ORDERING THE JUDICIAL PROCESS LIEN AND THE SECURITY INTEREST UNDER ARTICLE NINE: MESHING TWO DIFFERENT WORLDS
PART I—SECURED PARTIES AND POST-JUDGMENT PROCESS CREDITORS

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I. PROLOGUE

The clash between a creditor with a consensual security interest in personal property and a general creditor with a judicially created lien in the same property generates fundamental problems for the commercial lawyer. The respective rights of these two parties hinge upon a determination of priority. Because the interests of the parties are governed by distinct bodies of state law whose interrelationship remains unclarified, the resolution of priority problems in this context is difficult. Article Nine of the Uniform Commercial Code, which purportedly contains a comprehensive priority system, regulates the consensual security transfer, and a variety of independent state statutory provisions define the lien acquired by resort to judicial process. A complete understanding of the priority scheme requires integration of state law prejudgment and post-judgment remedies with the Code's priority principles—a task never systematically attempted. Undertaking that task, this article, comprising the first of a two part inquiry,[1] examines the relationship between Article Nine secured parties and those judicial process creditors who acquire an interest in personal property after judgment. The characteristics of liens generated by traditional post-judgment remedies, including execution and levy, garnishment in aid of execution, and liens resulting from equitable procedures such as creditors' bills and supplementary proceedings, will be explored and dovetailed with Article Nine priority rules.

While recognizing that bankruptcy is one of the most important contexts in which the secured party measures himself against the rights of a judicial process creditor, this article analyzes the problem purely from a state law perspective. Nevertheless, this analysis of

1. The focus of Part II, to be published in a subsequent volume, will be on the most common types of provisional remedies, attachment and prejudgment garnishment or trustee process. Although post-judgment remedies have been relatively unaffected by recent Supreme Court decisions, changes in the structure and mechanics of provisional remedies have gone through constitutional convulsions. To the extent that a lien on debtors' personal property is a "taking," these decisions may check the lien-generating capabilities of any provisional remedy. This and other constitutional questions related to the structure and lien effectiveness of prejudgment remedies will be explored in Part II.

state law is directly applicable in bankruptcy. This is particularly true in two respects: where the trustee dons the mantle of a judicial process creditor in exercising his status and avoidance powers, and where a "transfer" of personal property is defined in terms of the point in time when it becomes invulnerable to a hypothetical judicial process creditor.[2]

Provisional remedies and the status of the liens they generate within Article Nine will be taken up in Part II. Due process standards recently formulated by the Supreme Court may have broad implications for prejudgment judicial lienholders, but post-judgment judicial process creditors treated herein are outside the major thrust of these standards.[3]

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2. *See* Bankruptcy Act, §§ 60(a)(2), 70(c), 11 U.S.C. §§ 96(a)(2), 110(c) (1970). *See also* Bankruptcy Reform Act of 1978, 11 U.S.C.A. §§ 547(e), 544(a)(1) (West Spec. Pamph. 1979). Much of the literature dealing with priority between secured parties and judicial process creditors relates to the trustee's avoidance powers. *See, e.g.*, Hensen, *Some Thoughts on Lien Creditors under Article 9*, 1974 U. ILL. L.R. 237.

3. Due process issues can arise in the context of post-judgment remedies, however. The non-finality of some judgments, coupled with the flexibility or harshness of some post-judgment devices, may create new risks for the judgment debtor who has not had an opportunity to litigate questions related to these new risks. In particular, these problems are inherent in the enforcement of non-final support decrees. The issue is not free from doubt, and has not been addressed directly by the Supreme Court since 1924 when the Court upheld a no-notice post-judgment garnishment in Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924). *Endicott* upheld a judgment against a garnishee-employer who refused to pay over to a judgment creditor wages of the debtor garnished after judgment. Justice Sanford, writing for the Court, dismissed the employer's arguments by stating:

> [T]he established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment.

266 U.S. at 288. Twenty-two years later, however, the premise of *Endicott* was restricted in Griffin v. Griffin, 327 U.S. 220 (1946). In *Griffin*, the plaintiff-wife tried to enforce a 1938 New York judgment for support arrearages in the District of Columbia. The New York judgment, based on a 1926 alimony decree, had been obtained ex parte without notice to the husband. An earlier New York judgment for arrearages based on the 1926 decree has issued in 1936, but judgment had followed notice and a hearing. The Supreme Court held in a five-to-three decision that the 1938 judgment was invalid because of the absence of notice, to the extent that it cut off the husband's defenses on arrearages occurring after those adjudicated in the 1936 judgment. Courts have generally followed *Griffin* in the domestic relations area and required notice and a hearing prior to enforcement of domestic relations decrees. *See, e.g.*, Dodd v. Lovett, 282 Ala. 383, 211 So. 2d 799 (1968); Means v. Means, 60 Misc. 2d 538, 303 N.Y.S.2d 424 (Fam. Ct. 1969); Overman v. Overman, 514 S.W.2d 625 (Mo. Ct. App. 1974).

In other areas *Endicott* seems to control. *See* Brown v. Liberty Loan Corp., 539 F.2d 1355 (5th Cir. 1976); Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *aff'd*, 395 U.S. 825 (1969). The one appellate court in the country which equates prejudgment and post-judgment due process requirements is Georgia. *See* City Finance Co. v. Winston, 238 Ga. 10, 231 S.E.2d 45 (1976); Coursin v. Harper, 236 Ga. 729, 225 S.E.2d 428 (1976). Both Georgia cases are discussed at Note, 12 GA. L. REV. 60 (1977). *See also* Dunham,

A necessary introduction to the first part of this inquiry is a brief description of the principal types of judicial process creditors, the Article Nine secured party, and the background of their present legal relationships within Article Nine.

II. INTRODUCTION

A. *Judicial Process Creditor*

The judicial process creditor seeking to satisfy a favorable judgment has access to a range of post-judgment enforcement procedures, the most common of which are execution and levy, and garnishment in aid of execution. Alternatively, a creditor may commence a creditor's bill, an action rooted in equity, if assets are either concealed by the debtor or in such a form as to require the court's aid in realizing on them. If provided by statute, a summary procedure can be utilized for discovering and applying all of the debtor's assets. At some stage, these collection devices generate what is loosely referred to as a "lien" in favor of the initiating judgment creditor. Though in this context the word "lien" lacks exact definition, it generally marks the time at which the initiating creditor is afforded a measure of judicial protection against the interest of third parties in the debtor's property.[4] Modern summary procedure remedies, which assume various forms

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Post Judgment Seizures: Does Due Process Require Notice and Hearing? 21 S.D.L. REV. 78 (1976). For an enlightened criticism of *Endicott Johnson*, see Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effecting Sniadach and its Progeny*, 65 GEO. L.J. 1 (1976).

There are, however, certain kinds of post-judgment remedies that suggest the need for added due process protection.

In Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970), the Maine Federal District Court held the Maine Debtor Disclosure Law violative of due process because it permitted the arrest and incarceration, without hearing, of a judgment debtor who failed to obey a subpoena to attend a disclosure of assets proceeding. The debtor had not been given an opportunity to assert his defense of inability to comply before his arrest and imprisonment. The court distinguished *Endicott*, because incarceration was permitted for failure to obey a court subpoena, not for failure to pay a judgment debt, "in which case it could be argued that he has had his day in court." *Id.* at 332. The Maine Supreme Judicial Court similarly distinguished *Endicott* in Yoder v. County of Cumberland, 278 A.2d 378 (Me. 1971). In *Yoder*, the court released a husband incarcerated for failure to pay his wife's attorney's fees, because he had not been given the opportunity to assert his defense of "honest indigency" before incarceration. *See also* Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972), holding that when a post-judgment wage garnishment is used to enforce a *confessed judgment*, the seizure must be preceded by notice and a hearing.

When a judgment creditor seeks to enforce a non-final decree, or in some manner raises unlitigated issues by resort to the collection process, he may avoid constitutional issues by utilizing whatever state discovery or citation statutes exist. Such statutes normally require a second service of process, and give the debtor an opportunity to be heard on questions relating to his judgment debt that were not disposed of by the judgment itself. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 3125 (Cum. Supp. 1978-1979).

4. The word "lien" has been regularly used by courts and legislatures to define vastly different bundles of rights. A good discussion of the problem can be found in

from state to state, have a particularly ill-defined "lien"-generating function.[5]

B. Secured Party

Matched against the creditor with a judicial process lien is the secured party, whose interest in the debtor's personal property arises by agreement. Section 1-201(37) of the Commercial Code defines "security interest" broadly as "an interest in personal property or fixtures which secures payment of performance of an obligation . . . . The term . . . includes any interest of a buyer of accounts or chattel paper which is subject to Article 9."[6] While the section 1-201(37) definition is broad enough to include the creditor who acquires a lien by resort to judicial process, Article Nine applies only to those security interests which are consensual. Section 9-102(1)(a) refers "to any transaction (regardless of its form) which is *intended* to create a security interest in personal property,"[7] and section 9-102(1)(b) refers to any *sale* of accounts or chattel paper.[8] The official comments add by way of explanation that "[t]he main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article . . . ."[9]

C. Judicial Process Creditor Versus Secured Party: Levying on Encumbered Chattels

The most common conflict between the judicial process creditor and the secured party occurs when the creditor seeks to satisfy a judgment out of the debtor's encumbered property. At common law the mortgagor of chattels held an equitable interest that was not subject to execution.[10] Long before the Uniform Commercial Code, however, courts began to recognize that the mortgagor was the real owner of the chattel, and that encumbered personal property in his possession could be levied on and sold at execution.[11] Codifying this approach, section 9-311 of the Code clearly acknowledges the creditor's right to reach the debtor's mortgaged property through the judi-

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Distler & Schubin, *Enforcement Priorities and Liens: The New York Judgment Creditor's Rights in Personal Property*, 60 COLUM. L. REV. 458, 459-62 (1970).

5. See text accompanying notes 187-96 *infra*.

6. U.C.C. § 1-201(37). All references to the U.C.C. refer to the current Official Text, unless otherwise indicated.

7. U.C.C. § 9-102(1)(a) (emphasis added).

8. U.C.C. § 9-102(1)(b) (emphasis added).

9. U.C.C. § 9-102, comment.

10. 1 A. FREEMAN, LAW OF EXECUTIONS § 117 (3d ed. 1900). In the absence of a statute, neither the conditional buyer nor the chattel mortgagor had an interest that could be reached by levy. Annot., 61 A.L.R. 781 (1929). *See also* Hunt v. Holton, 30 Mass. (11 Pick.) 216, 221 (1832).

11. 1 A. FREEMAN, *supra* note 10, § 117, at 477-78; 2 L. JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 556 (6th ed. 1933).

cial process,[12] but leaves to the law of each state the manner in which this access may be accomplished. In keeping with the free alienability principle of section 9-311, the Code rejects the common law notion that the secured party reserves some form of title in the chattel. Instead, the more precise concept of a "security interest" is adopted and refined by the rules governing consensual interests in Article Nine.[13]

The enabling effect of section 9-311, however, should not be confused with the concept of priority. If the Article Nine secured party has priority over a judicial process creditor, the creditor's ability to realize on the collateral is severely restricted, although not entirely blocked. Although section 9-311 permits the judicial process creditor to encumber and sell the debtor's property (despite contrary provisions in the security agreement),[14] the secured party with a prior interest (*i.e.* perfected before the creditor's lien arises) is well protected under Article Nine. Property sold in satisfaction of a judgment creditor's claim remains subject to the interest of a prior secured party.[15] Some states protect the secured party even further by requiring that the judicial process creditor satisfy the senior secured party before sale.[16] Failure to satisfy the secured party could result in the creditor's liability for conversion.[17]

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12. "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default." U.C.C. § 9-311.

A trickier question is presented when the debtor's chattels are held by a pledgee. Section 9-311 seems to give the process creditor access to the pledgor's interest on execution. The creditor should be able to levy on the pledgor's residual property rights, consisting of redemption and surplus rights surrounding the pledgee's sale. Garnishment or garnishment in aid of execution (trustee process) may be necessary because seizure from the pledgee cannot be made over his objection. However, if the pledgee will relinquish possession, levy by seizure and sale should be possible. Such sale should be subject to the pledgee's interest, although by relinquishing possession the secured party may be deemed to lose his perfected status. If the levying creditor or levying officer is viewed as a bailee with notice of the secured party's interest, then perfection would continue and the pledgee could be satisfied first. *See* U.C.C. § 9-305.

13. U.C.C. §§ 9-102, 1-201(37). *See also* Mayor's Jewelers of Ft. Lauderdale, Inc. v. Levinson, 39 Ill. App. 3d 16, 349 N.E.2d 475 (1976); U.C.C. § 2-401.

14. *See* U.C.C. § 9-311.

15. Citizens Bank v. Perrin & Sons, Inc., 253 Ark. 639, 488 S.W.2d 14 (1972); Powell v. Whirlpool Employees Fed. Credit Union, 42 Mich. App. 228, 201 N.W.2d 683 (Ct. App. 1972); Bloom v. Hilty, 427 Pa. 463, 234 A.2d 860 (1967). *See* U.C.C. § 9-301(1)(b).

16. *See* CAL. CIV. PROC. CODE § 689b (West Supp. 1979). The Maine statutory procedure envisions a hearing on the validity of a secured party's interest in personal property seized on execution. If after examination, the secured claimant's interest is valid, the court *may* direct the attaching creditor to pay that amount due in discharge of the secured party's interest. Such payment by the attaching creditor gives him the right to reimbursement *plus interest* out of the proceeds of the sale before satisfaction of his own debt. ME. REV. STAT. ANN. tit. 14, §§ 4251-4256 (Cum. Supp. 1978-1979). Validity within the meaning of § 4252 would seem to include questions of priority.

17. Royal Store Fixture Co. v. New Jersey Butter Co., 114 N.J. Super. 263, 276 A.2d 153 (Super. Ct. App. Div. 1971).

By contrast, the secured party with priority can foreclose and sell after the judicial process creditor obtains a lien under state law. Section 9-504(3) of the Code does not require the secured party to notify the judicial process creditor of the sale, or to satisfy the creditor out of any surplus generated.[18] Therefore, unless the judicial process creditor can establish a right in subject property prior to the secured party's, his ability to recover on the judgment is significantly hampered. Priority is a critical initial question, the answer to which may establish the particular rights of the secured party and the judicial process creditor.

