2d at 809–10, 439 N.Y.S.2d at 317–18.
\item\textsuperscript{736} See \textit{id.} at 578, 421 N.E.2d at 810, 439 N.Y.S.2d at 318.
\item\textsuperscript{737} See \textit{id.}
\item\textsuperscript{738} See \textit{id.}
\item\textsuperscript{739} See \textit{id.}
\end{enumerate}
\end{footnotesize}
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 section 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

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

There are two types of income executions. The one available to judgment creditors in general I will call regular income executions. The other is available for family creditors who

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741 See id. at 578, 421 N.E.2d at 810, 439 N.Y.S.2d at 318.
743 See N.Y. C.P.L.R. 5201(a) (McKinney 2008).
744 See id. 5201(b).
747 N.Y. C.P.L.R. 5231(b). 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.” Id. 5222(a); see also Silbert v. Silbert, 25 A.D.2d 570, 570, 267 N.Y.S.2d 744, 746 (2d Dep't 1966).
750 See N.Y. C.P.L.R. 5231.
claim alimony or child support. Unlike other executions, the sheriff is included as among those authorized to issue an income execution for enforcement of a support obligation.

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, the amount of money, and frequency of payment. 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.

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. Here is one of the few provisions in the CPLR that refers 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., JD worked in Saudi Arabia and AD was properly served in

751 See N.Y. C.P.L.R. 5241; see also N.Y. Fam. Ct. Act § 416(a) (McKinney 2008) (defining support). A provision similar to CPLR 5241, applying only to family support creditors, permits injunctive orders to employers to pay wages. See N.Y. C.P.L.R 5242(2). 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. See id. 5241(b)(2)(i); see also In re Oneida County Dep't of Soc. Servs. ex rel. Heidi S. v. Paul S., 41 A.D.3d 1189, 1190, 837 N.Y.S.2d 456, 457 (4th Dep't 2007).

752 See N.Y. C.P.L.R. 5241(b)(1); In re Smith v. ABC Co., 2005 N.Y. Misc. LEXIS 3467, at *9 (Fam. Ct. Nassau County Sept. 29, 2005). Prior to the CPLR, a court order was necessary to garnish wages. See WEINSTEIN ET AL., supra note 35, ¶ 5231.09. JC also had to show a regular execution returned unsatisfied before an income execution could be had. See Kaplan v. Supak & Sons Mfg. Co., 46 Misc. 2d 574, 576; 260 N.Y.S.2d 374, 375 (N.Y. Civ. Ct. N.Y. County 1965).


754 See N.Y. C.P.L.R. 5231(a).

755 See id. 5231(g). This section was added in 1987 to address constitutional objections that debtors were insufficiently notified of the rules of garnishment. See Follette v. Cooper, 658 F. Supp. 514, 515, 517–18 (N.D.N.Y. 1987), vacated in part, 671 F. Supp. 1362 (N.D.N.Y. 1987). The notice is not required for income executions under CPLR 5241. See N.Y. C.P.L.R. 5241(c) (support enforcement).

756 See N.Y. C.P.L.R. 5231(b).

757 See id.

Manhattan.\textsuperscript{759} Since \textit{JD} neither lived nor was employed in Manhattan, \textit{JC} could not comply with the above requirements.\textsuperscript{760} Accordingly, the levy was quashed.\textsuperscript{761} Yet in \textit{Oystermen’s Bank & Trust Co. v. Manning},\textsuperscript{762} a sheriff refused to serve an income execution on a California resident.\textsuperscript{763} The \textit{Manning} court simply ignored the jurisdictional limitation in CPLR 5231(b) and ordered the California sheriff to serve the debtor in California.\textsuperscript{764} It cited as authority CPLR 5240, which invites courts to change the rules whenever they want.\textsuperscript{765}

The jurisdictional limits connecting the sheriff with the \textit{JD}’s domicile or place of work overturn 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.\textsuperscript{766} The statute, therefore, does not go as far as the Constitution allows. In non-wage cases, if a court has jurisdiction over \textit{AD}, the court can indeed order \textit{AD} to pay or deliver property to the New York sheriff.\textsuperscript{767}

The procedure in the case of an income execution is that the sheriff serves the income execution on \textit{JD}, either by personal service or by certified mail.\textsuperscript{768} The income execution demands that the debtor pay the sheriff directly,\textsuperscript{769} with the warning that

\textsuperscript{759} See id. at 183–84, 278 N.Y.S.2d at 257–58.
\textsuperscript{760} See id. at 184–85, 278 N.Y.S.2d at 258–59.
\textsuperscript{762} 59 Misc. 2d 144, 298 N.Y.S.2d 355 (Sup. Ct. N.Y. County 1969).
\textsuperscript{763} See id. at 146, 298 N.Y.S.2d at 357.
\textsuperscript{764} See id. at 147, 298 N.Y.S.2d at 358; see also N.Y. C.P.L.R. 313 (McKinney 2008) (authorizing such orders).
\textsuperscript{765} See \textit{Manning}, 59 Misc. 2d at 147, 298 N.Y.S.2d at 358; supra note 763. But see \textit{Kaplan}, 46 Misc. 2d at 578, 260 N.Y.S.2d at 378 (“Section 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.”).
\textsuperscript{768} See N.Y. C.P.L.R. 5231(d).
\textsuperscript{769} See \textit{id.} 5231(a). If the debtor is paying ten percent to the sheriff directly, no other creditor can insist that an income execution be levied on the employer. \textit{Citibank v. East}, 121 Misc. 2d 861, 861–63, 469 N.Y.S.2d 557, 558–59 (N.Y. Civ. Ct. Queens County 1983).
the employer will be garnished if the debtor defaults.\textsuperscript{770} This procedure was designed “to avoid annoyances to third parties and to give the judgment debtor an opportunity to make payment without embarrassment.”\textsuperscript{771} If JD does not start paying within twenty days after service,\textsuperscript{772} or if the sheriff is unable to effectuate service within twenty days, the sheriff garnishes the employer.\textsuperscript{773} The income execution for support operates on a different basis. The debtor must be served first.\textsuperscript{774} Unless the debtor alleges a mistake of fact, the employer is served fifteen days thereafter.\textsuperscript{775}

After being served with the income execution, the employer has the duty to withhold wages until the judgment is paid.\textsuperscript{776} Importantly, the maximum a creditor can obtain from a regular income execution is ten percent of income.\textsuperscript{777} This amount coheres with the exemption of

ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, 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 . . . .\textsuperscript{778}

The sixty-day limit is significant. Where earnings have been due for over sixty days, the earnings are not exempt.\textsuperscript{779} Or if a bank

\textsuperscript{770}See N.Y. C.P.L.R. 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 fifteen days. See id. 5241(c)(iv).


\textsuperscript{772}At least as of 1970, few JDs ever paid the sheriff. See Marsh, supra note 745, at 402–03.


\textsuperscript{774}See N.Y. C.P.L.R. 5241(d).

\textsuperscript{775}See id. 5241(f).

\textsuperscript{776}See id. 5231(f). An employer is prohibited from firing a worker whose wages have been garnished. See id. 5252(1). The sheriff has the duty to calculate interest, and if she does not, the employer is not liable for paying the amount that the income execution requires to be paid. Nat’l Sur. Corp. v. R.H. Macy & Co., 116 Misc. 2d 780, 783, 455 N.Y.S.2d 1007, 1009 (Sup. Ct. N.Y. County 1982).

\textsuperscript{777}See N.Y. C.P.L.R. 5231(b).

\textsuperscript{778}Id. 5205(d)(2).

\textsuperscript{779}See id.
account consists of old wages, only an amount equating with ninety percent of the earnings over the past sixty days are exempt. 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 ninety percent exempt; the balance can be reached by a simple non-income execution. Sums not yet earned can be reached only by an income execution.

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 CPLR 5205(d)(2), which permits one hundred percent garnishment of recent earnings in a bank account under a non-income execution.

That bank accounts are exempt if they contain exempt wages depends upon a tracing rule applicable to exemptions. See infra text accompanying notes 1113–1119.


See N.Y. C.P.L.R. 5241(f).

See id. 5205(d)(2).

In Girard Trust Bank v. Gotham Football Club, Inc., 31 A.D.2d 142, 144, 295 N.Y.S.2d 741, 743 (1st Dep't 1968), AD owed JD football bonuses for a season. First, if JD played in fifty percent of the defensive or offensive plays, JD would receive $2,000. If JD showed a good attitude, JD would get $1,000 at the end of the season. After the season but before the bonuses were paid, JC served an income execution on AD and obtained ten percent of the bonuses. JC served both an income execution and an ordinary execution on AD. JD 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.” Id. at 145, 295 N.Y.S.2d at 744. 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. See id. at 147–48, 295 N.Y.S.2d at 746–47 (quoting N.Y. C.P.L.R. 5205(d)(2)). The court seemed to think that if the fifty percent level was reached within the sixty day period, all earnings were within the exemption. See id. at 147, 295 N.Y.S.2d at 746. In fact, CPLR 5205(d)(2) refers to “earnings of the judgment debtor for his personal services rendered within sixty days before ... an income execution is delivered to the sheriff.” N.Y. C.P.L.R. 5205(d)(2). So the issue is not earning (that is, the vesting of AD’s obligation to pay), but rather is rendering services. Properly, both bonuses should have been prorated.

See N.Y. C.P.L.R. 5205(d)(2).

See id. 5205(d).

The attempt to obtain one hundred percent of wages via a regular execution was rejected in Cadle Co. v. Newhouse, 20 F. App’x 69, 73–74 (2d Cir. 2001). In Power v. Loonam, 49 Misc. 2d 127, 129, 266 N.Y.S.2d 865, 867–68 (Sup. Ct. Nassau County 1966), the court ruled that a restraining notice had no effect as to ninety percent of a bank account, even though no income execution had been served.
The ten percent limit of CPLR 5231(b) coheres with federal legislation, which commands that state legislation permit the garnishment of no more than twenty-five percent of income. The ten percent maximum is reduced where a wage earner is at or near the minimum wage. With regard to regular income executions, garnishment is altogether prohibited if disposable earnings for the week are less than thirty times the minimum wage. For this purpose, disposable earnings are defined as take-home pay—"part of the earnings...after the deduction from those earnings of any amounts required by law to be withheld." The amount withheld cannot exceed twenty-five percent of disposable income or thirty times the minimum wage, whichever is less.

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 fifty percent of take-home pay can be withheld. If arrears on past support obligations exist, this number rises to fifty-five percent. Where there is no current spouse, sixty percent of take-home pay can be reached, sixty-five percent if arrears exist, which are more than twelve weeks old. These limits, which are consistent with the Federal Consumer Protection Act, 15 U.S.C. § 1673(a)(1) (2000). See generally id. § 1671. This Act permits garnishment to rise to sixty-five percent if family support obligations are due and owing. See id. § 1673(b)(2)(B).


See N.Y. C.P.L.R. 5241(g)(ii). For purposes of these limits, property settlements are not considered support obligations; the creditor must resort to regular income executions, where only ten percent can be obtained. See Brody v. Brody, 196 A.D.2d 308, 311, 609 N.Y.S.2d 191, 193 (1st Dep't 1994); Maloney v. Maloney, 140 Misc. 2d 852, 856, 532 N.Y.S.2d 203, 205 (Sup. Ct. Richmond County 1988). In Kahn v. Trustees of Columbia University, 109 A.D.2d 395, 396–97, 492 N.Y.S.2d 33, 34–35 (1st Dep't 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 CPLR 5242. JD asserted that, since the payment order exceeded twenty-five percent of earnings, AD should not pay the income execution. See id. at 397–98, 492 N.Y.S.2d at 35. The court ruled, rather questionably, that the money judgment for conversion of the bank account was for the "support" of JC and could
Consumer Credit Protection Act,\textsuperscript{796} apply only "[w]here the income is compensation paid or payable to the debtor for personal services."\textsuperscript{797} In comparison, a covenant not to compete—that is, a covenant to offer \textit{no} personal services—can be one hundred percent garnished.\textsuperscript{798}

There is an odd entanglement between regular income executions and support income executions. A support income execution can capture up to sixty-five percent of personal earnings.\textsuperscript{799} But if it absorbs more than twenty-five percent, no other regular income execution can be honored.\textsuperscript{800} If, on the other hand, the support income execution captures, say, twenty-three percent of earnings, then the regular income execution may get two percent. Family support obligations have priority over executions on other kinds of debt.\textsuperscript{801} So where the family's income executions are second in time but occupy the twenty-five percent or more of wages, ordinary income execution creditors will obtain nothing.\textsuperscript{802}

A divorced \textit{JD} may be paying support voluntarily when served with a regular income execution. May \textit{JD} claim that the voluntary support payments exhaust the twenty-five percent maximum to which \textit{JC} is entitled, thereby defeating the income execution?\textsuperscript{803} The statute requires that a support income execution must exist to soak up the twenty-five percent before \textit{JC}'s regular income execution is blocked.\textsuperscript{804} Nevertheless, courts

\textsuperscript{797} N.Y. C.P.L.R. 5241(g).
\textsuperscript{798} See Kennedy, 195 A.D.2d at 235–36, 607 N.Y.S.2d at 778.
\textsuperscript{800} See N.Y. C.P.L.R. 5231(b)(iii).
\textsuperscript{801} See \textit{id.}; see also \textit{id.} 5241(b).
\textsuperscript{802} See Long Island Trust Co. v. U.S. Postal Serv., 647 F.2d 336 (2d Cir. 1981).
\textsuperscript{803} See N.Y. C.P.L.R 5231(b)(iii).
have used the mandate of CPLR 5240\textsuperscript{805} to change the rules to give \textit{JD} the credit the statute so stingily denied.\textsuperscript{806}

A strange collision between CPLR 5231(b) and section 151 of the Debtor and Creditor Law can occur. The latter section permits \textit{ADs} to set off their obligation to \textit{JD} against \textit{JD's} obligation to them, thereby defeating a levy.\textsuperscript{807} In \textit{Franklin National Bank v. Brita Homes Corp.},\textsuperscript{808} \textit{AD} made cash advances to \textit{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.\textsuperscript{809} But when the commissions \textit{were} earned, presumably \textit{AD's} setoff right would defeat the levy. So any \textit{JD} who can arrange to be paid in advance\textsuperscript{810} can render herself judgment-proof from income executions. Advance pay is a mere loan, not earnings. The setoff right of the employer assures that \textit{JC} never gets a dime. Of course, since CPLR 5240 invites courts to do whatever they want, the tools no doubt exist to prevent such shenanigans.

