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Enforcing Money Judgments Against Personal Property in Virginia

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SYMPOSIUM: COLLECTING MONEY JUDGMENTS IN VIRGINIA

ENFORCING MONEY JUDGMENTS AGAINST PERSONAL PROPERTY IN VIRGINIA

The history of the enforcement of money judgments in Virginia has been characterized by recurrent changes and revisions as the legislature and the courts have attempted to reconcile the needs of the business community with the rights of the debtors.[1] Change has not been synonymous with progress, however, and the old adage that the more things change the more they remain the same is nowhere more apt than in the context of collection practices in the Old Dominion. Although the persistent creditor may have, in the words of one observer, "a vast arsenal of remedies"[2] at his disposal, it seems to be a debtor's world to those practitioners who have sought to employ the procedures that currently exist.[3] This is particularly true when the client is an unsecured creditor seeking to enforce a money judgment against the debtor's personal property. In today's modern economy, the ready availability of credit and the relative ease with which a consensual lien may be secured on chattels makes finding any personal property that is not already encumbered increasingly more difficult for the creditor.[4] Conse-

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1. Historical development of Virginia law dealing with enforcement of judgments has been treated in Riesenfeld, *Collection of Money Judgments in American Law - A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155, 169-70, 173-74 (1957) and Riesenfeld, *Enforcement of Money Judgments in Early American History*, 71 MICH. L. REV. 691, 709-12, 718 (1973). *See also* Charron & Co. v. Boswell, 59 Va. (18 Gratt.) 216 (1868).

2. Riesenfeld, *Collections of Money Judgments*, *supra* note 1, at 181.

3. As one commentator noted, creditors have more money but debtors have more votes. Dugan, *Creditors' Postjudgment Remedies: Part 1*, 25 ALA. L. REV. 175, 199 n.148 (1972).

4. *Id.* at 198. When the creditor's claim is based on a judgment resulting from an automobile accident that exceeds $50, an alternative collection tool is provided by statute. The Virginia Code allows the Commissioner of Motor Vehicles to suspend the driver's license of any person who does not pay a judgment within 30 days. VA. CODE § 46.1-442(a) (Repl. Vol. 1974).

quently, creditors resort to the writ of execution, the primary tool for enforcing money judgments against personalty, less and less frequently [5]

This Note will examine the postjudgment procedures available to a creditor who seeks to enforce a money judgment against personal property owned by the debtor.[6] In addition to analyzing the law of execution as it currently exists in Virginia, this survey will address the effect of the new bankruptcy law.[7] Finally, the constitutional questions that have been raised in other states concerning postjudgment procedures will be discussed in the context of Virginia's system.[8]

EXECUTION

A final money judgment[9] rendered by either a general district court[10] or a circuit court[11] has the effect of changing the relationship of the opposing parties from plaintiff and defendant to creditor and debtor. To the chagrin of the victor, this frequently means not the end of the road, but merely the first step of a long and often fruitless journey. The Virginia Code provides that money judgments are to be enforced against the personalty of the debtor by execution.[12] When the debtor's property consists of real estate, execution is unavailable and the creditor must enforce the judg-

5. A study of postjudgment remedies in Alabama revealed that property was recovered under a writ of execution in less than one percent of the cases. Dugan, *supra* note 3, at 197.

6. Similar analyses of the postjudgment procedures in other states reflect the great diversity of existing procedures and point up the need for a state-by-state approach. *See, e.g.*, Baugh, *Enforcement of Judgments in Tennessee*, 22 TENN. L. REV. 873 (1953); Dugan, *supra* note 3 (Alabama); Heiserman, *Procedures Available for Implementation of a Judgment in Iowa*, 42 IOWA L. REV. 265 (1957); Meacham, *Enforcement of Judgments Against Personal Property*, 1951 U. ILL. L.F 38; *Developments in Georgia Law: Debtor-Creditor Rights*, 12 GA. L. REV. 814 (1978); Note, *Postjudgment Procedures for Collection of Small Debts: The Maine Solution*, 25 ME. L. REV. 43 (1973); Note, *Enforcing Money Judgments in Tennessee*, 4 MEM. ST. L. REV. 65 (1973); *Symposium, Creditors' Post-Judgment Remedies in Texas*, 5 ST. MARY'S L.J. 715 (1974).

7. *See* notes 330-59 *infra* & accompanying text.

8. *See* notes 405-23 *infra* & accompanying text.

9. *See* Carney v. Poindexter, 170 Va. 233, 236, 196 S.E. 639, 640 (1938).

10. VA. CODE § 16.1-98 (Supp. 1978).

11. *Id.* § 8.01-466 (Repl. Vol. 1977).

12. *Id.* §§ 8.01-466 to 525.

ment lien by a separate creditor's bill in equity.[13] If the debtor owns both personalty and real estate, the creditor may choose against which to proceed first; no rule requires that one type of property be exhausted before pursuing the other.[14]

Execution presupposes that a valid judgment has been rendered.[15] If the judgment is void for any reason, then a resultant execution likewise is void.[16] Execution is carried out by means of a writ of *fieri facias* which commands the sheriff to levy and satisfy the amount of the judgment by selling the goods and chattels of the debtor.[17] The *fieri facias,* or *fi.fa.,* is an early common law writ derived from England as one of several writs available to a judgment creditor. The other common law writs of *elegit,*[18] *capias ad satisfaciendum,*[19] *distringas,*[20] *levari facias,*[21] and *scire facias*[22]

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13. Every money judgment rendered in the state becomes a lien on the real estate of the debtor from the time the judgment is docketed. *Id.* § 8.01-458. Jurisdiction to enforce the lien that is created is by a bill in equity. *Id.* § 8.01-462. Only if the rents and profits of the real estate will not satisfy the judgment within five years can the realty be sold. *Id.*

14. Rush v. Dickenson County Bank, 128 Va. 114, 121, 104 S.E. 700, 703 (1920); Stovall v. Border Grange Bank, 78 Va. 188, 196 (1883); A. PHELPS, HANDBOOK OF VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW 255 (3d ed. 1974). The doctrine of marshalling applies to any tangible property owned by the debtor when one creditor has a lien on several items of property and another creditor has a junior lien which likewise attaches to some of the same property. Under this doctrine, the senior creditor is required to satisfy his lien to the extent possible out of the property not subject to the lien of the junior creditor so as not to prejudice the latter's ability to satisfy his judgment. The adoption of the Uniform Commercial Code, however, which rejects common law lien and title theories in regard to personalty and the requirement that both creditors acquire a lien on the property before the doctrine can be invoked, has rendered the doctrine obsolete as a practical matter insofar as personalty is concerned. This is particularly true now that a lien on tangible personalty depends on a valid levy because of the unlikelihood of there being more than one lien on any particular asset.