Before examining the priority scheme in Article Nine of the Uniform Commercial Code, a short digression inquires into the extent to which a secured party's possessory rights on default might enable him to circumvent priority considerations and subordinate a prior levying creditor. By manipulating Code default provisions, an *unperfected* secured party could conceivably urge that the possessory rights provided in part 5 of Article Nine are powerful enough to displace otherwise prior judicial process creditors. A few cases have stated as part of their holdings that a secured party's right to take possession after default under section 9-503 is superior to the right of a levying creditor.[19] While in all of these cases, the security interest was perfected prior to attachment of the lien, these cases might be read to suggest that the secured party's possessory rights are measured by section 9-503's authorization alone—rights which exist whether or not the security interest is perfected.[20] Under this view, an unperfected secured party can achieve de facto priority over a levying creditor by gaining control of the sale and refusing to satisfy the creditor out of any surplus generated.[21]

The decided cases should not be taken this far, and should be read narrowly to preserve the integrity of the priority scheme. Indeed, two cases suggest that perfection with resulting priority *is* an important condition to the superior possessory rights of the secured party after the debtor's default.[22] In *Royal Store Fixture Co. v. New Jersey But-*

18. U.C.C. § 9-504(3) (1966 version). Under the 1972 Amendments, even other secured parties are not entitled to notice of the sale unless the collateral is not consumer goods and they have given written notice of their claimed interest. U.C.C. § 9-504(3).

19. Royal Store Fixture Co. v. New Jersey Butter Co., 114 N.J. Super. 263, 276 A.2d 153 (1971); State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966); Ford Motor Co. v. City of New York, 14 U.C.C. Rep. 211 (N.Y. Sup. Ct. 1974); General Motors Acceptance Corp. v. Stotsky, 60 Misc. 2d 451, 303 N.Y.S.2d 463 (Sup. Ct. 1969); William Iselin & Co. v. Burgess & Leigh Ltd., 52 Misc. 2d 821, 276 N.Y.S.2d 659 (Sup. Ct. 1974); Harrison Music Co. v. Drake, 43 Pa. D. & C.2d 637 (1967); Murdock v. Blake, 26 Utah 2d 22, 484 P.2d 164 (1971).

20. *See* U.C.C. § 9-503, comment (1966 version).

21. *See* U.C.C. § 9-504(3) (1966 version).

22. Royal Store Fixture Co. v. New Jersey Butter Co., 114 N.J. Super. 263, 276 A.2d 153 (Super. Ct. App. Div. 1971); William Iselin & Co. v. Burgess & Leigh Ltd., 52 Misc.

ter Co.,[23] a New Jersey court found the levying creditor liable for post-default conversion of property covered by a filed, and thus perfected, security interest. Partly because the secured party perfected by resort to a section 9-401 filing, the court charged the lien creditor who bought in at his own sale with notice of the secured party's interest. In *William Iselin & Co. v. Burgess & Leigh Ltd.*, a New York court stated that the secured party's right to possession on default as against the creditor who had already levied depended "on its security interest *and the perfection thereof* under the UCC."[24]

Language employed in standard security agreements poses a similar problem for lien creditors. Because most security agreement forms provide that levy upon subject property is an event of default, and because section 9-311 does not appear to make these clauses ineffective,[25] the lien creditor's ability to realize on the collateral may be further restricted. If the secured party's right to possession need exist only at the moment of levy, then these clauses seemingly give the perfected secured party power to prevent levy and sale in all cases where the security agreement contains this language. A Massachusetts decision supports this view by suggesting that a default, either before or *after* levy, creates in a perfected secured party a possessory claim superior to the claim of a levying creditor.[26] If the secured party is required to establish his right to possession *before* levy, however, the default clause does not give the perfected party a paramount right to possession absent some *prior* event of default. Boilerplate clauses should not affect the secured party's right to take control of the sale, one way or the other. On balance it seems preferable to restrict the secured party's ability to upset a levy to those situations where his possessory rights arise before levy.

The priority position of the secured party should not be enhanced by the leverage he gains when the debtor defaults. His priority vis-a-vis other creditors, including the judicial process creditor, must be measured by the ordering rules within Article Nine.

III. THE ARTICLE NINE PRIORITY SCHEME

The cornerstone of the priority scheme regulating competing interests under Article Nine is section 9-201. The first sentence of this section reads: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties,

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2d 821, 276 N.Y.S.2d 659 (Sup. Ct. 1967).

23. 114 N.J. Super. 263, 276 A.2d 153 (1971).

24. 52 Misc. 2d 821, 824, 276 N.Y.S.2d 659, 662 (Sup. Ct. 1967) (emphasis added).

25. *But see* Reporter's Comments, New Jersey Study Commission to Study and Report Upon the U.C.C. for New Jersey, Second Report at 632 (1960), *reprinted in* N.J. STAT. ANN. § 12A:9-311, n.1 (West 1962).

26. Natick Trust Co. v. Bay State Truck Lease, Inc., 28 Mass. App. Dec. 60 (Dist. Ct. 1963).

against *purchasers* of the collateral and against *creditors.*"[27] The language creates a broad presumption in favor of the effectiveness of the security interest as against purchasers and creditors, including purchasers at a judicial sale[28] and creditors with liens conferred by state judicial process who initiate such sales.[29] The establishment of a presumption of *effectiveness* ("[e]xcept as otherwise provided by this Act") plainly implies that the Article Nine security interest binds and "effects" those interests designated absent a specific rule to the contrary. So interpreted, the section 9-201 notion of effectiveness prevents gaps that might otherwise exist in the more specific priority rules. From the secured party's standpoint, the specific rules of priority are thus drafted in the *negative*: when a specific priority rule does not explicitly recognize a third party's priority, the secured party wins under the section 9-201 presumption. Only against the "gap-filling" backdrop of section 9-201 do these specific rules comprise the "comprehensive scheme for the regulation of security interests in personal property and fixtures" envisioned by the drafters.[30] Despite the contrary view of some commentators,[31] it is a major premise of

27. U.C.C. § 9-201 (emphasis added).

28. A "purchaser" is defined by U.C.C. § 1-201(33) as "one who takes by purchase." "Purchase," under § 1-201(32), "includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property."

Certainly the language is broad. The use of the word "includes" before the recited examples suggests that "purchase" may have meanings beyond those expressed. A court may not read "include" to mean "include only" if common usage suggests a definition outside the scope of those examples recited. For an example of this sort of definitional construction involving the meaning of "creditor" under the Bankruptcy Act, see American Sur. Co. v. Marotta, 287 U.S. 513 (1933).

29. "Creditor," under U.C.C. § 1-201(12), "includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate." Here again the express examples are broad and inclusive, and the use of "includes" suggests that meanings outside those recited may be appropriate. See note 28 *supra.*

30. U.C.C. § 9-201, comment. For a recent application of the § 9-201 presumption of effectiveness to resolve a priority question, see Citizens Nat'l Bank v. Mid-States Dev. Co., 380 N.E.2d 1243 (Ind. Ct. App. 1978).

31. At least one commentator has suggested that the right of a purchaser at a judicial sale to take free of the rights of the secured party are not covered by any provision of the U.C.C. Note, 67 MICH. L. REV. 1421, 1426 (1969). The writer's premise was based on 1) the conclusion that § 9-301(1)(c) did not specifically apply to the purchaser at the judicial sale; and 2) the language in comment 6 to § 9-501 which states that judicial sales are "governed by other law" and not by the Article. The latter comment clearly refers to the structure of the sale itself and not to its direct or indirect effect on an Article Nine security interest. The conclusion that § 9-301(1)(c) does not specifically deal with purchasers at the judicial sale as "buyer[s] not in the ordinary course of business" will be discussed later. Whether or not the premise is accurate, the conclusion based on it is faulty. If the purchaser does not come within § 9-301(1)(c) or some other code provision protecting him against the security interest, he falls victim to the residual presumption in favor of the effectiveness of the security agreement in

this article that *all creditors* who obtain lien status by resort to judicial process fall within the class identified by the first sentence of section 9-201. In order to assert priority, therefore, creditors must find within the framework of the Commercial Code some exception from the presumed effectiveness of the security interest.[32]

Section 9-301 supplies the specific rule which may rebut this presumption and establish a prior right in favor of the judicial process creditor's lien.[33] Subsections (1)(b) and (2) of section 9-301 establish specifically the right of a "lien creditor" to subordinate an unper-

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§ 9-201. *See also* Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan,* N.Y.U.L. REV. 1126, 1142-45 (1960).

32. Reading negative inferences into the positive priority rules in § 9-301(1)-(2) can produce anomalous results. *See In re* Moore, 7 U.C.C. Rep. 578 (D. Me. 1969) (Ref. Cyr). This case is discussed further in the text accompanying notes 37-38 *infra. See also* United States Slicing Machine Co. v. Cipressee, 6 U.C.C. Rep. 962 (Pa. Ct. of C.P. 1969).

33. The present uniform version of § 9-301 is set out in part below. Selected language from the 1966 Code is shown in brackets. The revision additions are italicized:

(1) Except as otherwise provided in subsection (2) an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under Section 9-312;

(b) a person who becomes a lien creditor [without knowledge of the security interest and] before [it] *the security interest* is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business, *or is a buyer of farm products in ordinary course of business,* to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts [contracts rights] and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within ten days after the *debtor receives possession of the collateral* [comes into possession of the debtor], he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. [Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest].

(4) *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.*

fected security interest. While most judicial process creditors will at some point in their resort to process qualify as "lien creditors," the definition in 9-301(3) may not be broad enough to cover all "liens" recognized under state law.[34] Thus, creditors who do not fall within section 9-301(3)'s definition, and who do not come within the scope of another specific priority rule will comprise that class of creditors against whom a security agreement is made presumptively effective under section 9-201.[35]

If, on the other hand, a judicial process creditor does qualify as a "lien creditor" under 9-301(3), the creditor can establish priority vis-a-vis the secured party in section 9-301(1)(b). This section provides that a security interest is subordinate to the rights of a person "who becomes a lien creditor" *before* the security interest is perfected. An additional precondition of lien creditor priority exists under the 1966 Code, which requires that a creditor possess no knowledge of the unperfected security interest. Subsection (1)(b) is silent as to a lien creditor's right to subordinate a security interest which does not *attach* until *after* the lien creditor's interest arises. To avoid the presumptive effectiveness of the secured interest under section 9-201, subsection (1)(b) of section 9-301 must be read to provide a "first in time" priority to the lien creditor, regardless of whether the security interest is simultaneously perfected at the time of attachment.

Subsection (2) of section 9-301 addresses the lien creditor's priority with respect to a purchase money security interest. Because subsection (2) does not provide any exception from the presumptive effectiveness of the security interest, its only effect is to *take away* some of the right to subordinate provided lien creditors in subsection (1)(b).[36]

Failure to recognize the pivotal effect of section 9-201 in the Code priority scheme can result in a misconstruction of sections 9-301(1)(b) and (2). For example, Referee Cyr in *In re Moore*[37] misconceived section 9-201's presumption of effectiveness and concluded that section 9-301(2) contained a negative inference that worked to the benefit of the lien creditor. The court held that a purchase money security interest which was automatically perfected without filing would nevertheless be subordinate to the rights of lien creditors whose interests

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The basic rule of § 9-301(1)(b) is stated in terms of subordination, not priority, while subsection (2) talks in terms of priority. For purposes of this article both rules will be considered as operative priority rules. To the extent that subordination confers a *prior* right on the lien creditor, § 9-301(1)(b) is a priority rule. *Compare* R. HENSON, HANDBOOK ON SECURED TRANSACTIONS 236 (2d ed. 1979) *with* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 25-2 (1972).

34. See text accompanying notes 161-73 *infra*.

35. Of course, the transactions in issue must be ones to which Article Nine applies. *See* U.C.C. § 9-104.

36. U.C.C. § 9-301(1)-(2).

37. 7 U.C.C. Rep. 578 (D. Me. 1969) (Ref. Cyr).

arose after the purchase money interest attached and became perfected, and within ten days after the collateral came into the debtor's possession. Against the backdrop of sections 9-201 and 9-301(1), section 9-301(2) does not *require* the purchase money secured party to file within ten days in order to be protected against an intervening lien creditor. It merely gives the purchase money interest limited relation-back priority in a situation where it might otherwise fall victim to the lien creditor's more general right to subordinate an unperfected interest under section 9-301(1)(b).[38] If the lien creditor is not protected by section 9-301(1)(b), the security interest is presumptively effective under section 9-201, and a negative inference should not be drawn from section 9-301(2) to create an exception in the creditor's favor.

The invocation of section 9-301(1)(b) to establish a creditor's right to subordinate a security interest presumes that the creditor can qualify as a "lien creditor," a status which is incompletely defined in Article Nine. The meaning of "lien creditor," therefore, is critical to the proper placement of the judicial process creditor within the scheme of priority.

IV. Post-Judgment Creditors Who Resort to State Process

Section 9-301(3) defines a "lien creditor" as "a creditor who has acquired a lien on the property involved by attachment, levy *or the like.*"[39] Before any creditor qualifies for lien creditor status, he must have *acquired a lien* by resort to state procedure for execution and levy, attachment, or a similar lien-generating process. While the creditor's status and entitlement are defined within the Code, state statutory and decisional law outside the Code determine the process necessary to create the lien, the characteristics of the lien, and the time the lien arises.[40] Taken as a whole, this body of law is complex and convoluted. Within a given jurisdiction, numerous lien-generating devices may exist for the collection of money judgments; moreover, each particular device may vary in form from state to state. Careful consideration of the important variations of post-judgment remedies is essential to a full understanding of the interre-

38. U.C.C. § 9-301(1)(b). Under the 1966 version of the Code, the lien creditor would also have to become such without knowledge of the secured party's interest. U.C.C. § 9-301(1)(b) (1966 version).

39. U.C.C. § 9-301(3) (emphasis added). Also included in 9-301(3)'s definition of "lien creditor" are an assignee for the benefit of creditors and the trustee in bankruptcy.