The regular income execution only encumbers ten percent of income.\textsuperscript{811} But, according to CPLR 5205(d), ninety percent of earnings are exempt,\textsuperscript{812} "except such part as a court determines to be unnecessary for the reasonable requirements of the judgment
debtor and his dependents.\textsuperscript{813} If some of the ninety percent is unnecessary in this way, the judgment creditor can obtain an installment payment order under CPLR 5226.\textsuperscript{814} 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 ten percent of the income permitted by CPLR 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.\textsuperscript{815}

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.\textsuperscript{816} Income 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.\textsuperscript{817} Priority is also preserved after the officer returns an income execution unsatisfied.\textsuperscript{818} 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.\textsuperscript{819} With simple executions, return means that the associated execution lien is dead.\textsuperscript{820} 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. 821 With regard to income executions for support, a levy pursuant to CPLR 5242 takes priority over any other levy. 822 If two such levies exhaust the applicable limit on deductions, the levies share pro rata. 823

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. 824 In the case of support income executions, the execution may be issued by the sheriff directly; 825 this is not true for ordinary executions. 826 So where a sheriff issues a support income execution, this could not also serve as an ordinary execution.

At least one court 827 and the leading treatise 828 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 end if the sheriff gives priority to JC 1 as the first to deliver an execution.

822 See N.Y. C.P.L.R. 5242(d).
823 See id.
824 See id. 5231(d).
825 See id. 5241(b)(1).
826 See id. 5230(b).
828 WEINSTEIN ET AL., supra note 35, ¶ 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.”).
Ordinary executions are subject to the rule of CPLR 5202(a)(1) and (2), empowering post-lien transferees to take free of the earlier lien. This rule seems not to apply to income executions. In In re Beneficial Finance Co. of New York, JC served an execution on the sheriff. Thereafter, JD assigned his wages to 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 income execution was delivered to the sheriff, why shouldn’t the exceptions to the preamble apply as well?

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. 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 ninety 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 ninety days.

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829 See supra text accompanying notes 32-165.
831 Wage assignments are not covered by article 9 of the UCC. See U.C.C. § 9-106 (2007). Rather, they are governed by article 3-A of the New York Personal Property Law. 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.
832 Beneficial Fin., 43 Misc. 2d at 548, 251 N.Y.S.2d at 557.
833 See id. at 549-50, 251 N.Y.S.2d at 558-59.
834 See N.Y. CPLR 5202(a) (McKinney 2008).
835 See Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 308 (1911) ("[T]he policy and purpose of the [B]ankruptcy [A]ct [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.").
837 See id. (delivery of execution and levy within ninety-day preference period).
In order to avoid a preference, the trustee must prove six elements. First, there must be a transfer of debtor property. A “transfer” is defined broadly to include “the creation of a lien.” Second, the transfer must be to or for the benefit of a creditor. Third, the transfer must be “for or on account of an antecedent debt owed by the debtor.” 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. Fifth, the transfer must occur within ninety days of bankruptcy. 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. This test is automatically met whenever an unsecured creditor becomes secured and the debtor is insolvent on the day of bankruptcy. If the trustee proves the prima facie case against a judicial lien, 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. 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

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840 See id. § 547(b)(1).
841 See id. § 547(b)(2).
842 See id. § 547(b)(3). Insolvency is presumed in the ninety-day period preceding the bankruptcy petition. See id. § 547(f).
843 See id. § 547(b)(4)(A). There is a one-year period for insiders, which will typically be triggered in intra-family litigation. See id. § 547(b)(4)(B).
844 See id. § 547(b)(5).
845 See GILMORE & CARLSON, supra note 705, § 2.05, at 157. In fact, the debtor is presumed to be insolvent at all times ninety days before the bankruptcy petition. See 11 U.S.C. § 547(f). In Barr v. National Aircraft Services, Inc. (In re Cosmopolitan Aviation Corp.), 34 B.R. 592, 596 (Bankr. E.D.N.Y. 1983), a judicial lien survived even though it was created within ninety days of bankruptcy because the trustee did not carry the burden of proof on section 547(b)(5). See 11 U.S.C. § 547(g). But given the presumption of insolvency, the trustee should have prevailed.
less than three of the six elements of the trustee’s prima facie case of voidable preference.\textsuperscript{447}

According to section 547(e)(2)(A) of the Bankruptcy Code, a transfer is deemed to occur when it occurs, but only if it is “perfected” within a grace period of thirty days after the transfer.\textsuperscript{448} The grace period was lengthened in 2005 to thirty days from the mean-spirited ten-day grace period of the original Bankruptcy Code.\textsuperscript{449}

Perfection is defined as follows by section 547(e)(1)(B) of the Bankruptcy Code: “[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.”\textsuperscript{550} 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.\textsuperscript{551}

Suppose perfection does not occur within the thirty-day grace period. Then, according to section 547(e)(2)(B) of the Bankruptcy Code, the transfer does not occur when it occurs.\textsuperscript{552} Rather, it occurs when it is perfected.\textsuperscript{553} This can be very bad news for a creditor. It can place a transfer within the ninety-day period, even though the transfer really occurred earlier.\textsuperscript{554}

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.\textsuperscript{555} But CPLR 5234(b) and (c) impose a complex priority rule.\textsuperscript{556} Where all creditors have

\textsuperscript{447} See 11 U.S.C § 547(b). 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 ninety days of bankruptcy (one year for insiders). See id.

\textsuperscript{448} See id. § 547(e)(2)(A).


\textsuperscript{550} 11 U.S.C. § 547(e)(1)(B).

\textsuperscript{551} See id.

\textsuperscript{552} See id. § 547(e)(2)(B).

\textsuperscript{553} See id. § 547(e)(2)(B).

\textsuperscript{554} See id. What if a transfer is never perfected? Since voidable preferences are pre-bankruptcy transfers, section 547(e)(2)(C) of the Bankruptcy Code provides that the unperfected transfer is deemed to be made slightly before the bankruptcy petition. See id. § 547(e)(2)(C).

\textsuperscript{555} See id. § 547(e)(2)(B).

\textsuperscript{556} See N.Y. C.P.L.R. 5202(a) (McKinney 2008).

\textsuperscript{557} See id. 5234(b), (c).
served executions on the same enforcement officer, priority is decided by the order in which the executions are delivered.\textsuperscript{857} 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 section 547(e)(2)(B).\textsuperscript{858} 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:

\textit{Twelfth Scenario}

\textit{December 1, 2006:} JC\textsubscript{1} serves an execution on the federal marshal.

\textit{January 1, 2007:} The start of the preference period.

\textit{March 1:} The marshal levies on the debtor’s property.

\textit{April 1:} JD files for bankruptcy.

Now imagine a hypothetical creditor—JC\textsubscript{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\textsubscript{2} would have priority to any proceeds generated by the sheriff’s execution sale. This possibility proves that JC\textsubscript{1}’s execution lien was not perfected until March 1. Only after March 1 does JC\textsubscript{2} lose the capacity to get a senior judicial lien. So, according to section 547(2)(B) of the Bankruptcy Code, JC\textsubscript{1} received a transfer on March 1, well within the preference period.\textsuperscript{859} JC\textsubscript{1}, therefore, has received a voidable preference, even though, under New York law, JC\textsubscript{1} has an execution lien on December 1.\textsuperscript{860}

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\textsubscript{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 \textit{creation} of a subsequent judicial lien, but also a \textit{levy} pursuant to the creation? To ask the same

\textsuperscript{857} See id. 5234(b).
\textsuperscript{858} See 11 U.S.C. § 547(e)(2)(B).
\textsuperscript{859} See id.
\textsuperscript{860} See N.Y. C.P.L.R. 5202(a).
question in different words, in my fiction, my dream of passion, may I force my soul so to imagine a subsequent \textit{perfected} judicial lien,\footnote{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 \textit{perfected} judgment lien creditor as of the petition date." (emphasis added)). Although this remark concerns section 544(a) of the Bankruptcy Code, not voidable preference law, both concepts require the imagination of attributes of a hypothetical judicial lien.} or am I limited to imagining the creation of an unperfected execution lien (which would be potentially but not necessarily senior to \textit{JC}_1's actual judicial lien)? Unfortunately, the Bankruptcy Code does not spell out any limitations on what a bankruptcy trustee may hallucinate in testing the perfection of \textit{JC}_1's judicial lien. Nevertheless, several New York bankruptcy courts have limited the imaginary exercise to the \textit{creation} of a competing judicial lien. They have not permitted the bankruptcy trustee to imagine a levy following that creation.\footnote{See, e.g., Balaber-Strauss v. Marine Midland Bank, N.A. (\textit{In re} Marceca), 129 B.R. 369 (Bankr. S.D.N.Y. 1991); Syed Indus. Corp. v. Cohen (\textit{In re} Syed Indus. Corp.), 58 B.R. 920 (Bankr. E.D.N.Y. 1986); Barr v. Nat'l Aircraft Servs., Inc. (\textit{In re} Cosmopolitan Aviation Corp.), 34 B.R. 592 (Bankr. E.D.N.Y. 1983); James Talcott Factors, Inc. v. Blatter (\textit{In re} Blatter), 16 B.R. 137 (Bankr. S.D.N.Y. 1981).} At least one 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 ninety days of bankruptcy.\footnote{See Sapir v. Mancuso (\textit{In re} Kambourelis), 8 B.R. 138, 142 (Bankr. N.D.N.Y. 1981).}

In fact, even if the bankruptcy trustee's imagination is too impoverished to conceive of a levy, the bankruptcy trustee can \textit{still} show that execution liens are unperfected until the time of levy.\footnote{See N.Y. C.P.L.R. 5234(c).} In New York, we do not even need to imagine a competing levy.\footnote{See id.} An alternative scenario goes as follows. Suppose on February 28, \textit{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 \textit{JC}_1 at any time before the sheriff levies on behalf of \textit{JC}_1. CPLR 5234(c) makes clear that the filing of a turnover order establishes priority for \textit{JC}_2.\footnote{See id.} \textit{JC}_2's senior judicial lien is a self-perfecting one.\footnote{See id.} Therefore, by simply imagining equity lien creation...
(without any subsequent lien perfection), I can show that JC1's execution lien is not perfected.

The matter stands differently with income executions. 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 section 547(e)(1)(B) requires that I imagine a creditor suing for breach of a simple contract. This imaginary limit precludes me from finding JC1 unperfected when JC1 serves an income execution. 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. 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 section 547(b)(5), if JC were to surrender her judicial lien and enter into a hypothetical chapter 7 liquidation, JC might still receive a one hundred percent 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 section 507(a)(1) priority. This means that a bankruptcy trustee can never undo a judicial lien for a domestic support obligation.

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666 See id. 5231(j).
671 See id.
674 See id.
Income executions in New York are not voidable preferences if the sheriff has served the employer more than ninety days before a debtor’s bankruptcy petition. This was the holding of In re Riddervold v. Saratoga Hospital. 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.

Although many have attacked this position, it is perfectly correct. JD’s “job” is what article 9 would call an account (if article 9 applied to wages). 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. The only case on this subject, however, misses this point.

877 See id. at 346.
878 See id. The avoidance action was brought by JD, not the bankruptcy trustee, pursuant to section 522(h) of the Bankruptcy Code. See id. at 344. 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. See 11 U.S.C. § 522(g)(1)(A) (2000). The wages were exemptible under section 522(d)(5) of the Bankruptcy Code—a wild card that allows any type of property to be exempted. 11 U.S.C.A. § 522(d)(5) (West 2007). 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 section 283 of the New York Debtor and Creditor Law. See Price v. Mfrs. & 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 un garnished portion. See In re McMahon v. Nourse (In re McMahon), 70 B.R. 290, 293 (Bankr. N.D.N.Y. 1987). But only wages earned within sixty days before the garnishment are properly exempted. See N.Y. C.P.L.R. 5205(d)(2) (McKinney 2008); In re Wrobel, 268 B.R. 342, 344 (Bankr. W.D.N.Y. 2001). Meanwhile, nothing in CPLR 5205 would sustain an exemption in the ten percent of wages actually paid over to the sheriff.
881 See David Gray Carlson, Security Interests in the Crucible of Voidable Preference Law, 1995 U. ILL. L. REV. 211, 238 (1995). 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. Riddervold, 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
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.\footnote{883} For this the creditor could be liable in damages.\footnote{884} The garnishment itself, though a valid lien on the debtor's pre-petition property, dissolves of its own accord under the authority of \textit{Local Loan Co. v. Hunt}.\footnote{885} 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.\footnote{886} If pre-petition voluntary wage assignments dissolve from post-petition wages, surely an involuntary assignment (i.e., a garnishment) does too.\footnote{887}

\section*{II. EQUITY LIENS}

In ancient days, the writ of execution was deemed the “legal” remedy for a money judgment.\footnote{888} Equitable remedies existed, but these were subject to the rule that equity disdained to intervene amount of the judgment on the side. Properly, this payment cancels the levy. The ten percent 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 ten percent of the wages.