15. Shackleford v. Apperson, 47 Va. (6 Gratt.) 451 (1849). When the debtor is deceased, all personalty first must be exhausted before the creditor can resort to the decedent's real estate. VA. CODE § 64.1-155 (Repl. Vol. 1973) has been interpreted to mean that personalty must be sold first. New v. Bass, 92 Va. 383, 23 S.E. 747 (1895); *see also* Scott v. Ashlin, 86 Va. 581, 10 S.E. 751 (1890).

16. Hill School v. Buchanan, 174 Va. 281, 283, 6 S.E.2d 622, 623 (1940).

17. VA. CODE § 8.01-474 (Repl. Vol. 1977).

18. Writ of *elegit* was created by the Statute of Westminster II in England in 1285. The writ, as adopted in Virginia in 1732, permitted the creditor to satisfy the judgment out of the rents and profits of the debtor's lands, but the land itself could not be sold. United States Fidelity & Guar. Co. v. Carter, 161 Va. 381, 170 S.E. 764 (1933); Riesenfeld, *Enforcement of Money Judgments, supra* note 1, at 694, 710.

19. Writ of *capias ad satisfaciendum,* adopted in Virginia in 1726, directed the sheriff to arrest the debtor and imprison him until he satisfied the judgment or until the creditor

since have been abolished by statute.[23] The *fi.fa.*, however, has proved remarkably durable. The abolition of imprisonment for debt resulted in the enlargement of the scope of the *fieri facias* lien to encompass all the personal estate of the debtor whether leviable or not,[24] and has remained relatively unchanged to the present time.

Issuance of the Writ

The judgment creditor, his assignee, or his attorney may request that a writ of *fieri facias* be issued.[25] If the source of the writ is a

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permitted his release. Virginia abolished body execution and substituted interrogatory proceedings following judgment, which allows for the imprisonment of an uncooperative debtor for contempt. *See generally* Evans v. Greenhow, 56 Va. (15 Gratt.) 153 (1859); Note, *Body Attachment and Body Execution: Forgotten But Not Gone*, 17 WM. & MARY L. REV. 543, 551 n.52 (1976).

20. Writ of *distringas* was a command to the sheriff to take possession of property of the debtor in order to compel his appearance before the court. Cloud v. Catlett, 31 Va. (4 Leigh) 462 (1833); Jordan v. Williams, 24 Va. (3 Rand.) 501 (1825); Garland v. Bugg, 19 Va. (5 Munf.) 166 (1816).

21. Writ of *levari facias* at common law authorized the taking of personalty of the debtor as well as the rents and profits from his real estate. In the United States, the writ became a method that allowed the creditor to have the debtor's real estate sold to satisfy the judgment. The writ was shortlived in Virginia, the *fieri facias* and *elegit* being preferred methods of execution. *See* A. FREEMAN, TREATISE ON THE LAW OF EXECUTIONS IN CIVIL CASES 6 n.1 (1885) [hereinafter cited as FREEMAN ON EXECUTIONS]; Riesenfeld, *Collection of Money Judgments, supra* note 1, at 157-58.

22. Writ of *scire facias* was a judicial writ employed to revive a judgment, in which case the writ represented a continuation of the original judgment. Duffy v. Hartsock, 187 Va. 406, 46 S.E.2d 570 (1948); American Ry. Express v. F.S. Royster Guano Co., 141 Va. 602, 126 S.E. 678 (1925); White's Adm'r v. Palmer, 110 Va. 490, 66 S.E. 44 (1909).

23. *Scire facias* was abolished under VA. CODE § 8.01-24 (Repl. Vol. 1977). The Virginia Code section dealing with the writ of *scire facias* in the general district court has yet to be repealed though the writ itself has been abolished. VA. CODE § 16.1-104 (Repl. Vol. 1975). All the other aforementioned writs are abolished under VA. CODE § 8.01-467 (Repl. Vol. 1977).

24. Charron & Co. v. Boswell, 59 Va. (18 Gratt.) 216, 230 (1868); Puryear v. Taylor, 53 Va. (12 Gratt.) 401, 407 (1855). The *ca.sa., supra* note 19, was abolished by the Code of 1849. Prior to that time, the writ of *fi.fa.* was limited to the goods and chattels of the debtor. The expansion of the *fi.fa.* coverage to include the debtor's entire estate was an effort by the legislature to offset the loss of leverage over the debtor that the *ca.sa.* provided. *See* Riesenfeld, *Collection of Money Judgments, supra* note 1, at 178 n.2 & accompanying text. *See generally* Note, *Body Execution, supra* note 19. *See also In re* Acorn Elec. Supply, Inc., 348 F Supp. 277, 280 (E.D. Va. 1972).

25. VA. CODE § 8.01-466 (Repl. Vol. 1977), reads as follows:

> On a judgment for money, it shall be the duty of the clerk of the court in

circuit court, the plaintiff must wait twenty-one days from the date of entry of judgment except when he can show "good cause."[26] Writs based upon judgments rendered in the general district courts, however, may be issued immediately.[27] The request for issuance of the writ should be directed to the clerk of the court in which the judgment is rendered.[28] The *fieri facias* then is given to the proper officer of the court, generally the sheriff or his deputy, for execution.[29] If the writ is issued against personalty that is located outside the territorial jurisdiction of the issuing court, then the writ must be sent from the clerk where the judgment is rendered to the clerk of court where the property is located for execution.[30] When the judgment has been rendered for specific personal property, the creditor may elect between a *fi.fa.* and a writ of possession.[31]

Executions may issue against individuals[32] and corporations.[33] When the judgment is against several persons jointly, executions may issue against some or all of the joint judgment debtors at the

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which such judgment was rendered, upon request of the judgment creditor, his assignee or his attorney, to issue a writ of fieri facias at the expiration of twenty-one days from the date of the entry of the judgment and place the same in the hands of the proper officer of such court to be executed and take his receipt therefor. For good cause the court may order an execution to issue on judgments and decrees at an earlier period.

Id.

26. *Id.*

27. *Id.* § 16.1-98. The only limitation on the issuing of a writ of *fi.fa.* under this section is that it be requested by the plaintiff. Because this section was amended recently to allow the request to be filed by a judgment creditor, his assignee, or his attorney in accord with § 8.01-466, note 25 *supra*, the failure to require that a writ not issue before 21 days after judgment appears to be intentional.

28. *Id.* §§ 8.01-466, 16.1-98.

29. *Id.* § 8.01-466. Though the Code suggests that the writ is to be delivered by the clerk to the sheriff, local practice frequently results in the clerk allowing the writ to be handcarried by the creditor to the sheriff's office, particularly when the respective offices are located in different buildings.

30. Early cases suggest that the writ must be sent to the jurisdiction where the debtor is domiciled unless it can be shown that he has removed his tangible personalty elsewhere. *See* Fleming v. Saunders, 8 Va. (4 Call) 563 (1803); Brydie v. Langham, 2 Va. (2 Wash.) 72 (1795). In actuality, it is common practice to have the writ of *fi.fa.* sent directly to the locale in which the property is located regardless of the debtor's domicile.