40. The possibility that a lien acquired by resort to state process may clothe the creditor with some status other than that of a lien creditor (*i.e.* purchaser) will be explored in Part II. See note 1 *supra*. A creditor with a *judgment* lien in one of the few states where it reaches personal property, may be excluded from Article Nine altogether under U.C.C. § 9-104. *See, e.g.*, GA. CODE ANN. § 39-701 (1975); MISS. CODE ANN. § 11-7-191 (1972).

lationship of judicial process creditors and secured parties under the Article Nine priority framework. Underlying this examination of the relationship between post-judgment remedies and Article Nine priority principles are two central inquiries: whether a creditor who resorts to these devices is a "lien creditor" within the meaning of section 9-301(3), and at what point a creditor who fits the section 9-301(3) definition by resort to such devices "become[s] a lien creditor" for purposes of applying the rules in section 9-301(1)(b) and (2).

A. *Lien on Execution and Levy*

1. Introduction. The 9-301(3) status of a creditor who relies upon execution and levy to satisfy his judgment essentially hinges upon an identification of the precise point at which the execution lien arises. Historically, several theories have been invoked to describe the creation of this lien. Before the enactment of the Statute of Frauds in 1676, it was generally held that the writ of *fieri facias,*[41] a common law writ which directed the sheriff to levy on and sell the debtor's non-exempt personal property,[42] gave rise to a lien in the debtor's personalty from the moment of the writ's *teste,* or certification.[43] This formulation of the lien's creation, however, caused several harsh results. Since the *teste* might be deemed to be the first day of the term, a lien could conceivably arise before judgment was rendered. Good faith transfers of the debtor's property after its *teste* were vulnerable to subsequently issued executions.[44] A provision of the Statute of Frauds alleviated the hardships of this rule by postponing the effectiveness of the *fieri facias* writ until the time of its delivery to the sheriff.[45] In those jurisdictions which have adopted the English rule derived from the Statute of Frauds, the so-called "order of delivery" jurisdictions, the creditor's lien is created upon delivery of the writ of execution to the sheriff. The "order of delivery" rule was not universally adopted in the United States, and for a short period some states utilized the early common law *teste* rule for dating the execu-

41. The most ancient writs available for the enforcement of judgments were generally designated as writs of *levari facias* commanding the sheriff to levy. The origins of these writs seem to go back to days when compulsory process had the effect of constraining the defendant, but was not a device for sale and realization out of defendant's property. *See* M. DALTON, OFFICIUM VICECOMITUM 59 (London 1623); G. GILBERT, THE LAW OF EXECUTIONS 4ff, 27ff (London 1763).

42. 1 A. FREEMAN, *supra* note 10, § 9b.

43. The *teste* usually refers to the signature of seal which attests to the fact that the writ has been issued by the proper authority. If sued out during the term, the *teste* could specify any day of the term in which judgment was signed. *See* J. IMPEY, THE NEW INSTRUCTOR CLERICALIS 464, 465 (2d ed. Dublin 1785) (1st ed. London 1784); 2 W. TIDD, THE PRACTICE OF THE COURTS OF KINGS BENCH AND COMMON PLEAS 999 (3d ed. Philadelphia 1840) (1st ed. Dublin 1791). *See also* Harris v. Max Kohner, Inc., 230 Md. 349, 187 A.2d 97 (1963).

44. 2 A. FREEMAN, *supra* note 10, § 199, at 1014 n.45.

45. Statute of Frauds, 1677, 29 Car. II. c. 3 § 16.

tion lien.[46] In contrast, a number of states delay the effectiveness of the execution lien until levy. In these so-called "order of levy" jurisdictions, a lien upon debtor's personalty does not arise until the sheriff actually commences to levy. Finally, several jurisdictions provide in limited circumstances for notice filing on personal property as an alternative to levy.[47] Both New Hampshire and Vermont, for instance, have enacted statutes which authorize or require the recordation of execution liens on personal property in Article Nine files.[48] Maine enacted in 1971 a comprehensive disclosure law that gives the initiating creditor an alternative lien-generating device in the form of a procedure for obtaining a property lien order.[49]

2. *Lien Status under the "Order of Levy" Rule.* In an "order of levy" state, a judgment creditor does not acquire a lien until levy is made.[50] The levy that occurs when an officer gains dominion or control over property is often viewed as the most effective notice of the executing creditor's interest in the debtor's property. States originally adopted the "order of levy" rule to extend maximum protection to good faith purchasers and mortgagees. In his work on executions, Freeman argues in favor of this protection:

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46. *See, e.g.,* Stahlman v. Watson, 39 S.W. 1055 (Tenn. Ch. App. 1897).

47. CAL. CIV. PROC. CODE §§ 688, 488.320, 488.360(c) (West 1979); N.H. REV. STAT. ANN. § 511:23 (1968); VT. STAT. ANN. tit. 12, § 3251 (1973).

48. See the comparison made in the text accompanying notes 66-76 *infra.*

49. Although most Maine "executions" are no doubt carried out within the procedure, the writ of execution has been maintained as a separate remedy. ME. REV. STAT. ANN. tit. 14, § 3133 (Cum. Supp. 1978-1979). *See* Note, *Postjudgment Procedures for Collection of Small Debts: The Maine Solution,* 25 MAINE L. REV. 43 (1973).

50. Maine and Massachusetts are examples of New England states with an "order of levy" rule. ME. REV. STAT. ANN. tit. 14, §§ 4751, 5001 (1964); MASS. GEN. LAWS ANN. ch. 235, §§ 29-31 (West 1959). *See* Wright v. Morley, 150 Mass. 513, 23 N.E. 232 (1890); Rice v. Tower, 67 Mass. (1 Gray) 426 (1854); Whittier v. Smith, 11 Mass. 211 (1814). *Whittier* may serve as a guide for construing the Maine statute since the case was decided prior to the separation of Maine and Massachusetts by the court sitting in Maine, and the Maine statute is substantially identical to the Massachusetts statute.

The alternative for the Maine creditor is to obtain a court ordered lien against the debtor's property. This lien can be obtained within the framework of Maine's statute providing for the enforcement of money judgments. ME. REV. STAT. ANN. tit. 14, § 3132 (Cum. Supp. 1978-1979). It is not a prerequisite to the creditor's disclosure action that execution issue and be returned unsatisfied. See the discussion of supplementary proceedings in the text accompanying notes 187-203 *infra.*

In Massachusetts, civil suits may begin with a writ of attachment under the new scheme in Rule 4.1 of the Massachusetts Rules of Civil Procedure. Pursuant to such procedure the lien usually arises at levy, although personal property may be kept on the owner's premises under a keeper with court approval, and a "lien" in "bulky goods" may be secured by an Article Nine filing. MASS. GEN. LAWS ANN. ch. 223, § 50 (West Supp. 1979). If the Massachusetts plaintiff does not resort to attachment, his rights against chattels after judgment can be secured by execution and levy. The provision for an Article Nine filing on bulky goods, however, does not seem to provide a vehicle for acquiring an *execution lien.* But a new suit on the judgment would make chapter 223 applicable.

> As the plaintiff, when he has taken out his execution, is authorized thereby to seize upon all the personal property of the defendant liable to forced sale, there seems but little necessity of allowing him any lien on the defendant's goods, otherwise than such as may be acquired by an actual seizure thereof. If he really designs to execute his writ he ought to proceed with diligence. Personal property is constantly being subjected to the necessities of commerce. It changes owners with great rapidity in the course of lawful and meritorious business relations. It ought not to be unnecessarily tied up in the hands of any owner.[51]

It should be noted, however, that although levy presumes control and dominion by the officer, it does not always require removal of the goods from the debtor's possession. When all other requirements of dominion are met, goods can remain with the debtor without invalidating the levy.[52] Where property is difficult to manually deliver, an open and notorious display of dominion may suffice as an equivalent of seizure.[53] This sort of levy without seizure often diminishes the notice to third parties that the "order of levy" rule was designed to provide.

Notwithstanding possible imperfections in the resulting notice effect of a valid levy, executing creditors in "order of levy" jurisdictions fit most neatly into the section 9-301(3) definition of a "lien creditor" and, therefore, within the section 9-301(1)(b) priority rule when their lien competes with an Article Nine security interest.[54] Under the 1966 version of section 9-301, the creditor in an "order of levy" jurisdiction must become a lien creditor "without knowledge of the security interest," which may be unperfected, and must levy before the security interest is perfected. When knowledge is an issue, the time of the sheriff's levy, usually noted on his return, is critical. The lien creditor with actual knowledge of an unperfected security interest before levy is denied the right to subordinate that interest.[55] The present uniform version alters the section 9-301(1)(b) subordination rule by eliminating the lack of knowledge requirement. In "order of levy" jurisdictions under the 1972 uniform version of Article Nine the lien creditor

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51. 2 A. FREEMAN, *supra* note 10, § 201. A further explanation of this view appears in the North Carolina Supreme Court decision of Sawyer v. Bray, 102 N.C. 79, 8 S.E. 885 (1889).

52. 2 A. FREEMAN, *supra* note 10, § 261. *See, e.g.*, Myers v. Lee & Co., 22 Ga. App. 20, 95 S.E. 475 (1918).

53. State v. Poor, 20 N.C. 428 (1839); Johnson v. Iron Belt Mining Co., 78 Wis. 159, 47 N.W. 363 (1890). For a collection of cases dealing with the validity of a levy without physical removal see Annot., 22 A.L.R. 2d 1276 (1952).

54. U.C.C. § 9-301(1)(b). Cushman Sales & Serv., Inc. v. Muirhead, 201 Neb. 495, 268 N.W.2d 440 (1978). *See also* Massachusetts Mut. Life Ins. Co. v. Central Penn Nat'l Bank, 372 F. Supp. 1027 (E.D. Pa. 1974).

55. U.C.C. § 9-301(a)(b) (1966 version). A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. U.C.C. § 1-201(25).

prevails if levy is accomplished before the secured party perfects.[56]

When the secured transaction assumes the form of a pledge an additional problem surfaces. Section 9-311 seems to give the levying creditor access to a pledgor's residual property rights.[57] However, levy by seizure from the pledgee would impair the pledgee's perfected status, and possibly the enforceability of the interest, both of which are dependent upon possession of the collateral.[58] The seizing sheriff could discharge the secured obligation, but this presents risks to the levying creditor. Normally the creditor can protect his interest by resort to garnishment of the pledgee, or to service of an execution on the pledgee, in the nature of garnishment.[59] In most states the creditor's lien would arise when the garnishee was served.[60] Where possession is essential to the creditor's lien status and the debtor is not in default under the security agreement, the sheriff should be viewed as a bailee with notice of the secured party's interest within the meaning of the second sentence of section 9-305. The pledgee could then safely relinquish possession because he would lose neither his perfected status nor his priority. An ordinary levy and sale would then be possible.

3. *Lien Status in States with a Notice-Filing Option.* While a creditor can normally obtain a judgment lien on real property either by docketing[61] or recording[62] the judgment, or by recording some evidence of the judgment in the county in which the land is located,[63]

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56. Possession of the collateral is an alternative mode of perfection recognized in § 9-305 for all but intangible types of collateral. Theoretically, it would be possible for a secured party to perfect by possession after levy. The sheriff's seizure could be constructive; that is, the property could be under his control although not technically in his possession, and could even be in the possession of the defendant. If the levy is otherwise proper and the creditor does not abandon his interest, a taking might result in a conversion of the levying creditor's interest. But see text accompanying notes 19-26 *supra.* In any case, possession would come too late to perfect under § 9-301(1)(b).

57. *See* U.C.C. § 9-311. Comment 1 to § 9-311 makes clear that *"in all security transactions* under this Article (including a pledge, § 9-102(2)), the debtor has an interest . . . which he can dispose of and *which his creditors can reach."* (emphasis added). *See* Cohen v. First Nat'l City Bank, 49 Misc. 2d 141, 145, 267 N.Y.S.2d 146, 150 (Civ. Ct. N.Y. 1966).

58. Loss of possession is loss of perfection under § 9-305 and if the parties do not have a written security agreement, the secured party's loss of possession leaves him without an enforceable interest of any kind. U.C.C. § 9-203.

59. In some jurisdictions, garnishment of the pledgee is considered a mode of levy or a method of executing in lieu of levy. CAL. CIV. PROC. CODE § 488.330 (West 1979); IOWA R. CIV. PROC. RULE 54(b); MINN. STAT. ANN. §§ 550.13, 550.14, 550.141 (West 1947 & Supp. 1977); N.Y. CIV. PRAC. LAW § 5232(b) (McKinney 1978).

In Massachusetts, the judgment creditor may bring either an action on the judgment and attach the pledged property under MASS. GEN. LAWS ANN. ch. 223, § 74 (West 1958) or trustee process against the pledgee under MASS. GEN. LAWS ANN. ch. 246, § 1 (West Supp. 1979). *See* Lyon v. Coburn, 55 Mass. (1 Cush.) 278 (1848).

60. See text accompanying notes 118-21 *infra.*

61. *See, e.g.,* ARK. STAT. ANN. § 29-130 (1979).

62. *See, e.g.,* HAW. REV. STAT. § 636-3 (1976).

63. *See, e.g.,* ILL. ANN. STAT. ch. 77, § 1 (Smith-Hurd Supp. 1979).

neither the traditional "order of levy" nor "order of delivery" rules for personal property link lien status to recording.[64] Some "order of levy" jurisdictions, however, including New Hampshire and Vermont, have recently adopted the Article Nine filing system as a lien-creating or lien-preserving alternative to seizure.[65] This option gives the judgment creditor access to the notice-perfection scheme available to holders of consensual interests under Article Nine, but the relationship between the judicial creditor who makes use of the file and the priority rules in section 9-301 has not been clarified.

Vermont permits the serving officer to file a copy of the writ of execution with his return "in the office or offices proper for the filing of a financing statement to perfect a security interest in such property under section 9-401 of Title 9A."[66] The effect of such filing is to "hold the property against all subsequent sales, attachments or executions as if it had been actually removed and taken into the possession of the officer."[67] Only sales, attachments, and executions are expressly mentioned as third party interests against which the executing creditor is shielded by his filing. Although the statute omits reference to the Article Nine security interest, this omission should not be viewed as effecting a rule contrary to section 9-301(1)(b). Vermont, unlike most American jurisdictions, has had a filing alternative to seizure since colonial times and has considered a chattel mortgagee to fall within the definition of one who took by subsequent "sale."[68] In light of this history, it is doubtful that the Vermont Legislature intended to limit the scope of its filing alternative to levy when it replaced its Chattel Mortgage Act with Article Nine.