For the view that a federal property rule for transfer of wages renders \textit{Riddervold} erroneous, see Matthew Frankle, Note, \textit{Wage Garnishments in Bankruptcy: Riddervold Revisited}, 21 CARDOZO L. REV. 927, 952–56 (1999). For opinions within the Second Circuit that decline to follow \textit{Riddervold} on the erroneous premise that \textit{Riddervold} is overruled by \textit{Barnhill v. Johnson}, 503 U.S. 393, 397 (1992), see Price v. Mfrs. & Traders Trust Co. \textit{(In re Price)}, 272 B.R. 828, 829 (Bankr. W.D.N.Y. 2002); Arway v. Mount Saint Mary's Hosp. \textit{(In re Arway)}, 227 B.R. 216, 217 (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 falsely equated with no right to payment.

\footnote{882} \textit{In re Lawrence}, 18 B.R. 360 (Bankr. E.D.N.Y. 1982).

\footnote{883} See 11 U.S.C. § 362(a)(2) (2000) (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 section 362(a) of the Bankruptcy Code to put the debtor back into possession of property, see GILMORE & CARLSON, supra note 705, § 13.09.


\footnote{885} 292 U.S. 234 (1934).

\footnote{886} See \textit{id.} at 244–45.

\footnote{887} See \textit{In re Rutty}, 39 B.R. 204, 206 (Bankr. S.D.N.Y. 1984) (assuming that the debtor owns postpetition wages in a chapter 7 case, in spite of garnishment).

if a legal remedy proved adequate. 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.

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. As with the creditor's bill, a supplementary proceeding was initially possible only if the execution was returned nulla bona. In 1935, however, the legislature abolished the requirement of the execution nulla bona. Today it is possible for judgment creditors to proceed directly to the equitable remedies.

889 See id. at 1024.
890 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 law, or in case he was not in 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 of N.Y. v. Quackenbush, 143 N.Y. 567, 571, 38 N.E. 728, 728–29 (1894) (citations omitted). As a practical matter, if JD did not contest the bill, inquiry into the adequacy of the legal remedy was waived. See Cohen, Supplementary Proceedings, supra note 6, at 1013.
891 See Cohen, Supplementary Proceedings, supra note 6, at 1012.
892 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 Cohen, Property Fraudulently Transferred]. The CPLR went effective on September 1, 1963.
A. Creation

Heretofore we have considered mainly the execution lien. Yet CPLR 5202(b) also provides liens in connection with the “secur[ing of] an order for delivery of, payment of, or appointment of a receiver of, a debt owed to the judgment debtor or an interest of the judgment debtor in personal property.”\(^{894}\) Strangely, when these equity liens come up against levies pursuant to executions, the equity lien’s priority depends on when the order “is filed.”\(^{895}\) 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.\(^{896}\) Or if JC\(_1\) “secures” an order first, but the clerk “files” JC\(_2\)’s order first, JC\(_2\) prevails.\(^{897}\) 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.”\(^{898}\) This vulnerability exists whether or not the property is capable of delivery.\(^{899}\) 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, 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

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\(^{894}\) N.Y. C.P.L.R. 5202(b) (McKinney 2008).

\(^{895}\) See id. 5234(c).

\(^{896}\) See id.

\(^{897}\) See id. (“Where two or more such orders affecting the same interest in personal property or debt are filed, the proceeds of the property 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 CPLR 5225(a) is merely a judgment against the third party, which must be enforced by execution. See WEINSTEIN ET AL., supra note 35, ¶ 5225.06a. The language of CPLR 5225(b) is clearly injunctive; if AD violates it, she is in contempt of court. See N.Y. C.P.L.R. 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 278–308. So the suggestion ends up, in this context, uselessly requiring two turnover proceedings instead of one.

\(^{898}\) N.Y. C.P.L.R. 5202(b).

\(^{899}\) See id. 5202(a)(2).
dispossessed, \textit{JD} still has the power to give better title to a good faith transferee for value. So if the sheriff possesses by levy, \textit{JD} is disempowered. If the sheriff possesses turned-over property, \textit{JD}'s power continues. Obviously, such nonsense cannot be defended.

Suppose, however, that the sheriff holds an auction where \textit{X} is the buyer. Can \textit{X} be confident that \textit{JD}'s power to convey free of the lien has finally been laid to rest? Can \textit{JD} sell out \textit{X} years after the sheriff's sale? There is nothing on the face of the CPLR to give \textit{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,\footnote{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. N.Y. Civ. Prac. Act § 808 (1938).} but when the action terminates with the “securing” of an order.\footnote{See N.Y. C.P.L.R. 5202(b).} Thus, if \textit{JC}_1 commences a turnover proceeding and \textit{JC}_2 manages a levy before the conclusion of the turnover proceeding, \textit{JC}_2 snatches the laurel wreath of priority from the diligent brow of \textit{JC}_1.\footnote{See \textit{In re Kitson & Kitson v. City of Yonkers}, 10 A.D.3d 21, 27, 778 N.Y.S.2d 503, 508 (2d Dep't 2004). This is indicated by the negative pregnant in the first sentence to CPLR 5234(c). See City of New York v. Panzirer, 23 A.D.2d 158, 159–60, 259 N.Y.S.2d 294, 286–86 (1st Dep't 1965).} This is a change from prior law. In \textit{Metcalf Bros. & Co. v. Barker},\footnote{187 U.S. 165 (1902).}\footnote{See \textit{id.} at 175.} for example, \textit{JC} commenced a turnover proceeding with regard to fraudulently conveyed assets eighteen months before a bankruptcy proceeding was commenced.\footnote{See \textit{id.} at 168–69.} It secured a turnover order five months before bankruptcy.\footnote{See \textit{id.} at 172.} The order was filed within four months of bankruptcy.\footnote{Act of July 1, 1898, ch. 541, § 67(f), 30 Stat. 544, 565 (1899).} Under the Bankruptcy Act of 1898, any lien obtained within four months of bankruptcy was null and void.\footnote{Act of July 1, 1898, ch. 541, § 67(f), 30 Stat. 544, 565 (1899).} 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
In modern times, the equity lien would have been judged from the time it was secured or perhaps filed. Commencement of a turnover proceeding does not create a lien, but it does perpetuate a levy. According to the eighth sentence of CPLR 5232(a):

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. This state of affairs is, of course, absurd.

The rejection of the rule of Metcalf Brothers 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. 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 the nineteenth century.

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909 For the record, a bankruptcy trustee would prevail for a different reason. In Metcalf, JC obtained a lien on fraudulently conveyed property by commencing a 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 under 11 U.S.C. § 544(b)(1) (2000) and could recover from JC as a transferee of a transferee. See 11 U.S.C. § 550(a)(2) (2000); David Gray Carlson, The Logical Structure of Fraudulent Transfers and Equitable Subordination, 45 WM. & MARY L. REV. 157, 179–80 (2003).
912 See Ch. 835, § 687-a(2), 1952 N.Y. Laws 1851.
913 See Cohen, Supplementary Proceedings, supra note 6, at 1011–12.
914 See id. 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, 930 (1933).
With regard to tangible property, however, courts declared that if $JC_1$ commenced a supplementary proceeding, she had a lien. But courts also insisted that, if the sheriff levies for $JC_2$ before the turnover or receivership order was entered, $JC_2$ took priority. 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. 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.

After 1952, it became possible for the sheriff to levy property not capable of delivery. This new power of the sheriff extended the battleground 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. Bona fide purchasers could take free and clear of a receiver until the receiver was actually

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915 Doubt was expressed on that score. First Nat'l Bank of Amsterdam 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 overreached by a subsequent levy in favor of other creditors, made before the appointment of a receiver.").

916 See Davenport v. Kelly, 42 N.Y. 193, 198–99 (1870); Van Alstyne v. Cook, 25 N.Y. 489, 495–96 (1862) (equity action started at 2:00 p.m.; levy occurred at 5:00 p.m.); see also Kitchen v. Lowery, 127 N.Y. 53, 60, 27 N.E. 357, 358 (1891) ("[T]he 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 a 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.").

917 Note, supra note 916, at 507.

918 See Distler & Schubin, supra note 8, at 494.

919 See Ch. 835, § 687-a(1), 1952 N.Y. Laws 1851.

appointed.\textsuperscript{921} No express bona fide purchaser rule existed outside the context of receivership.\textsuperscript{922}

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\textsuperscript{923} and have the order filed by the clerk prevails.\textsuperscript{924}

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 the non-statutory idea of \textit{in custodia legis}. In \textit{Clarkson Co. v. Shaheen},\textsuperscript{925} \textit{JD} fraudulently conveyed certificated equity shares to \textit{X}.\textsuperscript{926} \textit{JC}_1 commenced a turnover proceeding against \textit{X} under CPLR 5225(b).\textsuperscript{927} \textit{X} responded claiming the transfer was in good faith and for a fair consideration. While the district court pondered the bona fides of \textit{X}, it required \textit{X} to hand

\textsuperscript{921} See N.Y. Civ. Prac. Act § 808 (1937) (last sentence). This provision was somewhat complex. Former section 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 section 808, meaning that no bona fide purchaser protection existed after the receiver’s appointment. See Cohen, Third Party Orders, supra note 277, at 1208–09.

\textsuperscript{922} A concurring Court of Appeals judge once suggested that bona fide purchasers took free and clear of turnover orders. See Lynch v. Johnson, 48 N.Y. 27, 33 (1871) (Earl, J., concurring).

\textsuperscript{923} See N.Y. C.P.L.R. 5202(b) (McKinney 2008).

\textsuperscript{924} See id. 5234(c) (second sentence). So, for example, the result in Hubbard v. J.P. Lewis Co., 128 A.D. 416, 112 N.Y.S. 1050 (4th Dep’t 1908), would surely be different. In Hubbard, \textit{JC}_1 commenced a supplementary proceeding seeking appointment of a receiver. Before the receiver was appointed, \textit{AD} (who had been served with notice of the supplementary proceeding) paid \textit{JD}. Thereafter, \textit{JC}_2 had the receivership extended to \textit{JC}_1’s judgment. See N.Y. C.P.L.R. 5228(b) (“Where 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) (holding that when a receivership is extended to \textit{JC}_2, \textit{JC}_1 still has priority). The effect of the extension was that \textit{JC}_2 had a lien as of the day he commenced the action seeking the extension. Since \textit{AD} had paid after \textit{JC}_1’s commencement (but before \textit{JC}_1’s extension), the receiver could require \textit{AD} to pay the receiver the amount of \textit{JC}_1’s judgment. Beyond that, \textit{AD} had the right to pay \textit{JD} free and clear of \textit{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 \textit{AD} would have escaped liability altogether.

\textsuperscript{925} 716 F.2d 126 (2d Cir. 1983).

\textsuperscript{926} See id. at 127.

\textsuperscript{927} See id. at 128.
over the equity shares to an officer of the court. Thereafter, the
sheriff, on behalf of JC2, levied the shares. On these facts, if
the matter were governed by the CPLR alone, JC2 should have
prevailed, as JC2 levied before JC1 obtained a turnover order. The
court nevertheless held for JC1; the shares were in custodia legis
at the time of the levy. Therefore, the court officer held the
property in trust for JC1. The most JC2 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.
In general, jurisdiction over the person possessing property is jurisdiction over the property itself.

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,

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928 The Clarkson Court does not discuss the form this levy took. Stock
certificates are property capable of delivery. See N.Y. C.P.L.R. 5201(c)(4). But, where
the stock is in the "lawful possession of [a] pledgee[,]" no levy by seizure is
permitted. Id. 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 450-476.

929 See N.Y. C.P.L.R. 5234(c). Actually, not only had JC1 commenced a turnover
proceeding, but JC1 was the first to levy. The lower court, therefore, concluded that
JC1's levy continued to be valid after the ninety day expiration period, even though
JC1's turnover proceeding was commenced before the levy. See Clarkson Co. v.
Shaheen, 540 F. Supp. 636, 640 (S.D.N.Y. 1982). It can also be noted that the court
ordered property to be delivered to a receiver.

930 See Clarkson, 716 F.2d at 129.
931 See id. at 130.
932 See id.
933 See id. at 129.
934 See Taylor v. Sternberg, 293 U.S. 470, 473 (1935) (determining that a
bankruptcy estate was in custodia legis the minute a bankruptcy petition was 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 by the state court of jurisdiction over the same res necessarily impairs, and
may defeat, the jurisdiction of the federal court already attached. The converse of
the rule is equally true, that where 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)).
935 For the Full Faith and Credit worth of this lien, see supra text accompanying
notes 996-1016.
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 misruled 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 CPLR 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.\textsuperscript{936} 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 order 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.\textsuperscript{937}

C. Debt v. Property

In the context of execution liens, the New York Court of Appeals has attempted to obliterate the difference between debts garnishable under CPLR 5201(a) and property leviable under CPLR 5201(b).\textsuperscript{938} Yet this distinction has refused to be

\textsuperscript{936} See N.Y. C.P.L.R 5202(b) (McKinney 2008).
\textsuperscript{937} See Distler & Schubin, supra note 8, at 486.
obliterated.939 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 CPLR 5227, which presupposes that the proper party to enjoin is AD.940 If, however, the res is also "property," then a court must determine who possesses this property.941 If JD possesses it, JD is the proper party to enjoin under CPLR 5225(a), and JC may proceed by motion.942 If AD possesses property, then AD should be enjoined pursuant to CPLR 5225(b), which requires a "special proceeding."943 Because, under ABKCO Industries, Inc. v. Apple Films, Inc., the difference between...