31. VA. CODE § 8.01-472 (Repl. Vol. 1977). *See* McClure Grocery Co. v. Watson, 148 Va. 601, 139 S.E. 288 (1927).

32. VA. CODE § 8.01-468 (Repl. Vol. 1977).

33. *Id.*

option of the creditor.[34] This is also true when the judgment against one of several parties to a proceeding is entered at a different time than judgment against the others.[35] When a judgment *de bonis testatoris* is had against the personal representative of a decedent debtor, the execution is against the property of the testator in the hands of the personal representative;[36] but if a judgment *de bonis propriis* is had against the personal representative, the execution is against the personal assets of the representative, not the decedent.[37]

When the debtor is covered by either a surety or a guarantor, the creditor may sue them jointly The surety or guarantor is given the right by statute to require the creditor to proceed first against the principal individually, provided the creditor be given notice in writing to this effect.[38] The creditor is then bound to bring an action against the principal within thirty days or he forfeits any right to hold the surety or guarantor liable under the obligation.[39] When the judgment is taken against the principal and the surety or guar-

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34. *Id.* § 8.01-469.

35. Walker v. Commonwealth, 59 Va. (18 Gratt.) 13 (1867).

36. Beale's Adm'r v. Botetourt, 51 Va. (10 Gratt.) 278 (1853); VA. CODE § 64.1-144 (Repl. Vol. 1973) provides that the personal representative may be sued upon any judgment against the decedent. Section 64.1-157 specifies the order in which debts of the decedent are to be paid. The provisions of this section have been held to be mandatory. Deering & Co. v. Kerfoot, 89 Va. 491 (1892); Trevillian's Ex'rs v. Guerrant's Ex'rs, 72 Va. (31 Gratt.) 525 (1879). The personal representative may be personally liable if he pays a debt out of order. McCormick's Ex'rs v. Wright's Ex'rs, 79 Va. 524 (1884); May v. Bentley, 8 Va. (4 Call) 528 (1800). VA. CODE § 64.1-169 provides for a cause of action against the surety of the personal representative when an execution is returned unsatisfied. *See* Kent's Adm'r v. Cloyd's Adm'r, 71 Va. (30 Gratt.) 555 (1878); Bush v. Beale, 42 Va. (1 Gratt.) 234 (1844); Meade v. Brooking, 17 Va. (3 Munf.) 548 (1811). VA. CODE § 64.1-179 permits the personal representative to order creditors of the decedent to show cause why the estate should not be distributed.

37. Moore's Ex'x v. Ferguson, 16 Va. (2 Munf.) 421 (1811); Barr v. Barr's Adm'r, 12 Va. (2 Hen. & Munf.) 26 (1808).

38. VA. CODE § 49-25 (Cum. Supp. 1979). The notice to the creditor also must notify him that the failure to act will result in the loss of the surety or guarantor as security for the debt. Although this additional notice requirement, which was added in 1979, does not specifically require that the creditor be informed that the suit must be brought within thirty days, it would be prudent to do so.

39. *Id.* § 49-26 (Cum. Supp. 1979). The statute has been held to require the creditor to sue only the solvent, resident principals on the contract and not other sureties. This is based on the court's conclusion that the statute was designed to protect the surety's equity against the principal, not to protect one surety against another. Colonial Am. Nat'l Bank v. Kosnoski, 452 F Supp. 135 (W.D. Va. 1978).

antor jointly, the creditor may proceed against either one.[40] The creditor is not bound to exhaust the assets of the principal before execution can be levied on the surety. In fact, the creditor may proceed directly against the surety even though the debtor has adequate assets to satisfy the judgment, the theory being that, as far as the creditor is concerned, all defendants are obligated equally.[41]

The writ of *fi.fa.* may be requested anytime within twenty years after the date of judgment.[42] The life of the judgment can be extended for another twenty-year period on the motion of the judgment creditor or his assignee as long as the debtor is given proper notice.[43] If the debtor has died and the creditor seeks to revive the judgment against the decedent's representative, however, the motion must be made within two years from the date that the representative qualifies and the judgment may only be revived for two more years.[44] Apparently, when the decedent's representative qualifies for office more than two years before the expiration of the judgment, the judgment may not be revived. Actions on judgments from other states may be brought if the creditor could bring suit under the laws of that state. The action must be commenced within ten years, however, from the date of the state judgment.[45]

The life of the writ is determined by reference to the writ's re-

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40. Grizzle v. Fletcher, 127 Va. 663, 105 S.E. 457 (1920); Manson & Shell v. Rawlings, 112 Va. 384, 71 S.E. 564 (1911); Humphrey v. Hitt, 47 Va. (6 Gratt.) 509 (1850).

41. *Id. See also* M. BURKS, COMMON LAW AND STATUTORY PLEADING AND PRACTICE 685 (4th ed. 1952) [hereinafter cited as BURKS, PLEADING AND PRACTICE].

42. VA. CODE § 8.01-251 (Repl. Vol. 1977). The paragraph reads, "No execution shall be issued and no action brought on a judgment including a judgment in favor of the Commonwealth, after twenty years from the date of such judgment, unless the period be extended ..."

43. *Id.* Additional extensions may be granted on the same procedure. *Id.* The wording used in the revival statute has the effect of extending the life of the old judgment rather than creating a "new" judgment. This can create problems for the creditor who seeks to enforce the judgment in a foreign state that has a shorter statute of limitations. *See* Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 311 (1839). Because personal service is required to be made on the debtor by the statute, however, it can be argued that the revival has the effect of a new judgment. *See* Owens v. Henry, 161 U.S. 642, 646 (1896).

44. VA. CODE § 8.01-251.

45. *Id.* § 8.01-252. This section is the former § 8-22, which was revised in 1977 by omitting the ten-year residency requirement because it possibly constituted a denial of due process. VA. CODE COMM., RPT. TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON REVISION OF TITLE 8 OF THE CODE OF VA., H. DOC. 14, at 164 (1977).

turn date. The return date for writs issued by either the general district court[46] or the circuit court[47] is ninety days. The judgment creditor may request the issuance of as many executions as may be necessary to satisfy the amount of the judgment,[48] but he may not employ executions to harass or otherwise oppress the debtor.[49] If the creditor can show that an earlier writ has not been executed, that any amount of the judgment has not been satisfied, or that the property levied on has been discharged by order of law, he need not wait until the return date passes on an execution before he requests that other writs issue.[50]

The party against whom a writ of *fieri facias* has been issued may preempt execution by making a motion to quash to the court from which the writ originated.[51] The court then will stay execution until the motion has been considered if the moving party gives reasonable notice to his opponent and provides a bond in an amount satisfactory to the court.[52] There is no time limit within which the motion to quash must be made and the motion need not

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46. VA. CODE § 16.1-199 (Cum. Supp. 1979).