In jurisdictions like Vermont, where filing is an authorized substitute for levy, the act of filing serves as the functional equivalent of levy for purposes of invoking lien creditor status under 9-301(3). Filing, like levy, provides effective notice of conflicting interests in property to the secured party, a class of creditor most likely to use the file. And where levy can be accomplished by constructive control, filing may prove a more effective notice device. A creditor who levies by filing should therefore be viewed as one "who has acquired a lien on

64. Vermont, however, is one ancient exception. VT. STAT. ANN. tit. 12, § 3251 (1973) was amended in 1971 to provide for Article Nine filing as an alternative to levy. While resort to the Article Nine filing was a change in Vermont law, the availability of a filing alternative to levy was not new. The predecessor of present § 3251 permitted lodging the writ with the town clerk as a substitute for levy. A similar provision dates back to the days of Ethan and Ira Allen. Vermont Statute of 1817, at 102. It might also be noted that in three states, Alabama, Georgia, and Mississippi, a judgment lien *does* attach to personal property. The judgment lien in these states arises by the entry or recordation of an abstract of the judgment itself. ALA. CODE tit. 6, § 6-9-211 (1975); GA. CODE § 110-507 (1973); MISS. CODE § 11-7-191 (1972).

65. N.H. REV. STAT. ANN. § 511:23 (1968); VT. STAT. ANN. tit. 12, § 3251 (1973).

66. VT. STAT. ANN. tit. 12, § 3251 (1973).

67. *Id.*

68. Thorp v. Robbins, 68 Vt. 53, 33 A. 896 (1895).

the property involved by attachment, levy or the like" within the meaning of section 9-301(3).

Thus, if the execution lien secured by the lodging of the writ or some written notice of the writ clothes the executing creditor in the mantle of "lien creditor" under section 9-301(3), the priority rule in section 9-301(1)(b) would control the relationship between the secured party and the creditor who levies by filing. In states that permit filing as an alternative to seizure and that have adopted the 1972 version of Article Nine, creditors with liens created by filing would gain priority over unperfected security interests. Yet, the priority contest between the lien creditor and secured party would not necessarily result in the first to file rule. A secured party who files before the judgment creditor must nevertheless have an attached interest to escape subordination under section 9-301(1)(b).[69]

In states (like Vermont) with the 1966 version of section 9-301, the additional factor of the lien creditor's knowledge of the security interest must be considered. Knowledge of the security interest before filing will defeat the lien creditor's right to subordinate even when the secured party's interest is unperfected. Because the sheriff lodges the writ under schemes like Vermont's, the lien creditor may be unaware of the exact moment at which he "becomes a lien creditor" under section 9-301(1)(b). Nonetheless, actual knowledge of an unperfected security interest before filing will defeat what would otherwise be section 9-301(1)(b) priority.[70]

New Hampshire provides a lien-preserving device which utilizes the Article Nine file when bulky goods are taken and the execution *has been accomplished* by the officer's actual levy.[71] The effect of the New Hampshire filing provision must be distinguished from Vermont's because in New Hampshire a lien does not arise by virtue of the sheriff's filing. The sheriff must first effectuate a levy by taking the property into his possession or placing it under his control. He may then preserve the lien by filing in the proper Article Nine file within forty-eight (48) hours of his initial levy or attachment. The New Hampshire statute is also more limited in its scope. It covers only bulky goods, defined as "any livestock or articles which by reason of their size, situation, fluidity, explosive or inflammable quali-

69. A security interest cannot be perfected until it has attached. U.C.C. § 9-303. Under the present uniform version, attachment requires: 1) that the debtor have rights in the collateral; 2) that value be given; and 3) that the debtor either sign a security agreement containing a description of the collateral or give possession of the collateral to the secured party. With respect to the last requirement, the 1966 version of the Code requires only that there be an agreement that the interest attach. *See also* U.C.C. § 1-201(3) (1966 version).

70. It might be more equitable to ignore the actual knowledge of the creditor acquired after the writ is delivered to the officer but before the levy by filing is made. See note 55 *supra*.

71. N.H. REV. STAT. ANN. § 511:23 (1968).

ties . . . are incapable of being conveniently taken into actual possession."[72] Resort to the Article Nine file is not an alternative to levy in New Hampshire; the executing creditor "becomes a lien creditor" under section 9-301(1)(b) only by a physical levy.

Maine is an "order of levy" state with no provision for levy by filing.[73] Maine creditors can, however, resort to that state's discovery of assets procedure to obtain a property lien order which is effective against third parties only after filing in the Article Nine file.[74] This statute will be discussed further in connection with the status of creditors who resort to citation or discovery procedures.[75] Massachusetts and, to a more limited extent, Maine give the *attaching* creditor access to the Article Nine file by allowing the officer to file after attachment is made.[76] This access is apparently not available to the judgment creditor who proceeds by execution alone.

4. Lien Status under the "Order of Delivery" Rule. Several states, including New York[77] and Illinois,[78] have adopted the English rule, derivative from the Statute of Frauds, that a lien arises upon the delivery of the writ of execution to the sheriff.[79] Thus, even before the sheriff levies, chattels become subject to the judicial process creditor's lien. Delivery of the writ, however, creates only a general lien, which remains inchoate until the writ's return date. If a levy under the writ is successful, the lien relates back to the date of delivery.[80]

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72. *Id.* Motor vehicles, trucks, trailers, and tractors are included in this provision.

73. See note 50 *supra.*

74. ME. REV. STAT. ANN. tit. 14, § 3132 (Cum. Supp. 1978-1979).

75. See text accompanying notes 197-99 *infra.*

76. MASS. GEN. LAWS ANN. ch. 223, § 50 (West Supp. 1979). The Maine statute applies to "personal property . . . which by reason of its bulk . . . cannot be immediately removed." ME. REV. STAT. ANN. tit. 14, § 4154 (Cum. Supp. 1978-1979).

77. N.Y. CIV. PRAC. LAW § 5202 (McKinney 1978).

78. ILL. ANN. STAT. ch. 77, § 9 (Smith-Hurd 1966). *See* Watkins v. Dunbar, 232 Ill. App. 1, 9 (1924).

79. For years Maryland had a model "order of delivery" scheme. *See In re* Continental Midway Corp., 185 F. Supp. 867 (D. Md. 1960). In 1973, the Maryland legislature repealed the state's lien on delivery rule in favor of a statute which postpones lien status until the levy is made. MD. CTS. & JUD. PRO. CODE ANN. § 11-403 (1974).

80. The metaphysics of the rule was explored in *In re* Continental Midway Corp., 185 F. Supp. 867 (D. Md. 1960), a district court review of a referee's decision under Maryland law. The case contained the following sequence of events after the creditor obtained a judgment against debtor: 1) Judgment creditor delivered execution writ #1 on July 26 (return date: August 6); 2) Writ #1 was returned unsatisfied on the return date; 3) Judgment creditor delivered execution writ #2 on August 14 (return date: September 4); 4) Writ #2 was returned unsatisfied on the return date; 5) Judgment creditor delivered execution writ #3 on September 11 (return date: October 2); 6) Writ #3 was returned unsatisfied on the return date (with respect to writ #3 the sheriff refused to make the levy, maintaining that his deputy had been informed when he started to make the levy that the property did not belong to debtor and could not be levied on); 7) An Involuntary Petition in Bankruptcy was filed December 13.

After the sale of bankrupt's personal property by the trustee, the judgment creditor filed a petition alleging that he was entitled to priority payment out of the proceeds

If the writ is returned unsatisfied, however, it expires unless revived by successive alias and pluries writs, each of which must be delivered before the expiration of the return date on the prior writ.[81] Before enactment of the Code, the common law rule in "order of delivery" states professed that an inchoate delivery lien secured by levy prevailed over mortgages arising after delivery, even though the intervening mortgagee acquired or even "perfected" his interest prior to actual levy.[82] Although it may appear that section 9-301(1)(b) does nothing to change this priority, two questions arise under the language of section 9-301: Does the executing creditor in an "order of delivery" state fit the section 9-301(3) definition of "lien creditor," as do his counterparts in states which follow the "order of levy" rule? If the executing creditor qualifies as a 9-301(3) "lien creditor," what is the effect on section 9-301 of provisions in state execution statutes which arguably give a different measure of protection to "purchasers" who become so between delivery and levy?

With respect to the first question, the argument can be made that an executing creditor in an "order of delivery" state is not a "lien

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because he had a lien on the personal property acquired by the delivery of various writs of execution. The judgment creditor wanted to rely on the July 26th delivery of the writ so that the lien, if it existed, would not fall within the trustee's avoidance power in § 67(c) of the Bankruptcy Act. This section would allow the trustee to avoid a lien acquired in a legal or an equitable proceeding if acquired within four months of bankruptcy and when the debtor was insolvent. As it turned out the judgment creditor was not forced to mark his lien on July 26, and the court was forced to deal with the lien-creating potential of all three writs, because the referee had made no finding with respect to the debtor's insolvency on any of the dates in question. Without such a finding, the trustee might not be able, under § 67(c) to avoid the liens acquired within four months of bankruptcy (*i.e.* those which may have been created by delivery of writs #2 and #3). Nevertheless, the court found for the trustee because *none* of the inchoate liens created on the dates of delivery were *perfected by a levy*.

Under these facts, successful levy would have perfected the inchoate "delivery" lien, and its effectiveness would have related back to the date of delivery. An interesting question would have been posed in *Continental Midway Corp.* had there been a successful levy under the last writ on September 11. To which delivery date would the successful levy relate back? Would it be the date on which the writ authorizing the levy was delivered? Or would the successful levy revive prior inchoate liens back to the delivery date of the first writ? A lien effective from the date of delivery of the first writ would be outside the four month period in § 67(c) and therefore beyond the reach of the trustee's avoidance power, even if the debtor were insolvent on July 26. Apparently, because none of the successive writs were issued before the return date on the prior writs, the lien would not have related back to the first delivery under the common law rule. Maryland no longer has an order of delivery rule with respect to executions. MD. CTS. & JUD. PRO. CODE ANN. § 11-403 (1974).

81. *In re* Liberty Lumber Co., 6 F. Supp. 397 (S.D.N.Y. 1933); McKenzie v. Commonwealth, 373 S.W.2d 595 (Ky. 1963); Webster v. Industrial Acceptance Corp., 234 Ky. 613, 28 S.W.2d 959 (1930); Vance Boiler Works, Inc. v. Co-operative Food Dealers, Inc., 46 Misc. 2d 654, 260 N.Y.S.2d 303 (Sup. Ct. 1965). In West Virginia, the execution lien may outlive the writ. W. VA. CODE § 38-4-8 (1966).

82. *See* Williams v. Mellor, 12 Colo. 1, 19 P. 839 (1888); Goodyear Tire & Rubber Co. v Daniell, 72 Fla. 489, 73 So. 592 (1916); Hale v. Sweet, 40 N.Y. 97 (1869).

creditor" under the Code because he does not acquire his lien by "attachment, levy or the like." Both levy and attachment imply an actual or constructive *seizure* of the debtor's property. While the notice filing alternative is "like" levy and attachment from a functional perspective—that is, filed notice is a reliable and widely used method of constructive notice[83]—mere delivery, on the other hand, fails to provide any notice to other creditors or secured parties.[84] If, however, the executing creditor in an "order of delivery" state meets the section 9-301(3) definition of "lien creditor," the secured party who extends credit or perfects his interest after delivery of the writ *but before* seizure of the property will lose to the executing creditor. In devising the rule in section 9-301(1)(b), the draftsmen of the Code may have believed that the definition of "lien creditor" in section 9-301(3) removed protection from all liens not acquired by such notice-generating acts as levy and attachment. Such an exclusion would avoid the use of section 9-301(1)(b) to protect a creditor whose levy occurs *after* a competing security interest is taken and perfected, but whose delivery of the writ to the sheriff precedes the perfection of the security interest.

Support for this argument is found in the 1929 New York case of *Baker v. Hull.*[85] *Baker* held that a creditor whose execution lien was acquired by delivery was not entitled to protection against a prior conditional sales contract that was filed (perfected) after delivery of the writ but before levy upon the property. Under section 65 of the New York Conditional Sales Law, only creditors whose liens were acquired "by attachment or levy" were protected against retention of title by the seller.[86] Title retention survived the lien on delivery in *Baker* because the lien was not acquired by attachment or levy. The only difference between the Code definition of lien creditor and that of the New York statute construed in *Baker* is the addition of the words "or the like" in section 9-301(3).[87] Although the Code definition derived from state statutes, including section 65 of the New York Personal Property Law, modern cases interpreting section 9-301(3) in "order of delivery" states do not observe the distinction in *Baker*, and find the lien at delivery sufficient under the section 9-301(3) defini-

83. See text accompanying notes 61-76 *supra*.

84. *But see* Robinson v. Wright, 90 Colo. 417, 9 P.2d 618 (1932). In *Robinson*, the Colorado court treated the delivery lien as one premised on notice. The sheriff's record of his receipt of the writ was deemed to be a *public record*, available for inspection.

85. 250 N.Y. 484, 166 N.E. 175 (1929).

86. 1922 N.Y. LAWS, ch. 642, § 2 (displaced by N.Y.U.C.C. § 13-102 (McKinney Supp. 1979-1980) (current version at N.Y.U.C.C. §§ 9-301, 9-302 (McKinney Supp. 1979-1980)). In the case of an unfiled chattel mortgage, all creditors of the debtor were probated. *See* 1960 N.Y. LAWS, ch. 1004, § 7 (displaced by N.Y.U.C.C. § 13-102 (McKinney Supp. 1979-1980) (current version at N.Y.U.C.C. §§ 9-101 to 9-507 (McKinney 1964)).