939 See supra text accompanying notes 331-394.
940 If JC brings a proceeding under CPLR 5225(b) and it should be brought under CPLR 5227, courts are prepared to overlook the gaffe. See JPMorgan Chase Bank, N.A. v. Motorola, Inc., 47 A.D.3d 293, 303, 846 N.Y.S.2d 171, 179 (1st Dep't 2007); City of N.Y. v. Midmanhattan Realty Corp., 119 Misc. 2d 968, 968-69, 464 N.Y.S.2d 938, 939 (Sup. Ct. N.Y. County 1983). But see V P Supply Corp. v. Normand, 27 A.D.2d 797, 797, 279 N.Y.S.2d 124, 125 (4th Dep't 1967) (reversing for many reasons, including trying to collect a debt under CPLR 5225(b)).
941 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. See Beauvais v. Allegiance Sec., Inc., 942 F.2d 838, 840 (2d Cir. 1991).
942 JC, however, must prove JD is in possession. An Internet report that JD owns a car, for example, does not meet the minimal standard of proof. See Erin Capital Mgmt. v. Celis, 19 Misc. 3d 390, 391, 854 N.Y.S.2d 640, 642 (Dist. Ct. Nassau County 2008).
943 A special proceeding is governed by article 4 of the CPLR. JD is not a necessary party to such a supplementary proceeding. See RCA Corp. v. Tucker, 696 F. Supp. 845, 850 (E.D.N.Y. 1988). Nevertheless, JD is entitled to notice of the CPLR 5225(b) proceeding. See N.Y. C.P.L.R. 5225(b) (McKinney 2008). A federal court need not find separate jurisdictional grounds for a supplementary proceeding if there was subject matter jurisdiction over the original law suit. See RCA Corp., 696 F. Supp. at 850. Filing a CPLR 5227 proceeding against AD is the equivalent of moving for summary judgment against him. See A.F.L. Falck, S.p.A. v. E.A. Karay Co., 722 F. Supp. 12, 15 (S.D.N.Y. 1989). Since JC brings a "special proceeding" in the case of CPLR 5225(b) and 5227, AD has a right to a jury if there are facts in dispute. See N.Y. C.P.L.R. 410. If AD does not dispute the indebtedness, no costs against him may be assessed. See id. 5227. 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. See Household Fin. Corp. v. Rochester Cmty. Sav. Bank, 143 Misc. 2d 436, 438, 541 N.Y.S.2d 160, 162 (Rochester City Ct. 1989). Where JC had a judgment against all the partners in a partnership, a special proceeding under CPLR 5225(b) is not necessary for the court to order the partners to pay. See Jones v. Faliermo, 105 Misc. 2d 405, 407-08, 432 N.Y.S.2d 288, 290 (Sup. Ct. N.Y. County 1980).
debt and property has been largely (but not entirely) erased, CPLR 5225(b) and 5227 are “essentially interchangeable.”

The Second Circuit had occasion to address these issues in *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo S.A.* In this case, D was a subcontractor in a toll road project in Mexico. The project failed, and the contractor could not pay D. The Mexican government intervened and intimated that it perhaps might issue notes directly to D or perhaps to the contractor, who would use them to pay D. Whether the Mexican government had actually committed itself to do this was in dispute.

When D defaulted on notes issued under a New York indenture, P commenced a diversity suit in federal court. Prior to judgment, P alleged that D planned to assign its rights (whatever they might be) to Mexican creditors. P 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, 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. 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, it would have found that pre-judgment attachment under article 62 of the CPLR to be a close question. Under article 62, the court issues an order of attachment only if the plaintiff can show

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946 190 F.3d 16 (2d Cir. 1999).
948 See id. at 332-33.
949 See id. at 318 n.3.
950 On other occasions, the Supreme Court has cast off its imperious sloth and has declared its ability to affirm a lower court opinion on grounds not considered by the court below. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996).
statutory grounds for it.\textsuperscript{951} One of the grounds is that the defendant is "a foreign corporation not qualified to do business in the state."\textsuperscript{952} "Qualified to do business" means that the corporation has filed the application described by article 13 in the New York Business Corporation Law. If that ground does not suffice, \( P \) would have to show 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]."\textsuperscript{953} In New York, insider preferences are fraudulent conveyances.\textsuperscript{954} 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.\textsuperscript{955}

If these preferences were fraudulent conveyances, an order of attachment could have issued. If delivered to the sheriff, a lien is created.\textsuperscript{956} 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

\textsuperscript{951} See N.Y. C.P.L.R. 6201 (McKinney 2008).

\textsuperscript{952} Id. 6201(1).

\textsuperscript{953} Id. 6201(3).


\textsuperscript{955} 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.


\textsuperscript{956} See N.Y. C.P.L.R. 6203.
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 or the legal ability to exclude others, then indeed a levy could be achieved by serving an order of attachment on D. 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? Under CPLR 6210, a court is authorized to issue “a temporary restraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of CPLR 6214." Oddly, CPLR 6210 authorizes a temporary restraining order that simply reiterates what CPLR 6214(b) already provides. CPLR 6214(b) states that a “garnishee” is prohibited from making “any sale, assignment of transfer of, or any interference with any such

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957 Id. 6214(a) (emphasis added).
958 See Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 23–25 (2d Cir. 1999).
959 See Benedict v. Ratner, 268 U.S. 353, 362–63 (1925) (noting that 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, 223 (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 possession of.”), overruled by Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The idea of possession as “sole and despotic dominion... in total exclusion” of others is Blackstonian. 2 William Blackstone, Commentaries on the Laws of England 2 (1766).
961 But see Michelsen v. Brush, 233 F. Supp. 868, 871 (E.D.N.Y. 1964) (stating that 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.’”).
962 See Grupo Mexicano, 190 F.3d at 18.
CPLR 6210 must be referring to \textit{prospective garnishees not yet garnished}. The idea is that $P$ obtains an order that can be served on the soon-to-be garnished person, even before the sheriff levies.

In order to justify a temporary restraining order under CPLR 6210, courts would have to find that $D$ can be a garnishee under CPLR 6214(b). The first two sentences of CPLR 6214(b) certainly treat the garnishee as someone different from $D$. The subsequent five sentences could be referring to $D$. One of these (the fifth sentence) forbids "the garnishee" from making or suffering any transfer. The CPLR defines a garnishee as "a person who owes a debt to a judgment debtor, or a person other than the judgment debtor . . ." Accordingly, one state authority thought this sentence does not apply to $D$. A federal court has ruled that CPLR 6210 refers only to ADs, never, to Ds. Yet at least one state justice thought CPLR 6210 applies to $D$ and therefore restrained $D$ for a time. Therefore, whether an injunction could have restrained $D$ in \textit{Grupo Mexicano} is a close question. A post-\textit{Grupo Mexicano} court has ruled, however, that where a creditor is likely to succeed on the merits of a fraudulent conveyance, a preliminary injunction under Rule 65 can issue.

This holding, if correct, reduces the significance of the Supreme Court's antiquarian dalliance in \textit{Grupo Mexicano} to near zero.

In any case, by the time \textit{Grupo Mexicano} was remanded from its unedifying stay with the Supreme Court, the district court had granted $P$ 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

\footnotesize{
\begin{itemize}
\item \textit{Id.} 6214(b).
\item \textit{Id.} 106(j).
\item Fin. Inv. Co. (Bermuda) v. Gossweiler, 145 A.D.2d, 535 N.Y.S.2d 633 (2d Dep't 1998) (D not guilty of contempt under the fifth sentence for selling property after receiving the order of attachment).
\item In re Contichem, No. 99 CIV. 10493, 1999 WL 977364 (S.D.N.Y. Oct. 27, 1999).
\item Louie v. David & Chiu Place Restaurant, Inc. 261 A.D.2d 150, 689 N.Y.S.2d 476 (1st Dep't 1999) (CPLR 6210 order later dissolved, as $P$ was unlikely to succeed on the merits).
\item \textit{Grupo Mexicano}, 190 F.3d at 19.
\end{itemize}
}
restraining order. The propriety of this injunction was not disputed. 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. On further appeal, the issue became whether this court order was justified as a turnover order under CPLR 5225 or 5227.

JD claimed not, because its receivables were "debts," not "property." If so, then JC could proceed only under CPLR 5227, which would have required action against 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., which sought to erase the distinction between debts and property. So the Grupo Mexicano court analyzed only whether the receivables were property.

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

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971 See id.
972 See id. at 20. Probably because the court, or even JC's attorney, as officer of the court, can issue restraining notices. See N.Y. C.P.L.R. 5222(a).
973 Grupo Mexicano, 190 F.3d at 19; see N.Y. C.P.L.R. 5225(c) ("The court may order any person to execute and deliver any document necessary to effect payment or delivery.").
974 See Grupo Mexicano, 190 F.3d at 20–22.
975 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. See id. at 20; cf. Gadsby & Hannah v. Socialist Republic of Rom., 698 F. Supp. 483, 485–86 (S.D.N.Y. 1988) (where illegal restraining order kept bank accounts in place, a turnover order, which could have been authorized, was denied).
976 See Grupo Mexicano, 190 F.3d at 22.
977 39 N.Y.2d 670, 674–75, 350 N.E.2d 899, 901–02, 385 N.Y.S.2d 511, 513 (1976); see Grupo Mexicano, 190 F.3d at 23 ("ABKCO virtually erases the distinction in [CPLR] 5201 between 'debt' and 'property' by recharacterizing—as '[p]roperty against which a money judgment may be enforced'—debts that otherwise are placed out of reach by [CPLR] 5201(a)'s requirement that the debt being pursued be either past due or certain to become due upon demand.").
979 Accord Beauvais v. Allegiance Sec., Inc., 942 F.2d 838, 841 (2d Cir. 1991) (debt could be recovered under CPLR 5225(b)); see Grupo Mexicano, 190 F.3d at 24.
980 N.Y. C.P.L.R. 5201(b) (McKinney 2008).
981 See Grupo Mexicano, 190 F.3d at 25–26.
purposes of [CPLR] 5201 is necessarily characterizable as property for purposes of [CPLR] 5225 and 5227 as well."\textsuperscript{982} 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 [CPLR] 5201; and second, \textit{that the party against which the creditor has chosen to proceed has the ability to produce the asset}.\textsuperscript{983}

This second requirement seems merely to be a restatement of CPLR 5225(a)'s requirement that "the judgment debtor \[be\] in possession or custody of money or other personal property."\textsuperscript{984} 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?\textsuperscript{985} The answer must be yes. The premise of \textit{Grupo Mexicano} is that debt \textit{is} property. Property must have a possessor, if possession means the power to exclude (and not mere manucaption of tangible property). So defined, who but \textit{JD} is eligible to be the possessor? Certainly not \textit{AD}. For \textit{AD} the debt is the \textit{opposite} of property; it is liability.\textsuperscript{986} Therefore, turnover is possible because, in general, a debtor possesses her general intangible property.\textsuperscript{987}

The rule that emerges from \textit{Grupo Mexicano} is that persons over whom a court has jurisdiction can be ordered to fetch

\begin{itemize}
  \item \textsuperscript{982} \textit{Id.} at 25.
  \item \textsuperscript{983} \textit{Id.} at 21 (emphasis added).
  \item \textsuperscript{984} N.Y. C.P.L.R. 5225(a).
  \item \textsuperscript{985} The \textit{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.3d at 25. This would appear, at first, to exceed the scope of Rule 69 of the Federal Rules of Civil Procedure, which requires deference to state law. See \textit{FED. R. CIV. P. 69(a)(1)}. But state law basically permits a court to do what it wants. See N.Y. C.P.L.R. 5240 ("The court may... make an order... extending... the use of any enforcement procedure.").
  \item \textsuperscript{986} According to CPLR 5232(a), "[a]ll property not capable of delivery in which [\textit{JD} had]... an interest... thereafter coming into the possession or custody of such a person... shall be subject to the levy." N.Y. C.P.L.R. 5232(a). So the CPLR oddly refers to \textit{AD} as having possession of its own obligation to \textit{JD}.
  \item \textsuperscript{987} My conclusion is contradicted by \textit{Harris v. Balk}, 198 U.S. 215 (1905), \textit{overruled by Shaffer v. Heitner}, 433 U.S. 186 (1977), a case on which I will, with some embarrassment, substantially rely. See \textit{infra} text accompanying notes 996-1020. 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." \textit{Harris}, 198 U.S. at 223. In my view, the word possession implies a power to exclude, not physical grasping of a thing.
\end{itemize}
property located outside New York. In In re Gaming Lottery Securities Litigation, 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. It found Grupo Mexicano to be consistent with such an order. Similarly, in Gryphon Domestic VI, LLC v. APP International Finance Co., B.V., 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.

In Koehler v. Bank of Bermuda Ltd., the Second Circuit certified this very question to the New York Court of Appeals.

Meanwhile, following this certification, an appellate panel, in a split decision, has ruled against such a power. The case involved a pre-judgment attachment, but since a levy of a garnishee is, in effect, an injunction, the case serves as good authority for our purposes.

In Hotel 71 Mezz Lender LLC v. Falor, P sued various Ds as guarantors of a bad loan. The Ds owned shares in limited liability corporations ("LLCs") located outside New York. P

988 See Grupo Mexicano, 190 F.3d at 25 n.9.
993 See id. at 33-34, 36-37, 836 N.Y.S.2d at 10-13. 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 . . .

Id. at 31, 836 N.Y.S.2d at 9. In fact, garnishment in New York is injunctive in nature. See supra text accompanying notes 270-277. 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.