47. VA. RULE 3:2 (Repl. Vol. 1977).

48. VA. CODE § 8.01-475 (Repl. Vol. 1977). See the text of this section at note 50 *infra*. *See* Richardson v. Wymer, 104 Va. 236, 51 S.E. 219 (1905).

49. Sutton v. Marye, 81 Va. 329, 334 (1886); Walker v. Commonwealth, 59 Va. (18 Gratt.) 13, 48 (1867); Puryear v. Taylor, 53 Va. (12 Gratt.) 401, 408 (1855).

50. VA. CODE § 8.01-475 (Repl. Vol. 1977) provides in appropriate part that

> a party obtaining an execution may sue out other executions at his own costs, though the return day of a former execution has not arrived; and may sue out other executions at the defendant's costs, when on a former execution there is a return by which it appears that the writ has not been executed, or that it or any part of the amount thereof is not levied, or that property levied on has been discharged by legal process which does not prevent a new execution on the judgment. In no case shall there be more than one satisfaction for the same money or thing.
>
> And the fact that a judgment creditor may have availed himself of the benefit of any other remedies under this chapter, shall not prevent him from issuing, from time to time, without impairing his lien under it, other executions upon his judgment until the same is satisfied.

Id.

51. *Id.* § 8.01-477. *See* notes 406-09 *infra*.

52. *Id.* On what constitutes reasonable notice, see Snavely v. Harkrader, 71 Va. (30 Gratt.) 487 (1878); Dillard v. Thornton, 70 Va. (29 Gratt.) 392 (1877); Ballard v. Whitlock, 59 Va. (18 Gratt.) 235 (1867). Generally, reasonableness is to be determined by the facts and circumstances of each case. Hendricks v. Dundass, 2 Va. (2 Wash.) 50 (1875).

be in writing.[53]

Levy

After the execution has been issued, the next requirement is to put the writ of *fieri facias* into the hands of the sheriff or his deputy This step was of critical importance until recently because delivery had the effect of creating a lien on all the debtor's personalty [54] Under the present statute, delivery of the writ to the sheriff gives rise to a lien only on intangible property that otherwise cannot be levied on;[55] a lien on tangible personalty does not arise until the sheriff actually levies on the property.[56] The sheriff, upon receipt of the writ of *fieri facias,* immediately must endorse on it the date and time.[57] If he neglects to do so he may be liable to the judgment creditor for damages.[58]

Having received the writ, the sheriff is duty-bound to execute it promptly The officer making the levy is considered to be acting as an agent of the plaintiff who retains the right to control the execution.[59] Should the plaintiff decide against the levy, then the sheriff may not proceed with the execution.[60] Likewise, the officer is

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53. Dillard v. Thornton, 70 Va. (29 Gratt.) 392, 398 (1877).

54. For an early case applying the old rule, see Walker v. Commonwealth, 59 Va. (18 Gratt.) 13 (1867). *See* notes 119-20 *infra* & accompanying text.

55. VA. CODE § 8.01-501 (Repl. Vol. 1977). The text reads as follows:

> Every writ of fieri facias shall, in addition to the lien it has under §§ 8.01-478 and 8.01-479 on what is capable of being levied on under those sections, be a lien from the time it is delivered to the sheriff or other officer to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return day of such writ become, possessed or entitled, except such as is exempt and except that, as against an assignee of any such estate for valuable consideration, the lien by virtue of this section shall not affect him unless he had notice thereof at the time of the assignment.

Id.

56. *Id.* § 8.01-478. This section provides that

> the writ of fieri facias may be levied as well on the current money and bank notes, as on the goods and chattels of the judgment debtor, except such as are exempt from levy and shall bind what is capable of being levied on only from the time it is actually levied by the officer to whom it has been delivered to be executed.

Id.

57. *Id.* § 8.01-487. *See* Hockman v. Hockman, 93 Va. 455, 25 S.E. 534 (1896).

58. *Id., see* notes 97-114 *infra* & accompanying text.

59. Rowe v. Hardy, 97 Va. 674, 677, 34 S.E. 625, 626 (1899).

60. Humphrey v. Hitt, 47 Va. (6 Gratt.) 509, 526-27 (1850). *See also* Alcock v. Hill, 31 Va.

bound to levy on the particular personal property that the judgment creditor specifies. It has been suggested as a practical matter that the creditor should instruct the sheriff on which personalty to levy and its location, in order to avoid return of an unsatisfied writ by the sheriff.[61] Similarly, the sheriff should be directed to nonconsumer goods because existing security interests can be discovered through a search of financing statements that are required to be filed in the clerk's office.[62] If the officer doubts whether the property so specified may be levied on, or if multiple liens on the property exist, he will require that the creditor furnish an indemnifying bond equal to the value of the property.[63] Once the bond is provided, the officer must execute on and sell the property regardless of whether it belongs to the debtor.[64] If the bond is not given within a reasonable time, the sheriff may refuse to levy on the property; if he is already in possession, the officer may return the property to the debtor.[65]

As mentioned above, the judgment creditor always has the option of abandoning the execution. He should be careful, however, to secure the defendant's consent or, in the case of a surety and his principal, the former's consent. A release by the creditor of goods levied on operates to discharge the judgment at least as to the extent of the value of the goods released.[66] If the action is taken with the implied or express agreement of the debtor, however, a new execution may issue.[67] The same is true when a levy has been abandoned either at the request of the debtor or for his benefit. For example, the debtor may request that he be given an opportunity to sell the chattels on his own in an effort to secure a better price than the goods would bring at an execution sale.

(4 Leigh) 622 (1833); M'Kenny v. Waller, 28 Va. (1 Leigh) 434 (1829).

61. JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, ENFORCEMENT OF LIENS AND JUDGMENTS IN VIRGINIA 175 (1977) [hereinafter cited as CLE, ENFORCEMENT OF LIENS].

62. *Id.*, VA. CODE § 8.9-401(1)(a) (Cum. Supp. 1979).

63. VA. CODE § 8.01-367 (Repl. Vol. 1977). Wheeler v. City Sav. & Loan Corp., 156 Va. 402, 405-06, 157 S.E. 726, 727 (1931). *See* Davis v. Davis, 43 Va. (2 Gratt.) 363 (1845); Aylett v. Roane, 42 Va. (1 Gratt.) 284 (1844); Stone v. Pointer, 19 Va. (5 Munf.) 287 (1816).