87. *Compare* 1922 N.Y. LAWS, ch. 642, § 2 (displaced by N.Y.U.C.C. § 13-102 (McKinney Supp. 1980)) *with* U.C.C. § 9-301(3).

tion.[88] At least one recent case has read section 9-301(3) broadly to include within the definition of "lien creditor" any creditor who acquires a lien by invoking the judicial process, without regard to the adequacy of the notice provided by the process.[89] If the "order of delivery" creditor is a "lien creditor" and the inchoate lien at delivery is completed by levy before the return date on the writ, the creditor's priority is measured as of delivery. Under the 1966 Code, the executing creditor in an "order of delivery" state takes priority over security interests of which he has no knowledge that are unperfected on the date of delivery. The present uniform version omits the lack of knowledge as a condition to lien creditor priority.[90]

The inchoate nature of the common law lien pending levy in "order of delivery" states prompts further complications in the priority scheme. For instance, if a secured party's interest is unperfected on the day the executing creditor delivers the writ, can he nevertheless defeat the prior lien creditor by taking possession of the property? Does it make a difference if the secured party takes possession, not as a mode of perfection under section 9-305, but rather as an exercise of his right to repossess on default under section 9-503?[91]

Under the Code scheme, the answer to both questions appears negative. Although under the "order of delivery" rule a lien will expire unless supported by a subsequent levy, the lien creditor can reach property in the secured party's hands before expiration of the writ by garnishment in aid of execution or other supplementary writ.[92] While section 9-504 clearly protects the secured party *with priority* who repossesses after the delivery lien of an executing creditor arises, it should not be read to allow an unperfected secured party asserting his rights under section 9-503 to defeat the rights of a lien creditor with a prior inchoate lien.[93]

Resolution of priority conflicts within the Code framework is complicated further in "order of delivery" states by statutory protections afforded to certain transferees of the property whose interest arise after delivery but before levy.[94] For example, section 5202(a)(1) of the New York Civil Practice Law and Rules protects the executing creditor against a transferee of the property, unless the transferee

88. *E.g.*, Levine v. Pascal, 94 Ill. App. 2d 43, 236 N.E.2d 425 (1968).

89. Massachusetts Mut. Life Ins. Co. v. Central Penn Nat'l Bank, 372 F. Supp. 1027 (E.D. Pa. 1974).

90. *Compare* U.C.C. § 9-301(1)(b) *with* U.C.C. § 9-301(1)(b) (1966 version).

91. The lien on delivery would result in an event of default under most form security agreements. *See, e.g.*, 5A F. HART & W. WILLIER, BENDER'S FORMS AND PROCEDURE UNDER THE UNIFORM COMMERCIAL CODE ¶ 92.26, at 9-120.2 (14th ed. 1979).

92. Master-Krete, Inc. v. Fidelity & Deposit Co., 244 F. Supp. 19 (W.D. Mo. 1965). See notes 12, 57 & 59 *supra*.

93. Protection of the prior delivery lien in such case is consistent with pre-Code law. *See* Williams v. Mellor, 12 Colo. 1, 19 P. 839 (1888). *But see* Baker v. Hull, 250 N.Y. 484, 166 N.E. 175 (1929).

94. *E.g.*, N.Y. CIV. PRAC. LAW § 5202 (McKinney 1978).

"acquired the debt or property for fair consideration before it was levied upon."[95] An antecedent debt is fair consideration within the meaning of this section, and the term "transferee" is broad enough to include an Article Nine secured party;[96] furthermore, the statute would give a secured party-transferee priority as long as both transfer and perfection occurred prior to the levy.[97] The statute would allow a secured party whose interest was unperfected on the date of delivery to claim transferee status by virtue of a perfection accomplished before the date of levy. To the extent that statutes like New York's do offer such protection, they would appear to be inconsistent with the Code priority scheme. Though arguably silent with regard to the priority contest between a secured party and one who becomes a "lien creditor" before the security interest attaches, section 9-301(1)(b) must be read broadly to provide "first in time" priority to the lien creditor. If section 9-301(1)(b) were read narrowly, it would produce an anomolous result: the secured party who attached *after* levy would prevail under the section 9-201 presumption of effectiveness. Although reading section 9-301(1)(b) broadly provides a fair "first in time" rule for the lien creditor and perserves the internal consistency of the Code priority scheme, it puts the section in conflict with statutes like CPLR section 5202(a)(1). This conflict should be resolved in favor of the Code's more comprehensive priority scheme.

Another problem emerges from the attempt to integrate state laws governing lien creation, like CPLR section 5202(a)(1), with Article Nine priority concepts: What should be the result when an unperfected secured party claims transferee status through a right to possession of the property upon default, rather than through subsequent perfection of his interest? At least one pre-Code New York decision concluded that CPLR section 5202(a)(1) gave priority to a chattel mortgagee whose interest was unperfected at the time of the writ of execution's delivery if that mortgagee took possession between delivery and levy.[98] The mortgagee's possession brought him under the statute's protection as a "transferee" of the property. It seems clear from the discussion above that under the Code scheme such transferee status should not give priority to the secured party who takes possession after delivery *as a mode of perfection* under section 9-305. As already noted, default and its concomitant right to possession

95. *Id.* at § 5202(a)(1).

96. *Id.*, practice commentary. *Cf.* Ruppert v. Community Nat'l Bank, 22 App. Div. 2d 165, 167, 254 N.Y.S.2d 341, 343 (Sup. Ct. 1964), *aff'd*, 16 N.Y.2d 589, 261 N.Y.S.2d 52, 209 N.E.2d 100 (1965) (Although the "transferee"-chattel mortgagee did not prevail in *Ruppert* because the transfer did not occur until after levy, the court observed that a transfer before levy would have subordinated the execution creditor under § 5202(a)(1).).

97. Russell v. St. Mart, 180 N.Y. 355, 73 N.E. 31 (1905).

98. Ruppert v. Community Nat'l Bank, 22 App. Div. 2d 165, 167, 254 N.Y.S.2d 341, 343 (Sup. Ct. 1964), *aff'd*, 16 N.Y.2d 589, 261 N.Y.S.2d 52, 209 N.E.2d 100 (1965).

should not be available to the unperfected secured party as a *tour de force* through the Code priority scheme.[99] The same result should hold even when the possessory right on default is buttressed with "transferee" status drawn from a statutory formulation outside the Code.[100]

When the secured party has perfected by possession prior to delivery of the writ, the secured party prevails under 9-301(1)(b). Even here the subordinate executing creditor should not be foreclosed from enforcing his lien against the debtor's residual equity.[101]

In those rare cases where possession by the secured party is either the exclusive mode of perfection or the most desirable as against other third party interests, a secured party who is unperfected at the time of delivery, but perfected by possession before levy, can preserve his section 9-305 status by characterizing the executing creditor or the sheriff as his bailee with notice under section 9-305. In this manner the prior lien creditor can reach assets in the possession of the subordinate secured party without jeopardizing the perfected status of the secured party prior to sale.[102]

5. *Purchase Money Status and the Executing Creditor.* The unperfected secured party who holds a purchase money security interest within the meaning of section 9-107[103] receives additional protection

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99. See text accompanying notes 19-24 *supra.*

100. *See* N.Y.U.C.C. § 13-102 (McKinney Supp. 1979-1980). If possession is obtained because an event of default has occurred and the secured party has a right to possession, irrespective of whether he is perfected, it is not so clear that statutes protecting transferees, like N.Y. CIV. PRAC. LAW § 5202(a)(1) (McKinney 1978), are inconsistent with the priority rule in Code § 9-301(1)(b). It can be argued that a *transfer* of possession on default, even when initiated by an unperfected secured party, deserves protection from the inchoate lien that arises on delivery. The secured party's right to possession against the debtor would not be related to the kind of transfers that *perfect*; that is, that give notice of the interest to third parties. This argument ought to be rejected, however, in favor of the Code scheme that does not envision the § 9-301(1)(b) priority rule being affected by an unperfected secured party's status on default under a statutory formulation outside the Code.

101. See note 12 *supra* and text accompanying notes 10-22 *supra.*

102. See note 12 *supra.* At least one court has taken the position that the secured party's right to possess as a mode of perfection is strong enough to foreclose the question of fraudulent procurement of collateral from the debtor if there is a written security agreement, possession is the only mode of perfection available, and only third party rights vis-a-vis the secured party are at issue. *See In re* Chapman, 5 U.C.C. Rep. 649 (W.D. Mich. 1968) (Ref. Nims).

103. The present uniform version of U.C.C. § 9-107 provides:

> A security interest is a *"purchase money security interest"* to the extent that it is
>
> (a) taken or retained by the seller of the collateral to secure all or part of its price; or
>
> (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

U.C.C. § 9-107 (emphasis added).

against the lien creditor under subsection (2) of 9-301. If the secured party files with respect to his purchase money security interest within ten days after the debtor takes possession of the property, the secured party's priority position is assured against challengers who qualify as "lien creditors" *after* attachment of the security interest but before the time of filing. In "order of levy" jurisdictions, the levying lien creditor whose interest arises before the security interest is perfected would nevertheless be subordinate to the security interest which qualifies as a "purchase money interest" and is filed within the ten day period. In "order of delivery" states, the creditor becomes a "lien creditor" at delivery. Thus, if delivery precedes attachment of the purchase money security interest, section 9-301(2) does not protect the secured party. This conflict is possible because the execution lien arises as to all property on which the officer may make a lawful levy, including property acquired by the debtor after delivery and up to the time at which the officer's authority to act terminates. Therefore, a purchase money interest attaching after delivery is subordinate to the creditor whose inchoate lien existed before the debtor had the property.[104] Note, however, that in states like Vermont, in which filing may substitute for levy, a filing by the lien creditor prior to attachment of the purchase money interest does not encumber property acquired by the debtor at that time.[105] As a substitute for levy, the filing cannot cover property that a specific levy would not reach. Additionally, the alternative levy by filing generally requires that property be specifically described before a lien in favor of the creditor is obtained.[106]

B. *Lien on Garnishment*

1. Introduction. The judgment creditor's search for the defendant's assets often leads to third parties. The device of garnishment, or trustee process, allows the creditor to reach property of the debtor in the hands of third parties, including, most commonly, obligations owing to the debtor by third parties. While the functional core of execution is the levy, typically accomplished by an actual or constructive seizure of debtor's property, the functional core of garnishment is the service of some form of legal process upon the garnishee.

Garnishment evolved from a customary prejudgment institution called foreign attachment. In London, and a few other English cities,

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104. Second Nat'l Bank v. Gilbert, 174 Ill. 485, 51 N.E. 584 (1898); Blatchford v. Boyden, 122 Ill. 657, 13 N.E. 801 (1887); Grooms v. Dixon, 36 S.C.L. (5 Strob.) 149 (1850).

105. *See* VT. STAT. ANN. tit. 12, § 3251 (1973).

106. West River Bank v. Gorham, 38 Vt. 649, 651 (1866); Bucklin v. Crampton, 20 Vt. 261 (1848) (reasonable cretainty required). After the 1971 amendments which substituted an Article Nine filing for the lodging of the writ in the town clerk's office, it would appear that a description which "reasonably identifies" within the meaning of section 9-110 would be sufficient.

foreign attachment was available to the creditor who, unable to locate his debtor, could find his debtor's property in the hands of a third party within the city.[107] In the colonies, this writ was coupled with domestic attachment and grew into a collection remedy.[108] Maryland was the first state to make garnishment applicable to the collection of judgments.[109] Following Maryland's example, post-judgment garnishment as a collection device gained general acceptance.[110] In the New England states, trustee process developed as the counterpart to garnishment.[111] Trustee process was a mesne writ, however, and only when Massachusetts made the process available in most personal actions could the judgment creditor employ the action by bringing a new suit on the judgment.[112] While in a number of jurisdictions post-judgment garnishment developed as a variation of *fieri facias* execution,[113] in others it developed as a separate writ,[114] which, in some cases, served as an alternative to levy under writ of execution and took the form of notice to the person indebted to the principal debtor.[115] Although there are a few exceptions,[116] in most American

107. W. BOHUN, PRIVILEGIA LONDINI 253 (3d ed. London 1723) (1st ed. London 1702); Levy, *Attachment, Garnishment and Garnishment Execution; Some American Problems Considered in the Light of the English Experience*, 5 CONN. L. REV. 399, 405 (1972-1973).

108. 5 Hening, Laws of Virginia 59 (1819).

109. 7 MARYLAND ARCHIVES 686 (W.H. Browne, ed. 1889).

110. *See, e.g.*, Pa. Execution Act of 1836, Pub. L. No. 191, § 35, 1836 PA. LAWS 767-68 (current version at PA. R. CIV. P. 3108(d)).

111. In some states the counterpart of post-judgment garnishment is really a form of mesne process called trustee process, which may be available to the creditor with a final judgment who brings suit on the judgment, and invokes the mesne process in connection therewith. *See* ME. R. CIV. P. 4B. The Maine rules permit the Superior Court to issue trustee process at the time it either enters a final judgment or terminates its power to act by transmitting the record under ME. R. CIV. P. 74(p). *See* Advisory Committee Notes to Rule 4A in 1 R. FIELD, V. MCKUSICK, & L. WROTH, MAINE CIVIL PRACTICE 53-55 (2d ed. Supp. 1977). While the 1975 amendments to Rule 4B make trustee process available throughout the pendency of the action, the writ is not available after final judgment except by resort to a new suit on the judgment. *See id.* In contrast to Maine, Vermont enacted a statutory authorization for trustee process in aid of execution in 1971. *See* VT. STAT. ANN. tit. 12, § 2732 (1973). The provisional writs will be discussed in Part II. See note 1 *supra*.

112. 1794-95 MASS. ACTS, ch. 65, at 120-29 (1869). In 1971 Vermont, a state where trustee process has long been available as a mesne writ, enacted a separate post-judgment garnishment device. See note 111 *supra*.

113. *E.g.*, Code of Virginia, ch. 188 (1849) (current version at VA. CODE § 8.01-501 (1977)).

114. *See, e.g.*, KAN. CIV. PRO. STAT. ANN. §§ 60-714 to -725 (Vernon 1976); MINN. STAT. ANN. §§ 571.41-.66 (West 1947 & Cum. Supp. 1979).

115. KAN. CIV. PRO. STAT. ANN. §§ 60-716 to -725 (Vernon 1976); MINN. STAT. ANN. §§ 571.41-.66 (West 1947 & Cum. Supp. 1979); N.D. CENT. CODE §§ 32-09-01 to -09-32 (1976); S.D. COMPILED LAWS ANN. §§ 21-18-1 to -18-50 (1967 & Supp. 1978); *see* Ide v. Harwood, 30 Minn. 191, 195, 14 N.W. 884, 886 (1883).