994 544 F.3d 78 (2d Cir. 2008). The highly confused procedural context of this case is discussed supra notes 535-546 and accompanying text.
995 58 A.D.3d 270, 869 N.Y.S.2d 61 (1st Dep't 2008).
obtained an order of attachment against the Ds (all nondomiciliaries who had nevertheless contractually agreed to a New York forum). The president of at least some of the LLCs (and himself a D) was levied while visiting New York in connection with the litigation. The appellate panel ruled that the order of attachment was inappropriate. Admittedly, the president was a proper garnishee under CPLR 5201(c)(1), which provides:

Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

The majority of the panel ruled that the situs of the property (LLC interests) was located outside the state. Therefore, no order of attachment (and by implication no turnover order) could be issued against a proper garnishee.

The weight of authority probably holds that 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, a civil procedure classic overruled for its jurisdictional holding but not for its proposition about the nature of debt, which it presumably borrowed from state law. 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." Harris suggests that a turnover order issued in New York against a person subject to its jurisdiction creates a lien on a debt that

997 See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980) ("We recently abandoned the outworn rule of Harris v. Balk . . . .").
999 Harris, 198 U.S. at 222. Some cogent discussion of these two holdings of Harris appears in WEINSTEIN ET AL., supra note 35, ¶ 5209.04.
must be recognized nationally. In *Harris*, *JC* was in Maryland, and *JD* and *AD* were in North Carolina. On a Maryland sojourn, *AD* was garnished on behalf of *JC*. Upon returning to North Carolina, *JD* sued *AD* on the debt and won at all levels of the North Carolina 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. *JD* would have been dispossessed of this payment intangible (to the extent of *JC*’s judicial lien) and would lack the right to collect it. This analysis, however, no longer pertains in pre-judgment situations because of *Shaffer v. Heitner*, but it still holds in the post-judgment venue of *Grupo Mexicano*.

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1001 See id.
1002 See id. at 318–19.
1003 See *Harris*, 198 U.S. at 228.
1004 See *Harris*, 30 S.E. at 318.
1005 See *Harris*, 198 U.S. at 223 (“If the debtor leave [sic] 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.”).
1006 In *Harris*, *AD* owed *JD* $180. *JC* claimed $300 from *JD*. If *JC* claimed less than $180 from *AD*, the garnishment would not have entirely extinguished *AD*’s obligation to *JD*. *JD* would still have the right to a surplus.
1008 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, 841 (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, 329–30, 67 N.E.2d 510, 512 (1946). *Hotel 71 Mezz Lender LLC v. Falor*, 58 A.D.3d 270, 869 N.Y.S.2d 61 (1st Dep’t 2008), has revived the old tradition of denying *Harris v. Balk*. In that case, a proper garnishee of intangible property was held immune from an order of attachment because the situs of the intangible property (interests in LLCs) was outside New York. When a dissenting judge pointed out that *Harris v. Balk* supported the order of attachment, the majority responded by relying on a case asserting the branch rule for banks. *Id.* at 274, 869 N.Y.S.2d at 64 (citing *In re Nat’l Union Fire Ins. Co. v. Advanced Employment Concepts, Inc.*., 269 A.D.2d 101, 703 N.Y.S.2d 3 (1st Dep’t
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), "[i]t 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." In other words, according to the Supreme Court, possession of intangible property is impossible. 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*, 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. On appeal, the United States Supreme Court upheld the insult.

*Fall* applies equally well to judicial liens on tangible personal property. According to New York law, the turnover order creates a lien. 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. Should JD in New

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1015 See id. at 14.

1016 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. See 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 apparently within its rights to snub the Washington decree.

1017 See 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.”).

1018 See N.Y. C.P.L.R. 5202(b) (McKinney 2008).

1019 New York courts are inclined to honor foreign attachments when the Constitution does not require it. See Oppenheimer v. Dresdner Bank A.G., 41 N.Y.2d 949, 950, 363 N.E.2d 358, 358, 394 N.Y.S.2d 634, 634 (1977) (bank garnished in Germany did not have to pay a second time in New York); see also JPMorgan Chase Bank v. Motorola, Inc., 47 A.D.3d 293, 312–13, 846 N.Y.S.2d 171, 186 (1st Dep't 2007) (excusing AD from a turnover action while in New York because JD was subject to insolvency proceedings in India, which entailed a statute prohibiting assignments by JD). In *American Fidelity Fire Insurance Co. v. Paste-Ups Unlimited, Inc.*, 368 F. Supp. 219, 230 (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, 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 inapposite. Two cases hold only that a local court has jurisdiction to adjudicate ownership of local assets. See Clark v. Willard, 294 U.S. 211, 213 (1935); Green v. Van Buskirk, 72 U.S. 307, 312 (1866). 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 holds only that,
York be ordered to deliver Nebraska-located property to a New York 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. 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 intangible as well as tangible property? Imagine an alternative history in Harris, in which, not AD, but JD traveled from North Carolina to Maryland. JD is served with process by JC. The Maryland court enters a money judgment and then issues an injunction à la Grupo Mexicano, ordering JD to assign all receivables to JC immediately, adding that the assignment shall be deemed accomplished when the turnover order is entered. Meanwhile, JC, 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 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.


1020 A bankruptcy trustee is deemed to be a judicial lien creditor as of the time of the bankruptcy petition. See 11 U.S.C. § 544(a)(1) (2000). Presumably, the trustee has a hypothetical judicial lien as of the bankruptcy petition in all fifty states and other territories of the United States.
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. 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 encumbered thing from SP's obligation to pay the surplus, if any.

JC also has the option of obtaining some sort of equity lien on the surplus. A receivership is possible, but a turnover proceeding seems the most logical alternative. Can the language of CPLR 5225(b) accommodate JC? The pledgee is "a person in possession... of... personal property in which the judgment debtor has an interest," as CPLR 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. JD has no right of possession against SP. Can JC show that her rights are superior to those of SP?

In this respect, new article 9 muddies the previously crystalline waters of New York law. According to old UCC section 9-311, "[t]he debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of... attachment, levy, garnishment or other judicial

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1021 N.Y. C.P.L.R. 5232(b).
1022 See supra text accompanying notes 445-477.
1024 See Knapp v. McFarland, 462 F.2d 935, 941 (2d Cir. 1972) (discussing the possibility of a turnover order in dictum); Key Lease Corp. v. Mfrs. Hanover Trust Co., 117 A.D.2d 560, 561, 499 N.Y.S.2d 66, 68 (1st Dep't 1986); Samuels v. Samuels, 99 A.D.2d 986, 986, 473 N.Y.S.2d 436, 437 (1st Dep't 1984) (ignoring JD's claim that the third party was a pledgee).
1025 N.Y. C.P.L.R. 5225(b).
1026 Id.
1027 See Key Lease, 117 A.D.2d at 561, 499 N.Y.S.2d at 68.
process). Under this language, JC could have shown that JC's right to JD's equity is superior to those of SP (with the proviso, of course, that SP's security interest remains intact). The new UCC section 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 judgment is possible "against any property which could be assigned or transferred." Can equity in collateral be assigned or transferred? New UCC section 9-401 refuses to say. Yet we learn from section 2-403 of the UCC that "[a] purchaser of goods acquires all title which his transferor had." This implies a power to convey the equity in pledged goods. "Equity" in this context would include the right of redemption, and the right to receive a surplus if the pledgee forecloses. Similar statements can be found in article 3 for instruments and article 8 for securities. So on this basis, we can affirm that CPLR 5225(b) permits access to the equity interest of JD in pledged collateral.

The ambiguity engendered by new section 9-401 has manifested itself in Capital Ventures International v. Republic of Argentina, in which JC sought pre-judgment attachment of excess collateral held by JD. JD argued that it had promised SP not to transfer equity. Therefore, JD reasoned, the equity could not be levied because the property could not be assigned. The

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1029 Id. § 9-401(a).
1030 N.Y. C.P.L.R. 5201(b).
1031 U.C.C. § 2-403(1).
1032 See U.C.C. § 9-623; see also Leumi Fin. Corp. v. Wydler, Balin, Pares & Soloway, 60 Misc. 2d 1021, 1028, 304 N.Y.S.2d 988, 996 (Sup. Ct. Nassau County 1969) (suggesting JC could redeem pledged stock by paying SP the amount of the secured debt).
1033 See U.C.C. § 9-615(d)(1).
1034 See id. § 3-203(b) ("Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument . . .").
1035 See id. § 8-302(a) ("[A] purchaser of a . . . security acquires all rights in the security that the transferor had . . .").
1036 280 F. App'x 14 (2d Cir. 2008).
court agreed and ruled that the surplus was not leviable.\textsuperscript{1037} This is an unfortunate interpretation. Of course, JD has the power to convey the equity. To be sure, it would be a breach of contract to do so. But so what? On the reasoning of the Capital Ventures court, if the appearance of a judicial lien constitutes an event of default (as it always does), then no judicial lien can attach because JD has, in effect, promised that there would be no judicial liens. Mere promissory restriction on transfers is surely not what CPLR 5201(b) is talking about when it requires property to be assignable. Rather, the restriction must be built into the property right itself.

An oddity about CPLR 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.\textsuperscript{1038} 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 her grubby fingers on the pledged property.

It will be recalled that a sheriff who holds an execution sale over the protest of SP with a right of possession commits the tort of conversion.\textsuperscript{1039} Presumably, in the context of a turnover order requiring the pledgee to turn over the collateral to the sheriff, the sheriff does not act wrongfully in holding the sale over the opposition of the pledgee. The very fact that a court has ordered the turnover implies that the pledgee’s senior right of possession has been set aside in the name of equity, so that a valuable equity can be realized on behalf of JC.

\section*{E. Fraudulent Conveyance Recoveries}

Under CPLR 5225(b), AD can be ordered to turn over JD’s property to the sheriff.\textsuperscript{1040} But is it likewise true that a transferee can be ordered to turn over property in which JD has no interest at all—property which JD fraudulently conveyed to AD? According to CPLR 5225(b), turnover can be had “against a person who is a transferee of money or other personal property

\begin{footnotes}
\item[1037] See id. at 16.
\item[1038] See N.Y. C.P.L.R. 5225(b) (McKinney 2008).
\item[1039] See Teddy’s Drive In, Inc. v. Cohen, 47 N.Y.2d 79, 82, 390 N.E.2d 290, 291, 416 N.Y.S.2d 782, 783 (1979); supra text accompanying notes 650-677.
\item[1040] See N.Y. C.P.L.R. 5225(b).
\end{footnotes}
from the judgment debtor where it is shown that... the judgment creditor’s rights to the property are superior to those of the transferee.” The glove of this provision well fits the hand of fraudulent conveyance.

Perhaps a creditor gets a lien on fraudulently conveyed property earlier than the entry of a turnover order. We have seen that the non-statutory notion of in custodia legis might push the date of the lien to the commencement of a proceeding under CPLR 5225(b). But beyond that, must we conclude that, since a debtor who fraudulently conveys property has completely alienated it, a receivership cannot reach the property because the receiver only obtains power over “property in which the judgment debtor has an interest”? A receiver, however, may also “do any... act[] designed to satisfy the judgment.” This would include the bringing of a fraudulent conveyance action against the transferee, but any lien would depend upon securing a turnover order under CPLR 5225(b).

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,

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1041 See id. CPLR 5225(b) is also a proper vehicle for piercing JD’s corporate veil to reach assets of JD’s shareholder. See Trust v. Kummerfeld, 153 F. App’x 761, 762 (2d Cir. 2005); Ren-Cris Litho, Inc. v. Vantage Graphics, Inc., No. 96-7802, 1997 WL 76860, at *4 (2d Cir. Feb. 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 909, at 171. Can this judgment be entered under the aegis of CPLR 5225(b)? The answer is yes. So long as X is a transferee, CPLR 5225(b) authorizes the proceeding, even if X is no longer in possession. See FDIC v. Conte, 204 A.D.2d 845, 846, 612 N.Y.S.2d 261, 262 (3d Dep’t 1994). The Supreme Court has ruled that veil-piercing cases do not fall within the ancillary jurisdiction of federal courts; some independent ground of jurisdiction must be found. Peacock v. Thomas, 516 U.S. 349, 349 (1996). Fraudulent conveyance actions, however, do fall within the ancillary jurisdiction. Epperson v. Entm’t Express, Inc., 242 F.3d 100, 104 (2d Cir. 2001).

1042 See supra text accompanying notes 927-936.

1043 See supra text accompanying notes 927-936.

1044 N.Y. C.P.L.R. 5228(a).

1045 Id.

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... 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... 1047

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.1048

This language, which precedes the enactment of the CPLR,1049 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 dispossesses 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.1050

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1047 N.Y. C.P.L.R. 5202(a) (emphasis added).
1048 N.Y. DEBT. & CRED. LAW § 278 (McKinney 2008) (emphasis added).
1049 New York enacted the Uniform Fraudulent Conveyance Act in 1925. L. 1925 ch. 254, effective April 1, 1925.
1050 See Thurber v. Blanck, 50 N.Y. 80, 84 (1872). The Court of Appeals said: “In the case of personal chattels, the sheriff seizes the 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
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.1051 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."1052 Here, the objection is that JD has no interest after conveying to X. Yet New York courts think JC has a lien on X's property all the same.1053 Given this analysis, why shouldn't an execution encumber X's personal property with a lien when JC delivers it to the sheriff?1054

The analysis assumes (erroneously, in my opinion) that when JD fraudulently conveys to X, JD actually conveys nothing and is still the owner.1055 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.