64. Wilson v. Butler, 17 Va. (3 Munf.) 559, 564-65 (1813).

65. Huffman v. Leffell, 73 Va. (32 Gratt.) 41, 46 (1879).

66. Walker v. Commonwealth, 59 Va. (18 Gratt.) 13, 46-48 (1867); Humphrey v. Hitt, 47 Va. (6 Gratt.) 509, 526 (1850).

67. Walker v. Commonwealth, 59 Va. (18 Gratt.) at 43.

Levy is the process of designating for sale to satisy the amount of the judgment certain specific property belonging to the debtor.[68] Generally, this is done by actually seizing and taking possession of the goods levied on, but this is not essential to a valid levy in Virginia. It is sufficient if the officer has the goods in his power and view.[69] In *Palais v. DeJarnette*,[70] a deputy sheriff with a valid execution went to the home of the judgment debtor who was absent. In the presence of a friend of the debtor, he made a detailed inventory of the personal property, but made no effort to remove any of the chattels.[71] The deputy advised the debtor's friend that the goods were levied on. Several months later, another writ of execution was issued on a different judgment and levy was effected by seizure of the same goods previously levied on.[72] The court upheld the validity of the first levy on the basis that Virginia law did not require actual seizure so long as the levying officer had the goods in his view and power and noted that fact on his writ.[73] When the sheriff merely has the goods in view but does not have the power to take them, there is no levy.[74] This would be the case, for example, when the goods are visible through a window but the building is locked and inaccessible to the officer. Under such circumstances, a valid levy would be impossible until the officer gained access to the goods.

Virginia law gives the levying officer the statutory authority to use force under certain limited circumstances when necessary to effectuate the levy Section 8.01-491 validates forceful entry into any dwelling house during the daylight hours if the officer decides such force is necessary to make the levy.[75] The officer is required to demand admittance of the occupant; any force he employs thereafter is subject to the additional requirement that the levy be carried out in a reasonable manner.[76] If any of these requirements are vio-

68. *Id.*

69. Bullitt's Ex'rs v. Winston, 15 Va. (1 Munf.) 269, 278-79 (1810). *See also* Dornier v. Masters, 83 Va. 459, 2 S.E. 927 (1887); Wardsworth v. Miller, 45 Va. (4 Gratt.) 99 (1847).

70. 145 F.2d 953 (4th Cir. 1944).

71. *Id.* at 954.

72. *Id.*

73. *Id.*

74. BURKS, PLEADING AND PRACTICE, *supra* note 41, at 687-88.

75. VA. CODE § 8.01-491 (Repl. Vol. 1977).

76. *Id.* § 8.01-490.

lated, the levy should be subject to challenge.

When the officer has no right to levy, as, for example, when he uses force to enter the dwelling without first demanding admittance, he likewise has no power to levy Consequently, he cannot carry out a valid execution by having the goods within his view because, by reason of his illegal entry, he lacked the concomitant power to perfect the lien. If the levy can be challenged successfully, then no lien ever attaches to the goods. The law therefore encourages challenges to the levy, because without a valid levy, no lien ever can exist.

The court in *Palais* also stated that no notice need be given to the debtor to make the levy valid.[77] The court felt that to impose such a requirement would allow the debtor to avoid levy simply by staying away from his property The court failed to consider, however, that notice of the levy could be posted on the premises where the goods are located or, when practical, on the goods themselves. The failure to require any type of notice raises a number of constitutional questions about the procedure.[78] The court did suggest notice is advisable whenever possible, but held that the failure to do so will not invalidate the levy The court attempted to justify this position by noting that it has become common practice in Virginia to allow the chattels to remain in the possession of the debtor as a matter of convenience and economics.[79] This argument has relevance only in situations in which the levy does not result in seizure. The court's holding, however, was not restricted to such situations. Levy without notice or seizure creates the danger that an innocent debtor subsequently could dispose of the property levied on to a bona fide purchaser, with the result that both parties to the sale are ignorant of the levy that has created a lien in favor of the judgment creditor superior to the rights of the purchaser.[80] This is exactly the type of situation that the Revisers of the Code intended to eliminate by changing the act which creates the lien from delivery of the writ to the sheriff to actual levy on the goods

77. 145 F.2d at 955.

78. *See* note 405 *infra* & accompanying text.

79. 145 F.2d at 955.

80. *See* note 121 *infra* & accompanying text. *See also* CLE, ENFORCEMENT OF LIENS, *supra* note 61, at 175.

sought.[81] Under the old rule, a bona fide purchaser taking from a debtor would lose to the creditor if, at the time of the purchase, the sheriff had in his possession an unexcuted writ.[82] Under the new rule, a bona fide purchaser will lose to the creditor only when he purchases goods after they have been levied on and left in possession of the debtor, even when the debtor has no notice. Presumably, the bona fide purchaser is in a better position under the new rule for two reasons. First, a bona fide purchaser is less likely to purchase goods with a superior lien outstanding because an innocent debtor is more likely to know that a lien has attached under the new law than under the old.[83] Second, when the sheriff has left the goods in the possession of the debtor and failed to require him to provide a forthcoming bond,[84] the officer may be personally liable to the purchaser.[85] Likewise, if the debtor, knowing of the levy, nevertheless sells or disposes of the goods, he may be liable to criminal prosecution for larceny.[86] Regardless of these mitigating factors, the inevitable conclusion is that the admirable goal of making execution more equitable by postponing the lien until levy has been partially frustrated by the failure to require that the debtor be notified properly.

The execution must be levied on or before the return day[87] in order to be valid.[88] If the levy is made after the return day, it is void and not binding on the creditor.[89] But if the levy is made before the return day, the sheriff may sell the property after the return day has passed as long as the sale is held within a reasonable time.[90]

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81. VA. CODE COMM., RPT. TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA OF REVISION OF TITLE 8 OF THE CODE OF VA., H. DOC. 14, at 288 (1977).

82. *See, e.g.*, Evans v. Greenhow, 56 Va. (15 Gratt.) 153 (1859).

83. *But see* note 78 *supra* & accompanying text.

84. *See* notes 176-80 *infra* & accompanying text.

85. Bullitt v. Winston, 15 Va. (1 Munf.) 269, 281 (1810). *See* Carr v. Meade, 77 Va. 142 (1883). For a discussion of procedures whereby a creditor may compel the sheriff to act in accordance with his statutory duties, see notes 97-114 *infra* & accompanying text.

86. BURKS, PLEADING AND PRACTICE, *supra* note 41, at 690 n.60.

87. *See* notes 46-47 *supra* & accompanying text.

88. Grandstaff v. Ridgely, Hampton & Co., 71 Va. (30 Gratt.) 1, 15 (1878); O'Bannon v. Saunders, 65 Va. (24 Gratt.) 138, 142-43 (1873); Chapman v. Harrison, 25 Va. (4 Rand.) 336, 339 (1826).