116. In North Carolina and Ohio the statutes provide neither for levy on choses in action nor for post-judgment garnishment. Debts owed or property belonging to the

jurisdictions, garnishment proceedings as well as a levy under writ of execution will reach choses in action.[117]

2. *The Garnishment Lienor as "Lien Creditor."* Generally, a garnishment lien arises when notice of garnishment is served on a third party who is indebted to the judgment debtor.[118] In the few states which apply the "order of delivery" rule[119] to garnishment liens, however, the lien arises in an inchoate form when the writ is delivered to the sheriff.[120] Although the garnishment lien on service or on delivery is not a possessory lien, it is acquired by "attachment, levy or the like" within the meaning of section 9-301(3).[121] Thus, when service or delivery is made, the judgment creditor "becomes a lien creditor" within the meaning of section 9-301(1)(b).

Two jurisdictions have characterized garnishment in a nontraditional manner, complicating the application of the priority rules under the Code.[122] At one extreme, the Iowa Supreme Court has held that the garnishment writ does not generate a lien. *Peirre v. Peirre,*[123] a decision that may be inconsistent with other Iowa decisions,[124] held that a garnishor did not acquire an interest in the garnished property, but rather obtained a right to proceed against the garnishee personally.[125] Where the garnishment order is characterized as strictly personal, and does not bind the property garnished as against subsequent transferees of either the garnishee or the debtor, garnishment

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judgment debtor that are in the hands of third parties must be reached by a supplementary proceeding. N.C. GEN. STAT. §§ 1-360, -440.21 (1969); OHIO REV. CODE ANN. §§ 2333.13-.14 (Page 1954 & Supp. 1978).

117. Some states require that the judgment debtor resort to execution before garnishment, although such a requirement is not common. Where it exists, it is not required that the execution writ be returned unsatisfied. Rather, the judgment debtor must only go through the formalities of execution. General Truck Sales, Inc. v. Simmons, 208 Tenn. 51, 343 S.W.2d 884 (1961).

118. *See, e.g.,* ILL. REV. STAT. ch. 62, §39(1972); IOWA CODE ANN. §§ 626.16, 642.13 (West 1950); MASS. GEN. LAWS ANN. ch. 246, § 20 (West Supp. 1979). Even without controlling statutory language, courts have associated the lien with the operative act of service. *See* Northwestern Nat'l Ins. Co. v. Wetherall, 267 Md. 378, 384, 298 A.2d 1, 5 (1972).

119. See text accompanying notes 77-93 *supra.*

120. VA. CODE § 8.01-501 (1977). *Cf.* TENN. CODE ANN. § 26-403 (1955) (Tennessee rule applies to the choses in action of corporations only).

121. Rocky Mountain Ass'n of Credit Mg't v. Hessler Mfg. Co., 553 P.2d 840, 843 (Colo. Ct. App. 1976).

122. U.C.C. § 9-301(3). The problem centers on the definition of "lien." The Code defines a lien creditor as one "who has acquired a *lien* on the property involved."

123. 210 Iowa 1304, 232 N.W. 633 (1930).

124. *E.g.,* Briley v. Madrid Improvement Co., 255 Iowa 388, 122 N.W.2d 824 (1963).

125. It is possible to view the garnishment lien in Iowa, as described in Pierre v. Pierre, 210 Iowa 1304, 232 N.W. 633 (1930), as simply a directive from the court to the garnishee forbidding him to dispose of the defendant's property or to satisfy his obligation to the defendant. *See also* McGarry v. Lewis Coal Co., 93 Mo. 237, 6 S.W. 81 (1887); Hulley v. Chedic, 22 Nev. 127, 36 P. 783 (1894).

should not create lien creditor status in the garnishee.[126] Garnishment without a lien puts the garnishor in a precarious position under Article Nine. Absent some interest in the garnished property, a garnishing judgment creditor fails to qualify for "lien creditor" status within the protective language of section 9-301(1)(b); without this protection, he would be subordinate to the unperfected secured party under the presumption of effectiveness in section 9-201.[127]

At the opposite extreme, another court has held that a temporary order restraining the defendant from " 'assigning, transferring or otherwise disposing of amounts due [the defendant]' " imposes enough of a "conditional" lien on the property to qualify the garnishor for lien creditor status under section 9-301(3).[128] This result can be justified only if what appeared to be a personal injunctive order did, in fact, create a terminable interest in the property itself in favor of the plaintiff. In a jurisdiction where garnishment is a personal order, section 9-301 should not be interpreted to aid the garnishor unless some form of lien, even if conditional or of limited duration, is recognized.

3. The Accounts Financer and the Garnishment Lien under "Order of Service" Rule. In the vast majority of jurisdictions a garnishment lien arises in favor of a judgment creditor only when a notice of levy or a garnishment (trustee) summons is served on the third party in possession of money or property of the judgment debtor.[129] When service is made, the judgment creditor "becomes a lien creditor" within the meaning of section 9-301(1)(b).[130] Because garnishment is most frequently employed by a judgment creditor to reach choses in action and other intangible property of the judgment debtor, a typical conflict under section 9-301(1)(b) arises between a judgment creditor and a specific type of secured party—the debtor's accounts financer.[131] In such a case, the garnishing creditor gains priority under section 9-301(1)(b) only if he becomes a lien creditor before the secured party's interest is perfected. The garnishing lien creditor will not subordinate a security interest perfected prior to *or simultaneously with* the impounding of the property pursuant to the garnishment lien.[132]

Central to the resolution of this priority issue is the determination

126. *See, e.g.,* Benedict v. T.L.V. Land & Cattle Co., 66 Neb. 236, 92 N.W. 210 (1902).

127. See text accompanying notes 27-32 *supra.*

128. Massachusetts Mut. Life Inc. Co. v. Central Penn. Nat'l Bank, 372 F. Supp. 1027, 1043 (E.D. Pa. 1974). Injunctive orders are typically provided for in state supplementary proceedings. See text accompanying note 191 *infra.*

129. See note 118 *supra.*

130. See note 121 *supra.*

131. See note 121 *supra.* An accounts financer is typically a secured party whose collateral consists of all present and future accounts of a particular debtor.

132. U.C.C. § 9-301(1)(b).

of the precise point at which the interest of an accounts financer in a debtor's after-acquired accounts is perfected. Perfection requires an "attachment" of the security interest, and, as defined in section 9-204, attachment requires that the debtor have rights in the collateral.[133] Assuming that the secured party has already filed his interest, perfection should occur at the moment the debtor's account comes into existence. However, under the "entity" theory, a theory which has emerged from cases decided under section 60 of the Bankruptcy Act, perfection in after-acquired accounts is deemed to occur at the time of the original filing if the secured party's interest in existing accounts was perfected at that time.[134] The entity theory rests upon the premise that the secured party's interest lies in the debtor's present and future accounts as a whole; when the interest in existing accounts attaches and a filing is made, an interest in *all* the accounts is perfected. Accordingly, the time at which the accounts financer's interest attaches to subsequently-acquired accounts is immaterial for purposes of perfection. Several courts adopted the entity theory to allow the time of "transfer" of property to be advanced beyond the trustee's avoidance powers under section 60(a)(2) of the Bankruptcy Act. Applying this outside the bankruptcy context, as at least one court has, unnecessarily warps state law.[135]

Whatever its purpose in bankruptcy, the entity theory is incompatible with the structure of the Code and should be rejected. By deeming after-acquired interests to be "taken for new value and not as security for an antecedent debt,"[135] under section 9-108, the drafters

133. "No security interest attaches under an after-acquired property clause to consumer goods . . . unless the debtor acquires the rights in them within ten days after the secured party gives value." U.C.C. § 9-204.

134. Grain Merchants of Indiana, Inc. v. Union Bank & Sav. Co., 408 F.2d 209 (7th Cir. 1969).

135. In Rocky Mountain Ass'n of Credit Mg't v. Hessler Mfg. Co., 553 P.2d 840 (Colo. Ct. App. 1976), the court refers to the date when the secured party filed a financing statement on debtor's accounts as the time when it acquired a "perfected" interest in the accounts. *Id.* at 842-43. This may represent a non-bankruptcy extension of the "entity" theory invoked by Judge Cummings in Grain Merchants of Indiana, Inc. v. Union Bank & Sav. Co., 408 F.2d 209 (7th Cir. 1969). In order to preserve the secured party's fixed value interest in accounts against the trustee's challenge under § 60, Judge Cummings refused to look at each item of collateral to determine "attachment" and thus "perfection" of the secured party's interest under § 9-301(1)(b). Instead he looked at all the accounts as an entity unchanged from the time of filing. If the interest in accounts existing at the beginning of the four month period was perfected when the financing statement was filed irrespective of the changes and turnover of individual accounts, then accounts arising within the period would not be "deemed" § 60 transfers. Whatever value such a theory has in bankruptcy, it does not suggest a general "filing is perfection" rule for conflicts between the secured party and the lien creditor in a non-bankruptcy context. *See* Bankruptcy Reform Act of 1978, 11 U.S.C.A. § 547 (West Spec. Pamph. 1979).

136. The rule that a debt must be accrued and owing to be garnishable is premised on the view that the garnishor should have no greater rights against the garnishee than the defendant-debtor would have and should be in no better position vis-a-vis the

attempted to avoid the inclusion of after-acquired accounts as preferences in bankruptcy. While section 9-108 may be a dead letter in bankruptcy, such a characterization would have been unnecessary if the drafters had viewed the collateral covered by the interest as an unchanging whole.

In most cases, rejection of the entity theory would not jeopardize the accounts financer's position. If an interest is properly filed, perfection occurs simultaneously as each account comes into existence. Because a garnishment lien impounds only "garnishable" property, the best position a judgment creditor could achieve would be a tie, which is insufficient to cause subordination of the security interest under section 9-301(1)(b). The point at which subsequently-acquired property becomes "garnishable" is not uniformly recognized. In most jurisdictions, contractual debts must have accrued unconditionally and must be fixed in amount before garnishment can occur. The jurisdictions differ, however, as to whether and up to what time garnishment impounds a garnishee's indebtedness which accrues or becomes garnishable *after* service. While in some states the lien encumbers only property that is garnishable on the date of service,[137] in others the lien also impounds an indebtedness that becomes garnishable after service and up to the date set for the garnishee's answer.[138] In a few states the lien is also effective against debts arising betwen the time of service and the time a determination is made against the garnishee, if the garnishee's answer or disclosure is controverted.[139]

Even in those jurisdictions where the garnishment lien encumbers property that becomes garnishable after service, section 9-301 protects the filed secured party whose interest attaches under section 9-204 before, or simultaneously with, the accounts becoming garnishable. Under the present uniform version of Article Nine, the secured party's interest in accounts "attaches" when the executory right to payment under the contract comes into existence, whether or not the right has been earned by performance.[140] Attachment, therefore, occurs before the right becomes garnishable. Under the 1966 version of the Code, an interest in accounts *alone* attaches when the contract right is earned by the sale or lease of goods or by the rendition of

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garnishee than the position the defendant-debtor would be in if he brought suit against the garnishee. Coward v. Barnes, 232 Ark. 177, 334 S.W.2d 894 (1960); *see* Godfrey Coal Co. v. Gray, 296 Mass. 323, 5 N.E.2d 556 (1936); Annot., 82 A.L.R.2d 858 (1962).

137. *E.g.*, ILL. ANN. STAT. ch. 62, § 39 (Smith-Hurd 1972); MASS. GEN. LAWS ANN. ch. 246, § 20 (West 1959); *see* Abbott Lumber & Bldg. Supply Co. v. Cushing Constr. Co., 330 Mass. 182, 112 N.E.2d 245 (1953).

138. *E.g.*, ARIZ. REV. STAT. ANN. §§ 12-1574, -1581(a), -1585 (1956 & Supp. 1977); FLA. STAT. ANN. §§ 77.04, .06 (West 1978); N.H. REV. STAT. ANN. § 512:20 (1955); *see* Protective Check Writer Co. v. Collins, 92 N.H. 27, 29, 23 A.2d 770, 772 (1942).

139. *See, e.g.*, MD. R. P. Fl., G45, G55(b); PA. STAT. ANN. tit. 12, § 3111(b) (Purdon 1967).

140. U.C.C. § 9-106.

services, and should occur at latest when the debtor's right becomes garnishable.[141] Therefore, under either version the secured party is usually safe.

Under the 1966 version of the Code, the secured party-accounts financer has some vulnerability vis-a-vis the service lien garnishor in jurisdictions that both recognize garnishment liens in property acquired after service and treat certain unearned contract rights as garnishable if the contract is made after service and before the time set for answer.[142] In this situation the garnishment lien gives "lien creditor" status to the judgment creditor in accounts unearned by the debtor as of the contract date. The accounts financer cannot under the 1966 version, be perfected in accounts *alone* until the right becomes earned within the meaning of sections 9-204(2)(d) and 9-106. Under the present uniform version of section 9-106, however, no distinction is made between the debtor's rights in accounts and in contract rights. The accounts financer's perfection can thus occur when the debtor's *contract right* comes into existence. As long as the garnishment lien on after-acquired property or indebtedness does not relate back to the time of service, the secured party is perfected *at the latest* when the contract is made. Again, section 9-301(1)(b) does not protect the garnishing creditor who becomes a lien creditor simultaneously with perfection of the secured party's interest.

4. "Order of Delivery" Jurisdictions. In several jurisdictions the garnishment lien dates from the delivery of the writ to the sheriff,[143] and thus parallels the rule governing common execution liens in "order of delivery" states.[144] The garnishor with a delivery lien would apparently qualify as a section 9-301(3) "lien creditor" if his counterpart under a lien on delivery execution procedure is so recognized. Application of the subordination rule in section 9-301(1)(b) is difficult because of the existence of an inchoate lien before service on the garnishee. The secured creditor in an "order of delivery" state does not enjoy the same position with respect to after-acquired property as he enjoys under an "order of service" scheme. As is the case when the lien arises on service, the garnishability of debtor's property is measured at the time of service or whenever the lien impounds property that becomes garnishable after service. In an "order of delivery" jurisdiction, however, property which becomes garnishable *after* de-

141. U.C.C. §§ 9-106, -204(2)(d) (1966 version).

142. *See* Henry v. McNamara, 114 Ala. 107, 22 So. 428 (1897). *Contra,* Williams v. Androscoggin & K. R.R., 36 Me. 201 (1853); Clark v. Osage County, 62 Okla. 7, 161 P. 791 (1916); Johnson v. Healey, 35 R.I. 192, 85 A. 938 (1913).