Until 2008, no modern case existed in which the sheriff was asked to levy the property of X directly, or grounds that it was fraudulently conveyed.1056 Perhaps suspecting constitutional problems,1057 judgment creditors are utilizing turnover

1051 See Carlson, Money Judgment Part I, supra note 11.
1052 N.Y. C.P.L.R. 5203(a).
1054 See id. at 631, 459 N.Y.S.2d at 949 (restraining notice served on X deemed effective, even though CPLR 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 Dep't 1943), JD made a fraudulent conveyance to X, JC sought to set it aside. The lower court ruled that JC had priority because JC served an execution, and therefore, had an equitable lien on X's property. On appeal, the court held that JC's lien died when sheriff returned the execution unsatisfied.
1055 See N.Y. C.P.L.R. 5203(a).
1056 For ancient cases, see Rinchey v. Stryker, 28 N.Y. 45, 54 (1863) (levying sheriff unsuccessfully sued for trespass of chattels); Hall v. Stryker, 27 N.Y. 596, 605 (1863) (same).
1057 See Save Way Oil Co. v. 284 E. Parkway Corp., 115 Misc. 2d 141, 143, 453 N.Y.S.2d 554, 556 (Sup. Ct. Kings County 1982) (stating that fraudulent conveyance
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. Nevertheless, in SEC v. Universal Express, Inc., the clerk of the court in the Southern District of New York issued an execution to the marshall in Boca Raton, who seized jewelry from X, a cash buyer. X did not raise the due process issue and, at present, is litigating whether it was a bona fide purchaser within the meaning of the Uniform Fraudulent Conveyance Act.

F. Injunctions That Do Not Create Liens

According to CPLR 5202(b), an equity lien arises from the securing of an order for

(a) the delivery of a debt owed to JD;
(b) the payment of a debt owed to JD;
(c) delivery of an interest of JD in personal property;
(d) the appointment of a receiver of a debt owed to JD;
(e) the appointment of a receiver of an interest of JD in personal property.

Missing from the list are certain other injunctions authorized by the CPLR. For example, a court can order JD to make installment payments, but, other than the leading treatise, no one has suggested that such an order puts a lien law “tread[s] on thin constitutional ground [and] must be employed with the strictest adherence to statutory requirements” (citation omitted)).

1058 See id. at 145, 453 N.Y.S.2d at 557.
1059 See id.
1061 See id. at *1–2.
1062 See id. at *3. How is it that a federal marshal in Florida can levy under an execution issued pursuant to the CPLR? Ordinarily, federal JC's must register their New York judgments with the district court in Florida, which then issues a Florida execution to the marshal. 28 U.S.C. § 1963 (2000). When JC is the United States government, however, an execution “shall be issued from and made returnable to the court which rendered the judgment, but may be executed in any other State, in any Territory, or in the District of Columbia.” Id. § 2413.
1063 See N.Y. C.P.L.R. 5202(a) (McKinney 2008). A receiver can be authorized to “administer, collect, improve, lease, repair or sell any real or personal property.” Id. 5228(a). If JC has obtained the appointment of a receiver, JC is not necessarily entitled to a different receiver, but may have the receivership “extended” to JC, with JC having first priority. See id. 5225(b).
1064 See id. 5226.
1065 See Weinstein El al., supra note 35, ¶ 5202.15.
on the assets of a debtor.\textsuperscript{1066} 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 \textit{JD}.\textsuperscript{1067} According to CPLR 5222(b), the effect of serving a notice is that the recipient is forbidden to transfer any property or pay any debt in which \textit{JD} has an interest.\textsuperscript{1068} 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 \textit{JC} cannot pursue the property now in the hands of a third party.\textsuperscript{1069}

In \textit{International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.},\textsuperscript{1070} however, the Court of Appeals ruled otherwise.\textsuperscript{1071} In this forgotten case, \textit{JC} served a restraining notice on the debtor.\textsuperscript{1072} Shortly after, \textit{JD} made an assignment for the benefit of creditors.\textsuperscript{1073} \textit{JC} then sought a turnover against the assignee pursuant to CPLR 5225(b).\textsuperscript{1074} Obviously, a turnover was appropriate only if \textit{JC} already had a lien on the assignee’s property that was senior to the rights of the assignee.

\textsuperscript{1066} CPLR 5226 orders are the mode for reaching wages and other exempt income above and beyond the ten percent limit on income executions. See supra text accompanying notes 811-815. Oddly, a creditor can obtain appointment of a receiver to receive income, Edelman v. Edelman, 83 A.D.2d 622, 622, 441 N.Y.S.2d 529, 529-30 (2d Dep’t 1981), in which case a lien is created.

\textsuperscript{1067} See N.Y. C.P.L.R. 5222(a). A pre-judgment restraining notice is also possible upon court order, but only if the plaintiff has received “a verdict or decision.” \textit{Id.} 5229.

\textsuperscript{1068} See id. 5222(b).

\textsuperscript{1069} See id.


\textsuperscript{1070} 36 N.Y.2d 121, 325 N.E.2d 137, 365 N.Y.S.2d 808 (1975).


\textsuperscript{1072} See \textit{id.} at 123, 325 N.E.2d at 138, 365 N.Y.S.2d at 809.

\textsuperscript{1073} See \textit{id.} at 123-25, 325 N.E.2d at 138-39, 365 N.Y.S.2d at 809-11.

\textsuperscript{1074} See \textit{id.} at 124, 325 N.E.2d at 138, 365 N.Y.S.2d at 809.
Judge Charles Breitel ruled that, by virtue of the restraining notice, JC was senior to the assignee. He so ruled even as he acknowledged that early drafts of CPLR 5222 had expressly granted creditors a lien, a provision later deleted. The thrust of his analysis is the truism that an assignee takes the same rights as the assignor had. Since the assignor was enjoined from making conveyances, the assignee 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. There, JC served a restraining order on AD, who held proceeds from the sale of JD's business. JC also commenced a turnover proceeding. JC 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.1084

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.1085 Astonishingly, it cited International Ribbon as authority for its dictum, even though International Ribbon holds the dead opposite.1086

Still, one can find recent examples where a lien emerges from CPLR 5222. In Kates v. Marine Midland Bank, N.A.,1087 JC served a restraining notice on AD, a trustee of JD.1088 After the restraining notice, AD made an advance distribution to JD.1089 It then sought to set off its loan to JD against JC’s levy.1090 The court did not permit the setoff, although setoffs are generally good against levies.1091 Is this not attributing the power of a lien to the lowly restraining notice?

Similarly, in Rafkind v. Chase Manhattan Bank, N.A.,1092 the Securities and Exchange Commission (“SEC”) had enjoined a bank from paying a bank account.1093 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 against any property which could be assigned or transferred.”1094 Judge Martin reasoned that, since JC could not bring a turnover proceeding against the bank under CPLR 5227, the SEC was senior.1095 If this is correct, then restraining notices generally

1084 Id. at 160, 162, 259 N.Y.S.2d at 286, 288.
1088 See id. at 722, 541 N.Y.S.2d at 927.
1089 See id.
1090 See id. at 723, 541 N.Y.S.2d at 927.
1091 See id. at 722–23, 725, 541 N.Y.S.2d at 927, 929; see also N.Y. DEBT. & CRED. LAW § 151 (McKinney 2008).
1093 See id. at *1.
1094 N.Y. C.P.L.R. 5201(b) (McKinney 2008).
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 bound the bank only, not JD.1096

A different sort of injunction that has been denied lien status is one in connection with selling shares in a cooperative apartment. Such shares are considered personal property.1097 If they represent the debtor's principal residence, they are exempt property under CPLR 5206(a)(1).1098 According to CPLR 5206(e), a creditor is invited to commence a special proceeding for the sale of the shares if they exceed $50,000 in value.1099 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.1100 But where the homestead is in personal property, the special proceeding, which culminates in a court order, should be viewed as a turnover order.1101 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,1102 however, the court ruled otherwise. It relied on the premise that the order in question was not among those referred to in CPLR 5202(b). This decision must be viewed as wrongly decided. CPLR 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. If this order was ninety days old by the time of the debtor's bankruptcy petition,1103 then the creditor should have been deemed a secured creditor in JD's bankruptcy.

1098 See N.Y. C.P.L.R. 5206(a)(1).
1099 See id. 5206(e).
1100 See id. 5203(a).
1101 See id. 5225(b).
1103 Otherwise, it is a preference under section 547(b) of the Bankruptcy Code. 11 U.S.C. § 547(b) (2000).
Prior to the CPLR, the Court of Appeals, in *Wickwire Spencer Steel Co. v. Kemkit Scientific Corp.*, 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 section 808 of the former Civil Practice Act, 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. 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.

III. Exempt Property

A. Monetary Exemptions

Like all states, New York exempts certain personal property "from application to the satisfaction of a money judgment." Most items of exempt tangible property are of negligible 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 but may also exempt proceeds...
of the cash. In *Yates County National Bank v. Carpenter*, the debtor used an exempt military pension to buy a house. The Court of Appeals ruled that the source of the purchase money made the house exempt

where 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.

Consistent with this sentiment, courts agree that the income exemptions survive at least when deposited in checking accounts, even commingled bank accounts.

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. The exemption continues for one year after

\[\text{References:}\]

1112 119 N.Y. 550, 23 N.E. 1108 (1890).
1113 See N.Y. C.P.L.R. 5205(e).
1114 *Yates*, 119 N.Y. at 555–56, 23 N.E. at 1109.
1116 See *In re* Coolbaugh, 250 B.R. 162, 166–67 (Bankr. W.D.N.Y. 2000) (noting that the tracing rule presumed that all withdrawals within sixty days of bankruptcy were withdrawals of exempt wages; the leftovers are presumed to be non-exempt cash).
1117 This provision foresees that the sheriff might levy exempt property wrongfully, in which case she is guilty of the tort of conversion. See *Conklin v. McCauley*, 41 A.D. 452, 452, 58 N.Y.S. 879, 880 (2d Dep't 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. See *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." N.Y. C.P.L.R. 5205(b). Since cars are bankruptcy-only exempt but fully subject to money judgments, CPLR 5205(b) did not technically apply. See *In re De Vries*, 76 B.R. 917, 918–19 (Bankr. N.D.N.Y. 1987); *In re* Lauterbach, 74 B.R. 627, 629 (Bankr. N.D.N.Y. 1987).
collection.\textsuperscript{1118} Similarly, the real estate exemption safeguards the cash proceeds of real estate for one year after a judicial sale.\textsuperscript{1119} The fact that a proceeds theory was expressly provided in these instances suggests that it exists nowhere else \textit{but} these instances. But if this were true, then \textit{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.\textsuperscript{1120} But the CPLR extends protection of even self-settled spendthrift trusts if they qualify as tax deferred retirement accounts within the meaning of ERISA.\textsuperscript{1121} In this respect, the legislature need not have bothered, as federal law

\textsuperscript{1118} See N.Y. C.P.L.R. 5205(b) (last sentence).
\textsuperscript{1119} See id. 5206(e).
\textsuperscript{1121} See N.Y. C.P.L.R. 5205(c)(2). Profit sharing plans that are not related to “illness, disability, death, age, or length of service” do not fall under CPLR 5205(c)(2). \textit{In re Lowe}, 252 B.R. 614, 623–25 (Bankr. W.D.N.Y. 2000) (quoting N.Y. DEBT. & CRED. LAW § 282(2) (McKinney 2008)) (self-settled spendthrift trust not exempt). Canadian ERISA-like accounts are not exempt. \textit{See In re Ondrey}, 227 B.R. 211, 216 (Bankr. W.D.N.Y. 1998). ERISA qualification can be lost for highly technical reasons. \textit{In re Feldman}, 171 B.R. 731, 734 (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. \textit{See id.} at 739. But would not the trustee's hypothetical judicial lien on the day of the 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 a 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. \textit{See In re Handel}, 301 B.R. 421, 423 (Bankr. S.D.N.Y. 2003).
preempts the justified hostility of state law to self-settled trusts of this sort. New York also follows the federal lead by making ERISA property accessible if JC holds a “qualified domestic relations order.” Undoubtedly, New York would have found itself preempted if it dared to legislate otherwise.

CPLR 5202(c) exempts the principal of trusts. Income from an exempt trust can be reached under CPLR 5205(d), which suggests that creditors may obtain at least ten percent—plus greater amounts, if “unnecessary for the reasonable requirements of the judgment debtor and his dependents." Therefore, whereas the corpus of a spendthrift trust is entirely exempt, the income is garnishable in the amount of at least ten percent or more, as described below.

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1122 See 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, 623 (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. DEBT. & CRED. LAW § 282(2)(e), but such a plan must be related to “illness, disability, death, age or length of service.” In re Lowe, 252 B.R. at 623.

1123 N.Y. C.P.L.R. 5205(c)(4). The term is defined in 26 U.S.C.A § 414(p) (West 2007). A spendthrift trust is subject to a “qualified domestic relations order.” N.Y. C.P.L.R. 5205(c)(3)-(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. See In re Smith v. ABC Co., 2005 N.Y. Misc. LEXIS 3467, at *7 (Fam. Ct. Nassau County Sept. 29, 2005). Section 7-3.4 of the Estates, Powers and Trusts Law provides:

Where 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.

N.Y. EST. POWERS & TRUSTS LAW § 7-3.4 (McKinney 2008). In In re Smith, the court concluded that CPLR 5205(c)(4) simply overrides section 7-3.4 of the EPTL, when it comes to qualified domestic relations orders. In re Smith, 2005 N.Y. Misc. LEXIS 3467, at *11-12.


1125 See N.Y. C.P.L.R. 5205(c).

Individual retirement accounts, after 1994, are exempt,\textsuperscript{1127} 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.\textsuperscript{1128}

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.\textsuperscript{1129}

Can a debtor simply stuff extra funds into an ERISA or IRA account, beyond what tax law permits to be tax-deferred, claiming that the entire account is spendthrifted? In \textit{Tompkins County Trust Co. v. Gowin},\textsuperscript{1130} a retiree deposited $100,000 into his retirement account. Although the entire account was protected by a spendthrift clause as required by ERISA, the

\textsuperscript{1127} See N.Y. C.P.L.R. 5205(c)(2). "Either by statute or case law virtually every type of retirement plan is exempt from the claims of the decedent's creditors." \textit{In re Estate of King}, 196 Misc. 2d 250, 255, 764 N.Y.S.2d 519, 523 (Sur. Ct. Broome County 2003).