89. *Id.*

90. Palais v. DeJarnette, 145 F.2d 953, 955 (4th Cir. 1944); VA. CODE § 8.01-479 (Repl.

A sheriff must make a return on every writ that is given to him.[91] A return on a writ "is the short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing."[92] Under the present procedure, the sheriff must state the amount of money he has recovered, if any, along with his fees and charges, the date and time of levy and, when more than one defendant is mentioned in the writ, on which defendant he levied.[93] As noted, a return that is made within a reasonable time after the return date is valid,[94] provided that the levy was made before the return date.[95] When no return date appears on a writ that has been returned, the presumption is that the officer properly performed his duty by making the return on time.[96]

In those instances in which the sheriff or his deputy fails to make a proper return, the creditor has available several statutory remedies commonly referred to in other states as "amercement proceedings."[97] An amercement is a penalty imposed by the court issuing the writ on the sheriff for failing to make due return of a writ of execution or of the proceeds of any monies collected in carrying out the process. The procedure is used rarely in Virginia, possibly because many attorneys may be unaware that such sanctions are available or possibly because those who are aware of them doubt their effectiveness. Nevertheless, one practitioner in a neighboring state has found that the amercement of neglectful sheriffs had almost immediate beneficial results.[98]

Vol. 1977); *see* Moorman v. Board, 121 Va. 112, 92 S.E. 883 (1917); Grandstaff v. Ridgely, 71 Va. (30 Gratt.) 1 (1878); Paine v. Tutwiler, 68 Va. (27 Gratt.) 440 (1876); O'Bannon v. Saunders, 65 Va. (24 Gratt.) 138 (1873); Chapman v. Harrison, 25 Va. (4 Rand.) 336 (1826).

91. VA. CODE § 8.01-483 (Repl. Vol. 1977).

92. Rowe v. Hardy, 97 Va. 674, 676, 34 S.E. 625, 626 (1899); *see* Slingluff v. Collins, 109 Va. 717, 64 S.E. 1055 (1909).

93. VA. CODE § 8.01-483 (Repl. Vol. 1977). For Code sections governing returns in general district courts, see VA. CODE §§ 16.1-101, -102 (Repl. Vol. 1975).

94. Moorman v. Board, 121 Va. 112, 115, 92 S.E. 833, 834 (1917).

95. *See* note 90 *supra* & accompanying text.

96. Paine v. Tutwiler, 68 Va. (27 Gratt.) 440, 444 (1876); *see* Rowe v. Hardy, 97 Va. 674, 678, 34 S.E. 625, 626 (1899); BURKS, PLEADING AND PRACTICE, *supra* note 41, at 697.

97. Wyatt, *Amercement of Sheriffs*, 10 WAKE FOREST L. REV. 237 (1974).

98. *Id.* The author, a North Carolina practitioner, stated that he had

> amerced nine sheriffs, some more than once. In these dozen or so cases, the results have been amazing. In every case, save maybe one, when the notice,

Section 15.1-80[99] requires that the day, manner of execution, and name of the officer be inscribed on any order, warrant, or process returned. If the service is made by a deputy, then he must subscribe both his own name and that of his principal. Along with the writ, the sheriff also must return any bond taken and make an account of sales made under the writ, specifying what was sold, the purchaser, and the price received. The sheriff must make the return to the proper court. When a sale is made under the writ and no time is specified for the return, the statute requires that the return be made forthwith. The statute prescribes that the officer shall forfeit twenty dollars if he fails to comply with the section, and one hundred dollars if he makes a false return. If the officer makes no return of a process issued by a court of record,[100] then the clerk must issue a rule returnable on the first day of the next succeeding term of court, against the delinquent officer, directing him to appear and show cause why he should not be fined.[101] Presumably, it is within the discretion of the court to determine what fine will be imposed. These penalties require no formal action on the part of the creditor and, from the language of the statute, are mandatory upon violation.[102]

While section 15.1-80, discussed above, is applicable to any order, warrant, or process, some confusion is created by section 8.01-

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affidavits, and judgment *nisi* were served upon the sheriff, he suddenly became diligent. After receiving a new execution, he promptly executed and levied upon the properties of the defendant and caused a satisfaction of the judgment. Amercement causes quick action by the sheriff for he does not fancy being required to show cause in open court why the judgment *nisi* should not be made absolute.

Id. at 247.

99. VA. CODE § 15.1-80 (Cum. Supp. 1979).

100. By limiting the application of the penalty for failure to make a return of writs issued by courts of record, the writs issued by general district courts that are courts not of record evidently are excluded from coverage. Curiously, no such language of limitation can be found in the preceding sentence regarding failure to comply with the requirements of the section or making a false return; it therefore must be presumed that the penalties are applicable regardless of from which court the writ originated.

101. VA. CODE § 15.1-80 (Cum. Supp. 1979).

102. When used in statutes the word "shall" is generally imperative or mandatory. BLACK'S LAW DICTIONARY (4th rev. ed. 1968).

The penalty is a fine; the proceeds, unlike the analogous procedure in North Carolina, do not go to the aggrieved party. *See* N.C. GEN. STAT. §§ 162-8 to 21 (1972).

483,[103] which sets out a number of different requirements that the sheriff must meet in order to make a valid return of a writ of *fieri facias*. At first blush, one might conclude that failure to comply with the return requirements of section 8.01-483 would give rise to the sanctions set out in section 15.1-80.[104] Such a conclusion, however, is unjustified. The section setting forth the requirements for a return of any order, warrant, or process specifically states that the fine applies to "[a]ny officer failing to comply with *this* section,"[105] thereby precluding incorporation by implication of section 8.01-483. No such limiting language accompanies the sanctions for false return or failure to make a return and, arguably, the sheriff's noncompliance with the stricter requirements of section 8.01-483 could give rise to a fine against the officer for false return.

The creditor also may maintain an action against the officer for failing to make or subscribe the return, or for making a false return.[106] A judgment rendered for failure to return or to make a subscription does not bar further proceedings in the event the failure continues.[107] For each month subsequent to the judgment that the failure continues, the sheriff shall be fined twenty dollars until the return no longer can be made or the amount owed by the debtor is paid.[108] The court also is empowered to levy an additional fine of a reasonable sum upon the motion of any party injured by the continued delay Other fines are also within the discretion of the court, subject to the limitation that they do not, in the aggre-

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103. VA. CODE § 8.01-483 (Repl. Vol. 1977). *See* notes 91-93 *supra* & accompanying text. For example, § 15.1-80 requires only that the officer note on the return the day and manner of execution of the writ along with his signature. Section 8.01-483, however, requires the sheriff to state whether he made a levy and, if so, the date and *time* of the levy. The requirement that the time be noted in addition to the day (not required in § 15.1-80) is of critical importance to levying creditors because it establishes the point at which the lien created by the writ is perfected against subsequent levying creditors. VA. CODE § 8.01-478 (Repl. Vol. 1977); *see, e.g., id.* § 8.01-487 (Repl. Vol. 1977).

104. A note following § 8.01-483 in fact cross references to § 15.1-81 for failure to make a return. The reference is probably an error and should be to § 15.1-80. The cross reference, however, does not mention failure to comply or the making of a false return.

105. VA. CODE § 15.1-80 (Cum. Supp. 1979). The text reads in the appropriate part: "Any officer failing to comply with this section shall forfeit twenty dollars and if he make a false return shall forfeit therefor one hundred dollars." *Id.*

106. *Id.* § 15.1-81 (Repl. Vol. 1973). The court in Buttery v. Robbins, 177 Va. 368, 14 S.E.2d 544 (1941), recognized that a sheriff may be sued for defective service of process.