143. Under VA. CODE § 8.01-501 (1977), the delivery to the sheriff creates an inchoate lien in the property garnished. The statute excepts the assignee for value from the delivery lien however. *See In re* Acorn Elec. Supply, Inc., 348 F. Supp. 277, 282 (E.D. Va. 1972). *See also* TENN. CODE ANN. § 26-403 (1955).

144. See text accompanying notes 77-93 *supra.*

livery but *before* service is subject to a lien dating from delivery.[145] The secured party's interest in accounts is not perfected, however, until it attaches. A secured party whose interest in specific property attaches between the time of delivery and the time of service is not perfected until *after* recognition of the inchoate delivery lien. Such a secured party is subordinate to the delivery lien garnishor under section 9-301(1)(b).

This conceptualization of the garnishment lien could undermine the priority of the accounts financer. The outcome of a priority contest between an accounts financer and a delivery lien garnishor, relative to after-acquired accounts, might then depend on which version of the Code is in effect. Under the 1966 version, the secured party's debtor acquires rights in accounts only when they come into existence. Under section 9-106, "accounts" do not exist until the right to payment is earned by performance,[146] at which time the accounts also become garnishable in most jurisdictions.[147] Thus, the secured party cannot "perfect" his interest in accounts before they are garnishable. Where the garnishing creditor obtains lien creditor status at the time of delivery on property which needs to be garnishable only when service is made, he is prior to the secured party whose perfected status under section 9-301(1)(b) must await the debtor's acquisition of rights in the collateral under section 9-204. In jurisdictions which have adopted the present 1972 uniform version of the Code, the secured creditor's interest in accounts attaches as soon as the contract right, whether earned or not, comes into existence.[148] The secured party can, therefore, attain "perfection" before the right under the contract is garnishable—normally well in advance of the garnishor's delivery of the writ.

C. *Lien Status by Resort to Creditor's Bills and Supplementary Proceedings*

1. Creditor's Bills Generally. Execution and post-judgment garnishment possessed inherent limitations that often rendered them ineffective as enforcement tools. Certain equitable or intangible assets of the debtor often lay beyond the reach of execution or other "legal" process. Because sheriffs were seldom willing to double as detectives, execution and garnishment were effective only when the judgment creditor knew of the existence and location of the debtor's assets. Conveyances that defrauded judgment creditors could not always be effectively blocked by resort to execution alone.[149] Thus,

145. *E.g.*, Blatchford v. Boyden, 122 Ill. 657 (1887); Lea v. Hopkins, 7 Pa. 492 (1848).

146. U.C.C. §§ 9-204(2)(d), -106 (1966 version).

147. See note 136 *supra*.

148. U.C.C. § 9-106.

149. Creditors of the grantor may obtain a lien on property fraudulently conveyed by means of a levy on an attachment or execution in disregard of the conveyance. A

equity developed the creditor's bill to remedy shortcomings in legal processes available for the enforcement of money judgments. The importance of the creditor's bill as a mode of reaching equitable or intangible property beyond execution and garnishment has diminished, however, because most states have expanded their legal remedies to reach virtually all property in which the debtor holds an interest.[150] Although in many states the creditor's bill still functions effectively as a discovery and application of assets device, it has generally been abandoned for this purpose because creditors prefer the simpler alternatives available under summary enforcement procedures.[151] The creditor's bill remains, however, the principal, if not exclusive, device for attacking fraudulent transfers.[152]

As a separate action in equity, the creditor's bill is often a cumbersome collection device. From early times, access to the equitable procedure depended upon the inadequacy of available legal remedies. To establish the equitable jurisdiction necessary to support a creditor's bill, the judgment creditor was typically required to show that his writ of execution had been returned *nulla bona*.[153] These difficulties led first to legislative changes in the form and prerequisites of the creditor's bill,[154] and finally to nationwide legislative enactment of more streamlined supplementary devices that preserve most functions of the creditor's bill, as well as embody many functions of the legal collection writs.[155] In a few states supplementary proceedings provisions expressly abolish the creditor's bill;[156] absent express abolition, however, both remedies remain.[157]

Because of the merger of law and equity, the creditor's bill actually may be more accessible under modern practice rules than it was in its heyday. The jurisdictional requirement that the creditor's bill issue only after unsuccessful resort to execution has little more than an academic significance today. Under the Federal Rules of Civil Procedure, and in states with rules modeled thereafter, the proce-

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creditor with a lien thus acquired will then have resort to a bill to remove the obstruction to enforcement. In a majority of jurisdictions a creditor who has not obtained a lien upon the property by this method will obtain an equitable lien upon the property by instituting suit to have the conveyance set aside.

150. W. HAWKLAND & P. LOISEAUX, CASES AND MATERIALS ON DEBTOR-CREDITOR RELATIONS 79-80 (1979).

151. *Id.* at 79.

152. But see note 192 *infra*.

153. *See* Sackin v. Kersting, 105 Ariz. 464, 466 P.2d 758 (1970); Young v. Charnack, 295 So. 2d 665, 666 (Fla. Dist. Ct. App. 1974).

154. *See* Morgan v. United States Fid. & Guar. Co., 222 So. 820, 828 (Miss. 1969).

155. *See, e.g.*, ILL. ANN. STAT. ch. 110, § 73(4) (Smith-Hurd 1979); ME. REV. STAT. ANN. tit. 14, §§ 3121-3137 (Cum. Supp. 1978-1979); N.Y. CIV. PRAC. LAW § 5222 (McKinney Supp. 1978); UTAH R. CIV. P. 69(m).

156. *See, e.g.*, Kellogg v. Coller, 47 Wis. 649, 655-56, 3 N.W. 433, 435-36 (1879).

157. *See, e.g.*, Barrett v. Daly, 319 Ill. App. 169, 170-71, 48 N.E.2d 717, 718 (1943); McConnell v. Wolcott, 70 Kan. 375, 379-80, 78 P. 848, 849 (1904).

dural distinction between law and equity has been eliminated.[158] Federal Rule 18(a) authorizes joinder of legal and equitable claims, while Rule 18(b) states that "whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action."[159]

Creditor's bills consist of two distinct parts. The bill's discovery prayer is designed to compel defendants to disclose assets. Pursuant to such a prayer, a creditor requests that the court question the debtor and third parties in order to locate assets which can be applied to the judgment. By separate prayer the creditor asks the court to apply the debtor's property to the judgment. The court can enjoin the debtor from conveying or encumbering any property discovered, and can appoint a receiver to take over discovered property. In order to facilitate enforcement of the court order, the creditor's bill typically creates a lien on the debtor's equitable assets from the time the summons is served on the debtor.[160] This equitable lien is a general lien, unlike the lien in specific property that arises on execution or garnishment. Nevertheless, this equitable lien may become the basis for a judgment creditor's claim of "lien creditor" status in a priority contest with the secured party.

2. *Creditor's Bill Plaintiff as "Lien Creditor."* Although the filing of a creditor's bill, and the attendant service of process on the debtor, have traditionally been regarded as creating a "lien" on the subject property,[161] in this context especially the term "lien" suggests a variety of meanings. Whether this state law "lien" satisfies the section 9-301(3) definition may depend upon the function which a particular bill serves.

Historically, the creditor's bill gave rise to one form of "lien" which simply ordered priority on equitable assets that were beyond the reach of an action at law. When legal processes could not impose a conflicting lien on the property, a *non-specific* equitable lien was created to establish the priority of creditors bringing bills.[162] In this sense "lien" meant equitable priority based on diligence.[163] This general lien was acknowledged even when the property in question was not specifically described in the bill. However, the general lien did not protect a creditor's interest in specific property which was

158. FED. R. CIV. P. 2.

159. FED. R. CIV. P. 18; *see* Greenwich Trust Co. v. Tyson, 129 Conn. 211, 27 A.2d 166 (1942).

160. Metcalf v. Barker, 187 U.S. 165 (1902).

161. King v. Goodwin, 130 Ill. 102, 22 N.E. 533 (1889); Tolles v. Wood, 99 N.Y. 616, 1 N.E. 251 (1885); Kittinger Witt Co. v. Brookins, 35 Ohio App. 266, 172 N.E. 297 (1929).

162. *See* Russell v. Chicago Trust & Sav. Bank, 139 Ill. 538, 549-50, 29 N.E. 37, 39-40 (1891).

163. Talcott v. Grant Wire & Spring Co., 131 Ill. 248, 252, 23 N.E. 403, 404 (1890); Chase v. Searles, 45 N.H. 511, 517 (1864).

subject to more specific legal claims.[164] For example, a general lien on all of the debtor's assets would be subordinate to a subsequent execution on particular property.[165]

A more specific "lien" arising from the creditor's bill derived from the theory of *lis pendens*. This lien similarly fixed priority among other claimants. Although the doctrine of *lis pendens* is primarily applicable to real estate, it has been generally, albeit inconsistently, applied to personal property cases.[166] Rooted in the notice function of the bill, the *lis pendens* lien was contingent upon an adequate description of the property sought, and a separate service of process on the defendant where necessary to commence the action.[167] In federal court, and in jurisdictions with procedures patterned after the Federal Rules of Civil Procedure, the filing of a complaint with the court commenced the action on the bill.[168] In these jurisdictions service was not a prerequisite to the lien, although the lien would perish if the

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164. *See* Morton v. Jones, 136 Ky. 797, 803, 125 S.W. 247, 249 (1910); Bragg v. Gaynor, 85 Wis. 468, 486-88, 55 N.W. 919, 923 (1893).

165. *See, e.g.*, First Nat'l Bank v. Gage, 93 Ill. 172, 175 (1879).

166. 1 A. FREEMAN, JUDGMENTS § 524 (5th ed. 1925); 3 M. MERRILL, MERRILL ON NOTICE § 1151 (1952). Those opposing the application of *lis pendens* to personalty take the position that it would be unfair to innocent purchasers and would impede the certainty of commercial transactions. *See* 16 HARV. L. REV. 225, 226 (1902-1903). The majority view is that alienation pending suit should not be able to defeat judicial decrees affecting property interests. 1 A. FREEMAN, *supra*, § 524.

167. 3 M. MERRILL, *supra* note 166, §§ 1159, 1164; Fornoff, *The Creditor's Bill*, 16 OHIO ST. L.J. 32, 38-39 (1955).

168. FED. R. CIV. P. 3. The older state cases recognize the *lis pendens* as of the time service of process is made on the particular defendant. In nearly every case this is because the action on the bill was "commenced" by service, *see, e.g.*, Shaw v. Foley, 62 Ohio St. 30, 56 N.E. 475 (1900), although some jurisdictions required both service and the filing of plaintiff's pleading. *See, e.g.*, Jackson v. American Bank & Trust Co., 233 Ala. 486, 172 So. 600 (1937).

A creditor's bill in federal court presents an interesting *Erie* question in those jurisdictions which date the *lis pendens* from service of process, because such service is deemed to be "commencement." Must the federal court look to the state law which recognizes the lien on service even if the theory of the state *lis pendens* cases is rooted in the notion that the lien arises when the action is commenced? In Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), the Supreme Court held that an action in which the complaint had been *filed* within the applicable state limitations period, thereby commencing the action under Federal Rule 3, was nevertheless barred because *process* was necessary under state law to commence an action and thus to toll the statute of limitations. The Kansas service of process procedure was seen as "an integral part" of the statute of limitations. The vitality of *Ragan* has been questioned, however. *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). Today, the federal court should feel free to apply its own "commencement" rule to the creation of the *lis pendens* lien unless state law attaches independent notice-related significance to service of process beyond its function as the means to "commence" the action. *See* McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965).

For a discussion of the Erie Doctrine during the period between *Ragan* and *Hanna*, see Smith, *Blue Ridge and Beyond: A Byrd's Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962).

debtor was not served within the time prescribed.[169] The *lis pendens* lien applied when a creditor's bill described specific property and commenced an action against the debtor with respect to that property.[170] When the bill was directed against a debtor's specific equitable assets, or was used to attack a fraudulent transfer, the *lis pendens* lien attached and was viewed as a constructive trust on the specific property.[171]

The modern creditor's bill is broader than its historical antecedents. A *lis pendens* lien does not attach when the bill is used as a discovery device. To obtain a specific lien, the creditor must either amend his bill to raise title-effecting claims to specific property, obtain a court order with respect to specific property, or request appointment of a receiver. When the creditor has knowledge of the debtor's property (*i.e.*, when the bill is not used as a means of discovery), and when the bill is employed solely to reach equitable assets immune from execution or to attack fraudulent transfer, the *lis pendens* lien arises when the action is "commenced."[172]

Only when the creditor's bill gives rise to a lien that meets the prerequisites of a *lis pendens* in personal property should the judgment creditor be deemed a "lien creditor" under section 9-301(3). Under pre-Code state law, the lien status that established only equitable priority in undiscovered or undefined assets did not secure property against legal interests and more specific liens. It is unlikely, therefore, that the Code draftsmen intended to subordinate unperfected security interests to these general lienholders. When a creditor's bill gives rise to a *lis pendens* lien, however, it establishes a constructive trust on specific property, based on notice, that is effective at commencement of the bill. The moving creditor should therefore be accorded section 9-301(3) "lien creditor" status.[173]

If the judgment creditor with a *lis pendens* lien qualifies as "lien creditor," he is entitled to subordinate a security interest that is unperfected or that arises subsequent to the creation of the *lis pendens* lien. The lien creditor's priority under section 9-301(1)(b) seems justified and consistent with prior law when the secured party derives his interest from the judgment debtor.[174] When, however, the lien creditor employs the bill to challenge a fraudulent transfer by the judgment debtor, and the secured party takes his interest from the transferee after the bill is commenced, a different question is pre-

169. *See* 3 M. MERRILL, *supra* note 166, § 1167; 31 ST. JOHN'S L. REV. 136 (1956).

170. Fornoff, *supra* note 167, at 39. *See also* 3 M. MERRILL, *supra* note 166, §§ 1159, 1164.

171. *See* Hacker v. White, 64 S.W. 446 (Ky. 1901).

172. *See* 3 M. MERRILL, *supra* note 166, § 1165; Fornoff, *supra* note 167, at 39-40.

173. Meadows v. Bierschwale, 516 S.W.2d 125 (Tex. 1974), *rev'g* Bierschwale v. Oakes, 497 S.W.2d 506 (Tex. Ct. App. 1973).