\textsuperscript{1128} See Pauk v. Pauk, 232 A.D.2d 392, 394, 648 N.Y.S.2d 134, 135 (2d Dep't 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.").


\textsuperscript{1130} 163 Misc. 2d 418, 419, 621 N.Y.S.2d 476, 478 (Sup. Ct. Tompkins County 1994).
debtor was made to disgorge this amount, as it was not tax
defferred under the Internal Revenue Code.\textsuperscript{1131} 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.\textsuperscript{1132} 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."\textsuperscript{1133} This latter
phrase—interposition of a claim—has been interpreted to mean
the service of a summons or complaint that commences a civil
action.\textsuperscript{1134} At least one court has declared that CPLR 5205(c)(5)
is preempted by ERISA\textsuperscript{1135} under the broad preemption principle
articulated in Mackey v. Lanier Collection Agency & Service,
Inc.\textsuperscript{1136} In Mackey, the Supreme Court smacked down Georgia for
exempting 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 CPLR 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.\textsuperscript{1137} This should equally apply to transfers within

\textsuperscript{1131} See id. at 419, 621 N.Y.S.2d at 479.
\textsuperscript{1132} See N.Y. C.P.L.R. 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. See Planned Consumer Mktg., Inc. v. Coats & Clark, Inc., 71 N.Y.2d
\textsuperscript{1133} N.Y. C.P.L.R. 5205(c)(5)(i).
\textsuperscript{1134} See Baker v. Dorfman, No. 99 Civ. 9485, 2000 U.S. Dist. LEXIS 10142, at
*25 (S.D.N.Y. July 21, 2000); Tompkins County Trust Co., 163 Misc. 2d at 419, 621
N.Y.S.2d at 478.
\textsuperscript{1136} 486 U.S. 825, 830 (1988).
\textsuperscript{1137} See 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).
ninety days of the "interposition of the claim."\textsuperscript{1138} \textsuperscript{1138} CPLR 5205(c)(5) creates for such payments the same status as does fraudulent conveyance law for payments made by an insolvent \textit{JD}.

2. Income

\textbf{a. Trust Income}

New York provides various income exemptions. These differ from the exemption of trust principle in that "such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents"\textsuperscript{1139} is not exempt after all. The debtor has the burden to show that the income is indeed necessary for the debtor's reasonable requirements.\textsuperscript{1140}

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.\textsuperscript{1141} Rather, the creditor must seek an installment payment order pursuant to CPLR 5226.\textsuperscript{1142} 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 CPLR 5202(d) is necessary for the reasonable

\textsuperscript{1138} N.Y. C.P.L.R. 5205(c)(5)(i).

\textsuperscript{1139} \textit{Id.} 5205(d)(1); \textit{see also} N.Y. INS. LAW § 3212(d)(2) ("[With regard to exempt annuities,] the court may order the annuitant to pay to a judgment creditor or apply on the judgment in installments, a portion of such benefits that appears just and proper to the court, with due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the annuitant to other creditors under prior court orders."). Although CPLR 3212(d)(2) refers to "judgment creditors," at least one court has ruled that, in the bankruptcy context, an unsecured creditor can invoke CPLR 3212(d)(2) for the benefit of all unsecured creditors, provided it is the bankruptcy estate, not the objector, who profits. \textit{See In re Lyons}, 381 B.R. 444, 452 (Bankr. S.D.N.Y. 2008). This accords with the idea that the bankruptcy trustee is deemed a judgment creditor as of the day of the bankruptcy petition. \textit{See} 11 U.S.C. § 544(a)(2) (2000).


\textsuperscript{1141} \textit{See id.} at 63–64, 791 N.Y.S.2d at 560–61.

\textsuperscript{1142} \textit{See N.Y. C.P.L.R.} 5226.
requirements of the judgment debtor and dependents.\textsuperscript{1143} In such a hearing, the debtor has the burden of proving necessity.\textsuperscript{1144}

According to CPLR 5205(d)(1), ninety percent of income from spendthrift trusts is exempt.\textsuperscript{1145} 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.”\textsuperscript{1146} What this implies is that, if all the income is absolutely necessary for support, the creditors can still get ten percent.\textsuperscript{1147} 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.\textsuperscript{1148} The suspension of the “unnecessary” clause is undoubtedly required by the broad preemption rule of \textit{Mackey v. Lanier Collections Agency & Service, Inc.}\textsuperscript{1149}

\textbf{b. Wages}

Ninety percent of income derived from personal services is exempt.\textsuperscript{1150} This dovetails nicely with the statutes governing income executions, which are tied to obtaining ten percent of income.\textsuperscript{1151} Technically, the ten percent limit is suspended if the income is “unnecessary for the reasonable requirements of the

\textsuperscript{1143} \textit{See In re Balanoff}, 16 A.D. at 56, 791 N.Y.S.2d at 555.

\textsuperscript{1144} \textit{See Camphill Special Schs., Inc. v. Prentice}, 126 Misc. 2d 707, 708, 483 N.Y.S.2d 888, 889 (Sup. Ct. Onondaga County 1984). Nevertheless, where JD makes no showing, courts have discretion not to award one-hundred percent of salary to JC. \textit{See In re Dickens v. Dir. of Fin.}, 45 Misc. 2d 882, 883, 258 N.Y.S.2d 211, 213 (Sup. Ct. N.Y. County 1965).

\textsuperscript{1145} \textit{See N.Y. C.P.L.R. 5205(d)(1)}.

\textsuperscript{1146} \textit{Id.}

\textsuperscript{1147} \textit{See In re Smith v. ABC Co.}, 2005 N.Y. Misc. LEXIS 3467, at *6–7 (Fam. Ct. Nassau County Sept. 29, 2005). In \textit{In re Hilsen}, No. 05-30-850-ees 2009 Bankr. LEXIS 669 (Bankr. E.D.N.Y. Mar. 17, 2009), the court approved a ninety percent exemption from the income of a spendthrift trust. It should have conditioned the exemption on such income as is necessary for JD’s “reasonable requirements.” That would have permitted creditors, after the bankruptcy, to litigate whether any of the income is exempt from creditors. This could be done in the context of an installment payment order under CPLR 5226.

\textsuperscript{1148} \textit{See supra} text accompanying notes 1120–1138.

\textsuperscript{1149} 486 U.S. 825, 830 (1988).


\textsuperscript{1151} \textit{See N.Y. C.P.L.R. 5231(b)}. 
judgment debtor and his dependents." Nevertheless, the income execution rules do not permit the judgment creditor to exceed ten percent. How can a creditor gain excess to a surplus over ten percent? The answer is that the creditor can dip into the ninety percent by means of an installment payment order pursuant to CPLR 5226.

It is possible that a creditor might pursue income, but not via an income execution. In Cadle Co. v. Newhouse, 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 ten percent limit, but the court found that CPLR 5205(d)(2) gives an independent reason to limit JC to ten percent. What the court failed to note, however, is that CPLR 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 one hundred percent of earnings, if we read CPLR 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." The transfer of the "necessary" portion of the wages was a transfer of exempt property and, therefore, not susceptible of recovery as a fraudulent conveyance.

The wage exemption applies to wages already in a bank account when the bank account is levied, but translating this

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1152 Id. 5205(d).
1153 See id. 5226.
1154 20 F. App'x 69 (2d Cir. 2001).
1155 See id. at 70.
1156 See id. at 72–73.
1157 N.Y. C.P.L.R. 5205(d)(2).
1158 See Cadle Co., 20 F. App'x at 74.
1159 N.Y. C.P.L.R. 5205(d).
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 delivered to the sheriff.” 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 . . . 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.” 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 CPLR 5205(d)(2).

In In re Maidman, the debtor claimed over $50,000 in cash (presumably in a bank account) because it represented ninety percent of the amount of wages earned within sixty 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 CPLR 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.”

The Maidman court should have required the debtor to prove that the $50,000 was necessary to the debtor’s reasonable requirements, a daunting task where the debtor’s prodigious wallet was enlarged by $300,000 a year in post-bankruptcy

1162 N.Y. C.P.L.R. 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 ignored this feature of the statute. See supra text accompanying notes 785–787.


1165 See id. at 572.

1166 See id. at 572, 574.

1167 N.Y. C.P.L.R. 5205(d) pmbl.

1168 The court in In re Coolbaugh stated:

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.

250 B.R. 162, 166 n.9 (Bankr. W.D.N.Y. 2000).
earnings.\textsuperscript{1169} Incidentally, if we imagine that the bankruptcy trustee serves an income execution (on an employer), the trustee could reach only ten percent of wages, not the extra amount unnecessary to the debtor's requirements.\textsuperscript{1170} 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, ten percent of the sixty-day amount, and any additional amount not necessary to the debtor's requirements.\textsuperscript{1171}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1169} In the 2005 bankruptcy amendments, Congress pointed toward IRS standards to determine the reasonable expenses of a debtor's household. See David Gray Carlson, \textit{Means Testing: The Failed Bankruptcy Revolution of 2005}, 15 AM. BANKR. INST. L. REV. 223, 268–69 (2007). These guidelines, designed by the IRS to squeeze debtors out of back taxes, presume that 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.
\item \textsuperscript{1170} See N.Y. C.P.L.R. 5205(d)(1).
\item \textsuperscript{1171} In \textit{In re Coolbaugh}, Chief Judge Ninio issued the following instruction for debtors wishing to claim bank accounts exempt to the extent of the wages they contain:
\end{itemize}
\end{footnotesize}
c. Bankruptcy-Only Exemptions

Trustees have tried to argue that, in bankruptcy cases, any monetary exemption mentioned in CPLR 5205 is limited by sections 282 through 284 of the New York Debtor and Creditor Law. To understand this claim, a brief tour of this legislation is necessary.

According to section 522(b)(1) of the Bankruptcy Code, debtors may choose either exemptions under non-bankruptcy law or, alternatively, the miserly federal exemptions set forth in section 522(d). Yet section 522(d)(2) invites state legislators to deprive their 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 non-bankruptcy law, including New York statutory law.

New York's opt-out legislation goes on to authorize bankrupt debtors to take any exemption under CPLR 5205 (personal property) and CPLR 5206 (real property). It also permits the insurance exemptions described in section 3212 of the New York Insurance Law. And finally, it authorizes "bankruptcy only exemptions." These exemptions are no good against the sheriff because they are not listed in CPLR 5205 or CPLR 5206. They include an automobile worth $2,400 or less (after liens are considered) or certain choses in action not mentioned in CPLR 5205. Whether states are authorized to create bankruptcy-only exemptions not good against the sheriff has

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1173 See id. § 522(b)(2).
1174 See N.Y. DEBT. & CRED. LAW § 284 (McKinney 2008).
1175 See id.
1176 See id. § 282.
1177 See id.
1178 Id. § 282(1)-(3).
1180 See N.Y. DEBT. & CRED. LAW § 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. See id. § 282(2); 11 U.S.C.A. § 522(d)(10)(E) (West 2007).
1181 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 $7,500, if not related to pain and suffering), and actions for the loss of future earnings (to the extent necessary for support). See N.Y. DEBT. & CRED. LAW § 282(3).
been questioned with some cause.\textsuperscript{1182} A recent New York case has upheld the constitutionality of it.\textsuperscript{1183} 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 sections 282 and 283 of the New York Debtor and Creditor Law.\textsuperscript{1184}

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 section 283(1) of the Debtor and Creditor Law, a debtor must aggregate the exemptions of CPLR 5205(a) and certain annuity contracts under section 3212 of the Insurance Law.\textsuperscript{1185} The items in CPLR 5205(a) are tangible items, such as wearing apparel and tools of the trade.\textsuperscript{1186} The annuities to be aggregated are those purchased by the debtor within six months of bankruptcy.\textsuperscript{1187} Of these items, the debtor may have only $5,000 in total (or $10,000, in joint cases).\textsuperscript{1188}

Having limited debtors to $5,000 of the above items, section 283(2) of the Debtor and Creditor Law goes on to state that, where the debtor does not claim real estate, where the debtor has fully utilized the exemptions in CPLR 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-


\textsuperscript{1184} See Dubroff v. First Nat'l Bank of Glens Falls (In re Dubroff), 119 F.3d 75, 80 (2d Cir. 1997).

\textsuperscript{1185} See N.Y. DEBT. & CRED. LAW § 283(1).

\textsuperscript{1186} See N.Y. C.P.L.R. 5205(a) (McKinney 2008).