107. VA. CODE § 15.1-81 (Repl. Vol. 1973).

108. *Id.*

gate, exceed five dollars per hundred of the amount of the writ for each month the failure continues.[109]

If an officer receives any money by virtue of any warrant, order, or process or makes a return indicating he has received a sum of money and then fails to make a proper return of it, the person entitled to the money can recover against the officer and his sureties the amount received plus fifteen percent annual interest until payment.[110] The statute creates a presumption that in a motion against the officer, the fact that the *fi.fa.* has not been returned is prima facie evidence that the entire amount of the writ has been collected.[111]

When the officer fails to endorse on the writ of *fi.fa.* the date and time that he receives it, and when he levies on the tangible personalty of the debtor, the judgment creditor may make a motion to the court for recovery against the officer not to exceed fifteen percent of the amount of the execution.[112] Any officer receiving or collecting money on an execution must notify the person entitled to the money within thirty days.[113] If the officer fails to do so and cannot show good cause for such failure, then he must be fined between twenty and fifty dollars for each offense.[114]

The sanctions available to both the creditor and the court provide a formidable array of weapons against the recalcitrant sheriff. Because the sheriff is an elected official, he can ill-afford to take lightly the threat to his office that these procedures provide. The diligent creditor should find them a valuable tool.

Lien of Execution

Lien on Tangibles v. Intangibles

The judgment itself creates a lien only on real estate in Virginia and, then, only when it has been properly docketed.[115] In contrast,

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109. *Id.*
110. *Id.* § 15.1-85 (Repl. Vol. 1973).
111. *Id. See also* Paxton v. Rich, 85 Va. 378, 7 S.E. 31 (1888).
112. VA. CODE § 8.01-487 (Repl. Vol. 1977).
113. *Id.* § 8.01-500.
114. *Id.*
115. *Id.* § 8.01-458. *See generally* Wiltshire, *The New Judgment Lien in Lands*, 1 U. RICH. L. REV. 313 (1962). Enforcement is by a bill in equity. VA. CODE § 8.01-462 (Repl. Vol. 1977).

the lien of a writ of *fieri facias* varies in territorial scope, duration, and effect depending on the type of property involved. At common law, the lien created by a *fi.fa.* attached from the *teste* of the writ, which, for all practical porposes, was the day of judgment.[116] This was changed by the Statute of Frauds to make the lien effective from the time the writ was delivered to the sheriff.[117] Under this system, the writ became a lien on every kind of personal property regardless of whether it was tangible or intangible.[118] Revision of the Code of Virginia in 1977 changed the *fi.fa.* significantly by postponing the creation of the lien on tangible personal property until the property was actually levied on.[119] The lien on intangibles which, by definition, are incapable of being levied on, still arises at the time the writ is delivered into the hands of the sheriff.[120]

The liens have different effects on the rights of purchasers. If the property is tangible personalty, the lien created by the levy of the *fieri facias* is superior to the rights of subsequent purchasers regardless of whether the purchaser has notice of the levy.[121] On the other hand, when the property is intangible, an assignee for valuable consideration without notice will defeat the judgment creditor's lien.[122] Also, a third party making payment to the debtor is not liable to the judgment creditor under the lien on intangibles unless he is served with written notice of the lien, signed by plaintiff or his attorney, specifying the following: 1) name of the debtor, 2) name of the creditor, 3) amount of the judgment, 4) date of the judgment, 5) date and return date of execution, and 6) date execution was delivered.[123]

As a practical matter, most creditors' attorneys have standard-

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116. *See generally* S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 100 (1967); FREEMAN ON EXECUTIONS, *supra* note 21, § 199.

117. *Id.*

118. Frayser v. R. & A. R. R., 81 Va. 388, 392-93 (1886); Trevillian's Ex'rs v. Guerrant's Ex'rs, 72 Va. (31 Gratt.) 525, 527 (1879); Charron & Co. v. Boswell, 59 Va. (18 Gratt.) 216, 230 (1868); Puryear v. Taylor, 53 Va. (12 Gratt.) 401, 408 (1855). *See also* BURKS, PLEADING AND PRACTICE, *supra* note 41, at 703.

119. *See* note 56 *supra* & accompanying text.

120. *See* note 55 *supra* & accompanying text.

121. Evans v. Greenhow, 56 Va. (15 Gratt.) 153, 161 (1859).

122. VA. CODE § 8.01-501 (Repl. Vol. 1977). *See* note 55 *supra* & accompanying text; Trevillian's Ex'rs v. Guerrant's Ex'rs, 72 Va. (31 Gratt.) 525 (1879); Charron & Co. v. Boswell, 59 Va. (18 Gratt.) 216 (1868); Evans v. Greenhow, 56 Va. (15 Gratt.) 153 (1859).

123. VA. CODE § 8.01-502 (Repl. Vol. 1977).

ized forms that satisfy the statutory requirements for notice that they will have served on any banks at which the debtor is known to have an account. If the debtor's bank is unknown and the size of the judgment makes it practicable, the diligent creditor may send out notices to all the area banks in which funds may be located.[124] This notice serves to freeze the debtor's assets in those accounts until a garnishment summons can issue. When the debtor has funds in an out-of-state bank, however, the notice will have no effect because the lien itself extends only to property located within the state.

The territorial scope of the lien on tangible personalty is limited to the jurisdiction of the sheriff to whom the writ of *fieri facias* is given for execution; that is, the city or county limits.[125] The lien on intangibles, on the other hand, extends throughout the entire state.[126]

The duration of the lien also varies depending on the type of property Under section 8.01-479 of the Virginia Code, "the lien of a writ of *fieri facias,* on what is capable of being levied on but is not levied on under the writ on or before the return day thereof, shall cease on that day."[127] This section applies to liens on tangible property generally, but the wording was left intact in the 1977 revision that changed the nature of the lien on tangible personal property [128] Since the revision, the lien is contingent upon a valid levy being made. The lien cannot be terminated on the return date if no levy has been made because it never existed.[129] Consequently, the logical conclusion is that this subsection is irrelevant and that the duration of the lien is established by the time within which the sheriff reasonably could have sold tangible property that has been subjected to a valid levy.[130]

The duration of a lien on intangibles differs significantly from

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124. As to the rights of the bank under such circumstances, see VA. CODE § 8.4-303 (Added Vol. 1965).

125. *Id.* § 8.01-481 (Repl. Vol. 1977).

126. *Id.*

127. *Id.* § 8.01-479.