174. *See* 3 M. MERRILL, *supra* note 166, § 1151 and cases cited in notes 66 & 67 therein.

sented. In this situation the *lis pendens* lien operates against both the judgment debtor and his transferee, who holds *voidable* title. Yet, the transferee may have rights in the property which, on final adjudication, are beyond the reach of the bill. Because the fraudulent transferee has *voidable* title, the issue becomes whether the secured party who takes his interest from the transferee can defeat the *prior* lien of a creditor's bill plaintiff.

Secured parties who acquire interests from transferees with voidable title may have a plausible argument that their interest is prior to the lien creditor's. Section 2-403(1) gives a transferee with *voidable* title power to pass good title to a "good faith purchaser for value."[175] A secured party could, therefore, attempt to avoid a section 9-301(1)(b) subordination of his interest in favor of a lien creditor by relying on his status as a "purchaser" within the meaning of section 1-201(32) and (33).[176] The secured party who "purchases" his interest from a transferee could argue that the transferee has *voidable* title even after the bill has commenced; that the *lis pendens* lien does not prevent the secured party from qualifying as a "good faith purchaser" within the meaning of section 2-403(1); and that section 2-403(1) allows a qualified secured party-purchaser to take good title despite both the creditor's equitable right to otherwise avoid a fraudulent transfer and the creditor's right under section 9-301(1)(b) to subordinate a subsequently perfected or attached security interest.

A fraudulent conveyance of property by a judgment debtor is properly regarded as *voidable* when the transfer occurs. The judgment creditor's rights are cut off once the transferee conveys the property to a bona fide purchaser.[177] Thus, when the judgment creditor acquires a lien *before* the transferee conveys, the secured party's purchaser rights may depend upon whether the transferee from whom he takes still has voidable title. Oddly enough, the result may hinge

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175. U.C.C. § 2-403(1):

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
> (a) the transferor was deceived as to the identity of the purchaser, or
> (b) the delivery was in exchange for a check which is later dishonored, or
> (c) it was agreed that the transaction was to be a "cash sale", or
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

176. U.C.C. § 1-201 (32):

> "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue, or re-issue, gift or any other voluntary transaction creating an interest in property.

U.C.C. § 1-201(33):

> "Purchaser" means a person who takes by purchase.

177. City of New York v. Johnson, 137 F.2d 163 (2d Cir. 1943).

upon the enforcement method chosen by the transferor's judgment creditor, who can either disregard the fraudulent transfer by levying on his debtor's property, or "recognize" and attack the transfer by making the transferee a defendant in a creditor's suit. When the creditor levies in disregard of the transfer before the transferee conveys, courts are divided as to whether levy itself *voids* the title of the fraudulent transferee.

In *Schwartz v. A. J. Armstrong Co.*,[178] the Second Circuit held that a judgment creditor who *levies* on the property of his debtor in disregard of his debtor's fraudulent transfer, does not avoid the transfer under New York law until a court adjudicates the matter in his favor. Until that time the transferee retains *voidable* title. *Schwartz* has been challenged as an incorrect application of New York law because when a creditor resorts to levy, there is authority for treating the transfer as *void* from the time of the levy.[179] If the transferee's title is deemed void, the rights of a subsequent bona fide purchaser under section 2-403(1) are completely cut off. When a levy so affects the transferee's title, it not only secures lien priority for the judgment creditor, but also defeats the subsequent purchaser's rights to take *any* interest from the fraudulent transferee. This result is unnecessarily harsh for a subsequent good faith purchaser who may be as innocent as the judgment creditor. In jurisdictions other than New York, authority exists for treating the transferee's title as *voidable* until adjudication, even when the creditor resorts to levy in disregard of the sale.[180]

Whatever the case may be when the judgment creditor levies,[181] the *Schwartz* concept of *voidable* title until adjudication seems clearly correct if the creditor resorts to a creditor's bill and joins the transferee as defendant.[182] While the creditor's bill normally creates a lien on property in the nature of a constructive trust, it recognizes and challenges the transferee's interest rather than *voiding* it. It is therefore appropriate in such cases to apply section 2-403(1) to permit a subsequent bona fide purchaser, including a secured party, to take title from the transferee with *voidable* title.

Giving the transferee *voidable* title would not necessarily permit a secured party who qualifies as a good faith purchaser to avoid a judgment creditor's "lien" (and its priority) under section 9-301(1)(b). The secured party would have to argue further for the primacy of his purchaser status under section 2-403(1), and for the

178. 179 F.2d 766 (2d Cir. 1950) (applying New York law).

179. Mach v. Baum, 98 Misc. 607, 163 N.Y.S. 145 (Sup. Ct. 1917). *See also* Weintraub & Levin, *Bulk Sales Law and Adequate Protection of Creditors*, 65 HARV. L. REV. 418, 431 (1952).

180. Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 461, 92 N.W. 340, 341 (1902).

181. *See* Mach v. Baum, 98 Misc. 607, 609, 163 N.Y.S. 145, 146-47 (Sup. Ct. 1917).

182. *See* Weintraub & Levin, *supra* note 179, at 428-31.

displacement of the priority rule of section 9-301(1)(b). Although this is a difficult assertion for the secured party to make, an argument can be advanced based upon the official comment to section 2-403.

Subsection 4 of section 2-403 seems to preempt the operation of section 2-403(1) whenever the rights of a lien creditor and secured party conflict:

> (4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).[183]

Comment 4, however, suggests a narrower reference to Article 9:

> 4. *Except as provided in subsection (1),* the rights of purchasers other than buyers in ordinary course are left to the Articles on Secured Transactions, Documents of Title and Bulk Sales.[184]

The shelter principle built into section 2-403 appears to be one of the overlying rules in subsection 1 which is not overridden by Article 9. The right of a transferee with voidable title to convey good title may be another such rule. Yet giving effect to section 2-403 would not necessarily displace the subordination rule of section 9-301(1)(b). If the filing of a creditor's bill does not avoid a transfer, the transferee may still have *voidable* title after the bill is filed. So clothed, the transferee would have the power to convey good title to a secured party. Good title, however, does not necessarily mean unencumbered title.[185] While title may be free of the voiding effects of a fraudulent transfer, it may not be free of the "lien," which is given recognition under state *lis pendens* theory and in section 9-301(3). Such a view of sections 2-403(1) and 9-301(1)(b) gives meaning to both sections without extending the effect of the judgment creditor's challenge beyond what is necessary to protect his judgment.

Under this interpretation of section 2-403(4), a secured party is a "purchaser" to the extent that he takes good title from a transferee with *voidable* title. Only when the fraudulent transfer is deemed *void,* which, in the view of some older opinions, occurs when a prior judgment creditor obtains a lien by resort to *levy,* does the secured party-purchaser take nothing. These opinions notwithstanding, the purchaser's right to *take* should be preserved. However, section 9-301(1)(b) should be read to protect the prior encumbrance of the transferor's judgment creditor in the property "purchased" by the transferee's secured party. This position avoids the difficult issue

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183. U.C.C. § 2-403(4).

184. U.C.C. § 2-403, comment 4 (emphasis added).

185. Even a good faith purchaser for value under U.C.C. § 2-403(1) would take subject to perfected security interests under Article Nine unless he had *special* status as a purchaser under that Article. *See, e.g.,* U.C.C. § 9-307(1); *see also* Jackson & Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code,* 87 YALE L.J. 907, 956 n.178 (1978).

of a secured party purchaser's "good faith" if he takes after the *lis pendens* of a creditor's bill.[186] The issue of "good faith" must be addressed if section 2-403 is read in light of comment 4 as displacing the subordination rule of section 9-301(1)(b).

3. Creditor Who Invokes Supplementary Proceedings as "Lien Creditor." Unlike the creditor's bill, which is a separate equitable action that often generates a *lis pendens* lien, the supplementary proceeding is a form of summary process in aid of the original lawsuit.[187] While in some states supplementary proceedings are separate "proceedings" in aid of enforcing the original suit,[188] in others they are viewed as alternative enforcement tools that arise from the original action and that require neither a separate summons nor a hearing.[189] Because a *nulla bona* return is not a jurisdictional prerequisite, the process may commence immediately after the original judgment is rendered.

Like the creditor's bill, these supplementary proceedings constitute important discovery devices, which typically provide for the appearance and questioning of the debtor.[190] The proceedings make available a variety of realization tools that can be applied to discovered assets, including installment orders, turn over orders, and lien orders.[191] These devices can be used further as vehicles to upset fraudulent transfers.[192]

Because the supplementary proceeding is not considered a "new" judicial action and because it is typically geared to discovery, commencement of the proceedings would not appear to create a *lis*

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186. Two tests exist to measure the "good faith" of a "purchaser" under § 2-403(1). *See* § 1-201(19) (honesty in fact) and § 2-103(1)(b) (honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade in case the purchaser is a "merchant" under § 2-104). The latter test would apply to most secured party "purchasers." A secured party who does not check for possible *lis pendens* notice against property originally belonging to his debtor's transferor a) would not have actual knowledge, and b) might not be offending a reasonable commercial standard of diligence in the trade.

187. Florida Guaranteed Sec., Inc. v. McAllister, 47 F.2d 762 (S.D. Fla. 1931).

188. *See, e.g.,* ME. REV. STAT. ANN. tit. 14, §§ 3121-3137 (Cum. Supp. 1978-1979). At least one commentator finds authority for concluding that Maine's supplementary procedures abolish by implication the creditor's bill. *See* Note, *Enforcement of Creditors' Rights,* 1975 U. ILL. L.F. 424, 435, n.94 (citing Jameson v. Cunningham, 134 Me. 134, 136, 183 A. 131, 132 (1936)). Reliance on *Jameson* seems misplaced, however.

189. *See, e.g.,* N.Y. CIV. PRAC. LAW §§ 5222-5223 (McKinney 1978). In New York those devices which involve the need to determine third-party rights in property allegedly belonging to the judgment debtor are usually part of "proceedings." *See, e.g.,* N.Y. CIV. PRAC. LAW § 5225(b) (McKinney 1978).

190. *See, e.g.,* ME. REV. STAT. ANN. tit. 14, §§ 3122, 3125 (Cum. Supp. 1978-1979); N.Y. CIV. PRAC. LAW § 5224(d) (McKinney 1978).

191. *See, e.g.,* ME. REV. STAT. ANN. tit. 14, §§ 3127-3133 (Cum. Supp. 1978-1979); N.Y. CIV. PRAC. LAW §§ 5225(b), 5228, 5239 (McKinney 1978).

192. N.Y. CIV. PRAC. LAW § 5225 (McKinney 1978) as applied in Siemens & Halske v. Gres, 32 A.D.2d 624, 299 N.Y.S.2d 908 (App. Div. 1969).

pendens lien on the debtor's personal property. In *Levine v. Pascal*,[193] for example, an Illinois court of appeals gave lien recognition to a judgment creditor who levied on a beneficial interest in a land trust, and who, eight days later, resorted to the Illinois citation statute in order to compel "assignment of any chose in action or conveyance of title to real or personal property."[194] The Illinois court, without deciding whether or not the levy itself could reach the beneficial interest by execution, nevertheless found that the plaintiff had become a lien creditor when the sheriff received the *writ of execution* because the inchoate lien could then be enforced through the subsequent citation proceeding.[195] Although the decision stops short of acknowledging that the supplementary proceeding alone confers section 9-301(3) status, some knowledgeable commentators on Illinois law see the thrust of the decision as recognizing such lien status in the summary proceeding.[196]

One type of supplementary collection statute that does not create lien status on commencement, irrespective of the *lis pendens* doctrine, provides for court ordered liens that do not take effect until the judgment creditor files the lien order. Maine's summary enforcement proceedings are of this latter type.[197] In Maine, the lien order must be filed in the appropriate Article Nine file before it effectively binds third parties with respect to the debtor's personalty.[198] Apparently the lien order in Maine need not satisfy the requirements for a financing statement under section 9-402 or section 9-403 to achieve lien status. The order need only be filed "where a filing would be required to perfect a security interest in such property under . . . section 9-401."[199] Where a state enforcement statute confers lien status to a lien order by virtue of a proper filing alone, that status should be recognized under section 9-301(3), even if a specific description of the property covered by the order is not included.[200] The judgment creditor should become a "lien creditor" whenever his lien order is filed in the proper section 9-401 office. While they remain important discovery devices, much less cumbersome than the creditor's bill, supplementary proceedings are less likely to generate

193. 94 Ill. App. 2d 43, 236 N.E.2d 425 (1968).

194. ILL. ANN. STAT. ch. 110, § 73(2)(e) (Smith-Hurd Supp. 1979).

195. 94 Ill. App. 2d at 55, 56, 236 N.E.2d at 430, 431.

196. W. HAWKLAND & P. LOISEAUX, *supra* note 150, at 105; Henson, *Some Thoughts on Lien Creditors Under Article 9*, 1974 U. ILL. L.F. 237, 238 n.6.

197. ME. REV. STAT. ANN. tit. 14, § 3132 (Cum. Supp. 1978-1979).

198. *Id.*

199. *Id.*

200. (1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, *or describing the items*, of collateral.

U.C.C. § 9-402(1) (emphasis added). *See also* U.C.C. § 9-110.

a lien under state law in favor of the initiating creditor.[201] In jurisdictions where supplementary bills strongly resemble the creditor's bill (in that a lien does arise on commencement) the prior discussion of the creditor's bill should be applicable to describe its main features.[202]

In jurisdictions that provide for a filed lien order, a proper filing should place the creditor within the provisions of section 9-301(1)(b). The fact that these provisions refer to the Article Nine file as the place for effective recording should not be read, however, to incorporate any of the priority rules reserved for secured parties under section 9-312. The state lien order provisions do not create a first to file rule on application of section 9-301(1)(b) because a filed secured party may not be "perfected" when the lien order is filed.[203]

Part II of this piece takes up the conflict between the secured party and prejudgment process creditors. Constitutional restrictions on the capacity of prejudgment process to generate liens, combined with recent changes in prejudgment process itself, add another dimension to the meshing of judicial process liens with Article Nine.

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201. *See* W. HAWKLAND & P. LOISEAUX, *supra* note 150, at 105.

202. See text accompanying notes 160-73 *supra*.

203. "A financing statement may be filed before a security agreement is made or a security interest otherwise attaches." U.C.C. § 9-402(1).