\textsuperscript{1187} See In re Lyons, 381 B.R. 444, 449 (Bankr. S.D.N.Y. 2008). If, however, the annuity is described in section 805(d) of the Internal Revenue Code or is purchased with proceeds of an annuity bought prior to the six-month period, it is not subject to the limitation in question. Alas, section 805(d) of the Internal Revenue Code is no longer in effect. See In re Moore, 177 B.R. 437, 440 n.3 (Bankr. N.D.N.Y. 1994). As for the protection of rollover, In re 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. See id. at 441. Furthermore, the $5,000 cap refers to the principal amount of the annuity, not to income distributions going forward.

only exemption of cash to bring the total exemption up to $5,000.\textsuperscript{1189} But the cash exemption described must not exceed $2,500.\textsuperscript{1190} This confusing provision has spawned the claim of bankruptcy trustees that the bankruptcy-only cash exemption preempts any other claim to cash arising under CPLR 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 CPLR 5205(d)(2).\textsuperscript{1191} The $2,500 bankruptcy-only exemption is calculated by reference to CPLR 5205(a) and annuities.\textsuperscript{1192} It does not preempt the ability of the debtor to claim the bank account.\textsuperscript{1193}

d. Miscellaneous Income Exemptions

Payment to JD for support pursuant to an award in a matrimonial action is exempt.\textsuperscript{1194} Payment under a separation agreement is not,\textsuperscript{1195} but if the agreement is incorporated in a judgment of divorce, it becomes exempt.\textsuperscript{1196} Proceeds of milk are ninety percent exempt if JD owns the farm on which the milk was produced and if the milk was sold to a licensed dealer.\textsuperscript{1197} 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.\textsuperscript{1198}

Security deposits payable to a landlord or to a utility company are exempt.\textsuperscript{1199} So is the right of JD to accelerate life insurance payments or have the surrender value or to enter into

\textsuperscript{1189} See N.Y. DEBT. & CRED. LAW § 283(2).
\textsuperscript{1190} See id.
\textsuperscript{1191} See N.Y. C.P.L.R. 5205(d)(2).
\textsuperscript{1193} See id. at 573.
\textsuperscript{1194} See N.Y. C.P.L.R. 5205(d)(3).
\textsuperscript{1197} See N.Y. C.P.L.R. 5205(f).
\textsuperscript{1198} See In re Stinson, 59 B.R. 914, 915–16 (Bankr. W.D.N.Y. 1986).
\textsuperscript{1199} See N.Y. C.P.L.R. 5205(g). The exemption is lost if the security deposit has been returned. See In re Kleinman, 172 B.R. 764, 775 (Bankr. S.D.N.Y. 1994) (dictum).
a viatical settlement. A viatical settlement is an agreement in which a terminally ill person sells to an investor the rights to the death benefits payable under his or her life insurance policy. The terminally ill person, or viator, assigns the benefits to the investor in exchange for a cash payment that is something less than the total amount payable under the policy.


See N.Y. C.P.L.R. 5205(j).

See N.Y. SOC. SERV. LAW §§ 137, 137-a(1) (McKinney 2008).


A list of these non-CPLR exemptions can be found in WEINSTEIN ET AL., supra note 35, ¶ 5205.03.

After 1997, New York's state college choice tuition savings program is exempt.

Not all exemptions appear in the CPLR. For instance, sections 137 and 137-a of the Social Services Law exempt all public assistance awards from execution. There are also federal exemptions, such as veteran and social security benefits.

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 ex rel. K.A.S. v. Wendell, the court held that New York's Son of Sam Law 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. JD, however, claimed that the pay was exempt under CPLR 5205(e). The Wendell court found that CPLR 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." The retired sergeant's pay, however, was not earned income. Earned income is defined as "income derived from one's own labor." The Wendell court ruled that retirement pay was not earned income because it was "not derived from any current labor.

Meanwhile, the court ruled that the Son of Sam Law simply repealed all exemptions under CPLR 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 purposes. First, it requires those who pay convicts to report that fact to the Crime Victims Board. Second, it gives an extended statute of limitations to victims in order to pursue these funds. It says nothing at all about exemptions. In contrast, CPLR 5205 states that, where the prisoner obtains a money judgment for any reason, $1,000 of the judgment is exempt from Son of Sam judgments. Does not this provision show that CPLR 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.


1215 N.Y. Exec. Law § 632-a(1)(f).

1216 Wendell, 12 Misc. 3d at 805, 815 N.Y.S.2d at 441. Currency is not a concept that appears in the statute.

1217 See id. at 805–06, 815 N.Y.S.2d at 441–42.

1218 See id. at 806, 815 N.Y.S.2d at 442.

1219 See N.Y. Exec. Law § 632-a(2)(a).


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, the family bible, a wedding ring, an exhibition at a world’s fair, family pictures, and school books. Some are gruesome: dental accessions, wheelchairs, a seeing-eye dog. Would any JC be so mean and base as to execute on such things? Television, of course, is “a practical necessity of modern living.” Yet as late as 1976, it was not exempt property in New York. Today, the impeccunious debtor may choose which of his many television sets shall be considered exempt.

Some of the items listed must be “necessary” to the debtor. These include fuel for the stove, food for pets and...
family,\textsuperscript{1237} working tools, professional libraries, and professional furniture.\textsuperscript{1238} Wearing apparel and household furniture\textsuperscript{1239} must be necessary,\textsuperscript{1240} complicating the ability \textit{JD} has 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 \textit{and used} as part of the family library.\textsuperscript{1241} Only watches less than \$35 are exempt.\textsuperscript{1242} Tools cannot be worth more than \$600.\textsuperscript{1243} Domestic animals \textit{and} their food for sixty days cannot exceed \$450 in value.\textsuperscript{1244}

Suppose Fido is levied by the sheriff together with his pet food and yields \$500 at an execution sale. Does \textit{JD} get to keep \$450 of the proceeds? We have seen that, for monetary exemptions, courts have indeed permitted \textit{JD} to have the proceeds thereof.\textsuperscript{1245} There is a dictum to suggest that proceeds theory should be honored in general. In \textit{Sailors' Snug Harbor in the City of New York v. Tax Commission of New York},\textsuperscript{1246} 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 \textit{household furniture} (CPLR 5205, 5206). The usual rule in those situations is that the lien is

\textsuperscript{1237} See N.Y. C.P.L.R. 5205(a)(4); McCarthy v. McCabe, 131 A.D. 396, 398; 115 N.Y.S. 829, 832 (3d Dep't 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.").

\textsuperscript{1238} See N.Y. C.P.L.R. 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. See Wolf v. Farley, 16 N.Y.S. 168, 170 (N.Y.C. C.P. Gen. T. N.Y. County 1891); see N.N.Y. Trust Co. v. Bano, 151 Misc. 684, 687, 273 N.Y.S. 695, 698–99 (Jefferson County Ct. 1934) (motorized truck is not a "team").

\textsuperscript{1239} Hobby equipment, however, is not furniture at all. See \textit{In re Sherman}, 237 B.R. 551, 554 (Bankr. N.D.N.Y. 1999).

\textsuperscript{1240} Compare Conklin v. McCauley, 41 A.D. 452, 453, 58 N.Y.S. 879, 880, (2d Dep't 1899) (in replevin action against marshal, jury could decide pianos were necessary) \textit{with} Lader v. Gordon, 88 N.Y.S.2d 758, 759, (Sup. Ct. App. T. 1st Dep't 1949) (debtor must prove piano is necessary); see also \textit{In re Wattson}, No. 79-B-1034, 1980 Bankr. LEXIS 4460, *8–11 (Bankr. S.D.N.Y. 2007) (wine vault, throw rug not "necessary" household furniture).

\textsuperscript{1241} See N.Y. C.P.L.R. 5205(a)(2).

\textsuperscript{1242} See id. 5205(a)(6).

\textsuperscript{1243} See id. 5205(a)(7).

\textsuperscript{1244} See id. 5205(a)(4).

\textsuperscript{1245} See supra text accompanying notes 1112–1116.

enforceable to the extent the value of property to which the lien attaches exceeds the exemption.

If there is sale the owner is entitled to the amount of the exemption.\textsuperscript{1247}

Perhaps this dictum 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,\textsuperscript{1248} though we have seen that New York purports to grant a bankruptcy-only exemption for cars.\textsuperscript{1249} Possibly cars are tools of the trade, which are exempt under CPLR 5205(a)(7).\textsuperscript{1250} But the car must be entirely central to the trade, such as a taxi to a taxi driver.\textsuperscript{1251} Mere usefulness of a car to the trade is not enough.\textsuperscript{1252}

The exempt property listed in CPLR 5205(a) is nevertheless not exempt against a creditor claiming the purchase price of the item.\textsuperscript{1253} So, for example, if \textit{JD} buys a family bible\textsuperscript{1254} on credit from \textit{JC}, the sheriff can levy the bible on behalf of \textit{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\textsuperscript{1255} 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

\textsuperscript{1247} \textit{Id.} at 449, 259 N.E.2d at 912, 311 N.Y.S.2d at 489 (emphasis added) (citations omitted).
\textsuperscript{1249} See \textsc{N.Y. Debt. & Cred. Law} § 282(1) (McKinney 2008); \textit{supra} text accompanying notes 1172–1193.
\textsuperscript{1250} See \textsc{N.Y. C.P.L.R.} 5205(a)(7) (McKinney 2008).
\textsuperscript{1252} See \textit{id.; In re Kleinman}, 172 B.R. 764, 774 (Bankr. S.D.N.Y. 1994) (finding that stock in company that had a brokerage license was not a tool of the trade).
\textsuperscript{1253} See \textsc{N.Y. C.P.L.R.} 5205(a) ("The following personal property . . . is exempt from application to the satisfaction of a money judgment except where the judgment is for the purchase price of the exempt property . . . ").
\textsuperscript{1254} See \textit{id.} 5205(a)(2).
\textsuperscript{1255} See \textit{id.} 5205(h).
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.”\textsuperscript{1256} The CPLR exception invokes only “price of the collateral,” not the “enabling loan” portion of the UCC definition.\textsuperscript{1257} 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 CPLR 5205.\textsuperscript{1258} 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.”\textsuperscript{1259} So the plumber or the gardener, if she gets a money judgment, could execute on the family bible, the pet dog, or the wedding ring (though not on 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.\textsuperscript{1260} 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

\textsuperscript{1256} U.C.C. § 9-103(a)(2) (2007).
\textsuperscript{1257} See N.Y. C.P.L.R. 5205(a).
\textsuperscript{1258} The Court of Appeals has ruled that the exemption statutes do not imply that security interest on exempt items are against public policy. See In re New York v. Avco Fin. Serv. of N.Y., Inc., 50 N.Y.2d 383, 389–90, 406 N.E.2d 1075, 1077–79, 429 N.Y.S.2d 181, 185–86 (1980).
\textsuperscript{1259} N.Y. C.P.L.R. 5205(a).
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.” 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.

Meanwhile, the automatic stay of bankruptcy prevents the mechanic from executing on the family bible. Once the exemption is actually granted, the automatic stay still applies to the exempt property. The mechanic’s claim may well be dischargeable. One of the effects of discharge is that the mechanic’s money judgment is voided. Another is that the mechanic is enjoined against ever enforcing the debt following the discharge. As a result of bankruptcy discharge, the mechanic completely forfeits her CPLR privilege to pursue the family bible.

IV. SUGGESTIONS FOR REFORM

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 and incompetent legislative drafting.

It is probably not in the interest of institutional creditors, who know how to take security interests under article 9 of the UCC, to sponsor reform of enforcement of money judgments. So there is not much profit in speculating on a system that evens the playing field between secured lenders and unsecured creditors who need to obtain judicial liens. Were such a reform possible, one would do well to follow California’s lead, which has largely integrated judicial liens into the article 9 filing system. In California, creditors may file notice of judgments with the

1262 See In re Covington, 368 B.R. 38, 40 (Bankr. E.D. Cal. 2006) (allowing family creditor to reach exempt asset, but trustee could not use this as a pretext to avoid the exemption).
1264 See id. § 362(a)(5)–(6).
1266 See id. § 524(a)(2).
secretary of state. If they do, they have what amount to article 9 security interests on various categories of personal property of the debtor—the very categories that article 9 describes for secured lenders.1267

Assuming this kind of sensible conceptual reform is out of the question, there are some minor things that could simplify matters within the scope and compass of the current system. Here are some modest, realizable reforms as to which institutional lenders could not object.

Currently, liens on personal property are defeasible. No doubt this was legislated because the execution lien as established by the statute of frauds creates an invisible lien. But if, instead, we made the levy the moment of lien creation, we could dispense with invisible liens altogether and abolish the senseless complexity involving defeasibility. Such a reform would actually help secured lenders, who currently fail to get the benefits of defeasance, because of mal-coordination between article 9 and the CPLR.

I see no great reason why the return of an execution should be connected with the duration of the lien. The main argument for it is the danger that JC1, having served an execution on the sheriff, takes a free ride off JC2’s research if JC2 is second to serve the execution. This free ride already exists, however, for sixty days and longer (since JC1 can extend the life of the execution unilaterally). Why not have a rule that executions have a much longer life? Orders of attachment, for example, last as long as the judicial proceeding lasts in which the order was retained.

I would also propose abolishing the distinction between property capable and property not capable of delivery. For order of attachments, paper levies suffice. Why shouldn’t they also suffice for the post-judgment environment? Of course, to prevent JD misbehavior, the sheriff should have the duty to take tangible property into possession whenever JC requests it. In this same connection, the definition of debt as payment intangibles certain to become due is ill-advised. Since the courts have all but obliterated the difference between debt and property (which can be contingent), the distinction serves no good purpose. Of course,

1267 See CAL. CIV. PROC. CODE § 697.510(a) (West 2008).
it will be necessary to preserve a contingent letter of credit from being levied.

The sale procedure is also out of date. The requirement that property be on display suggests that the sheriff may not sell intangibles. To allay that implication, the CPLR should require the sheriff to display the property only “if possible.” Furthermore, in the case of securities, the sheriff should have the access to recognized securities markets without any need to advertise the sale in advance.

Finally, the CPLR should restore the rule that commencement of an equity proceeding creates a lien on personal property—not actually obtaining the order. The current rule penalizes JC for law’s delay and the insolence of office. It invites other creditors to swipe priority with a late levy pursuant to execution.

The current system cannot be defended. At best it can be tolerated. The CPLR is now forty-five 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. But the above-mentioned reforms would at least abolish some of the absurdities produced by an indefensible system.