128. This is the old § 8-412 that has been renumbered but otherwise remains unchanged. The revisers made no comment concerning this section given the change in § 8.01-478. *See* note 56 *supra.*

129. VA. CODE § 8.01-478; *see* note 56 *supra.*

130. *See* Palais v. DeJarnette, 145 F.2d 953, 955 (4th Cir. 1944).

the lien on chattels and goods. This lien is effective for one year from the return date on the execution or, when the intangible is a debt due from a third party, one year from the determination of the amount owed, whichever is longer.[131] The lien ceases when the judgment creditor no longer can enforce the judgment; that is, no longer than twenty years after the judgment has been rendered, unless the judgment is extended.[132] Likewise, the lien on intangibles terminates whenever the creditor is prevented from pursuing the judgment because the debtor has given and forfeited a forthcoming bond[133] or because legal process so orders.[134] A lien on the debtor's choses in action is not defeated by his death or the death of his creditor if the lien arose during the defendant's life. The action may be pursued in a suit against the decedent's assets in the hands of the personal representative;[135] however, no lien can be established on the estate of a debtor after his death. The writ of *scire facias,* which before the revision would have been necessary to revive the judgment following decedent's death, has been abolished. Therefore, a suit against the decedent debtor's estate apparently may be brought at any time during the twenty-year life of the judgment.[136]

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131. VA. CODE § 8.01-505 (Repl. Vol. 1977). The text reads as follows:

> The lien acquired under § 8.01-501 on intangibles shall cease whenever the right of the judgment creditor to enforce the judgment by execution or by action, or to extend the right by motion, ceases or is suspended by a forthcoming bond being given and forfeited or by other legal process. Furthermore, as to all such intangibles the lien shall cease upon the expiration of the following periods whichever is the longer: (1) one year from the return day of the executions to which the lien arose, or (ii) if the intangible is a debt due from, or a claim upon, a third person in favor of the judgment debtor or the state of such third person, one year from the final determination of the amount owed to the judgment debtor.

Id.

132. *Id. See* Boisseau v. Bass, 100 Va. 207, 40 S.E. 647 (1902); Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S.E. 596 (1897), *overruled on other grounds,* 100 Va. 207, 40 S.E. 647 (1902). As to extension of the judgment, see notes 43-44 *supra* & accompanying text.

133. VA. CODE § 8.01-505; *see* note 131 *supra*; notes 176-80 *infra* & accompanying text.

134. *Id.*

135. Trevillian's Ex'rs v. Guerrant's Ex'rs, 72 Va. (31 Gratt.) 525 (1879).

136. *See* CLE, ENFORCEMENT OF LIENS, *supra* note 61, at 171. The requirement under § 8.01-251 that a motion to extend the judgment must be brought within two years of the personal representative's qualification does not apply to an action based on the original judgment.

Finally, the Code revision making the lien attach at levy instead of delivery has the effect of restricting the lien to the specific property actually levied on. Under the old law, the lien attached to all the debtor's personalty, including property acquired after delivery of writ but before the return date.[137] Therefore, the scope of the lien is diminished significantly by the 1977 revision insofar as tangible property is concerned. This is not so for the lien on intangibles that is created when the writ of *fi.fa.* is delivered to the sheriff.[138] This lien attaches to all property incapable of being levied on that the debtor owns on the delivery date or subsequently acquires before the return date.[139] The lien does not attach, however, to exempt property or property subject to an assignment when the assignee for valuable consideration takes without notice.

Priorities

Priorities among lienholders are resolved in much the same manner as before the revision except that now the point of reference for perfecting the lien on tangible personalty is the time of actual levy The old system, under which the lien arose when the writ was delivered to the sheriff, more often than not resulted in inequities among competing creditors that could not be justified on any policy basis.[140] For example, the general rule was that when several executions, existed against the same property, the first writ to be delivered prevailed even when the junior creditor levied first.[141] Because the lien attached to all the debtor's property, a creditor who did not know the whereabouts of any personalty could take out a writ of execution and wait for a more diligent junior creditor to discover some leviable assets that then could be claimed on the bases of the senior lien.

The new system avoids such problems because the lien attaches

137. *See* BURKS, PLEADING AND PRACTICE, *supra* note 41, at 703.

138. *See* note 61 *supra.*

139. *Id.*

140. For some of the problems typical to states in which the lien attaches when the writ is delivered to the sheriff, see Distler and Shubin, *Enforcement of Priorities and Liens: The New York Judgment Creditors' Rights in Personal Property,* 60 COLUM. L. REV. 1196 (1935). See also the dissent in Pegram v. May, 36 Va. (9 Leigh) 176, 180-81 (1838).

141. Charron & Co. v. Boswell, 59 Va. (18 Gratt.) 216 (1868); Foreman v. Lloyd, 29 Va. (2 Leigh) 309 (1830).

not only in a manner more likely to give notice to junior creditors, but also in a way that specifies the particular property subject to the levy When several writs are delivered on the same day to the sheriff against the same property, the order of delivery determines the order of satisfaction.[142] When several writs are delivered to the sheriff simultaneously, the proceeds from the sale of goods levied on are apportioned ratably [143] But when the sheriff demands an indemnity bond and not all of the executing creditors comply, then the sale proceeds are divided only among those creditors providing a bond.[144]

Case law on the question of priorities among execution liens and other kinds of liens may have different results when examined in the context of the new law. For example, in *Pegram v. May*[145], a writ of *fieri facias* based on a valid judgment was issued and delivered to the sheriff for execution. Before levy could be carried out, the debtor executed a deed of trust on the property which he promptly recorded. Later, levy was made on the goods after they were in the hands of a subsequent purchaser.[146] The Virginia Supreme Court held that the purchaser of the goods at the execution sale took priority over the lien of the deed of trust because the execution lien was first in time.[147] Today, the outcome would be exactly the opposite. Since the deed of trust was recorded prior to the actual levy on the goods, the deed lienholder, being first in time to perfect his lien on the property, would prevail over the subsequent execution lien.[148]

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142. VA. CODE § 8.01-488 (Repl. Vol. 1977). The text reads as follows:

> Of writs of fieri facias, that which was first delivered to the officer, though two or more be delivered on the same day, shall be first levied and satisfied, and when several such executions are delivered to the officer at the same time they shall be satisfied ratably. But if an indemnifying bond be required by the officer as a prerequisite to a sale, and the same to be given by some of the creditors and not by others, and the officer sells under protection of such bond, the proceeds of the sale shall be paid to the creditors giving the bond in the order in which their liens attached.

Id.

143. *Id.*

144. *Id.*

145. 36 Va. (9 Leigh) 176 (1838).

146. *Id.* at 177-78.

147. *Id.* at 179-80.

148. *See* note 56 *supra* & accompanying text.

On the other hand, an old case involving competing garnishment and execution lien claims would have the same result under today's law. In *Puryear v. Taylor*[149], the senior creditor obtained judgment against the debtor and had several executions issued that were returned unsatisfied. Later, the junior creditor sued the debtor and had an attachment by garnishment issued and served on the garnishee. The senior creditor then sued out a garnishment against the same garnishee asserting his claim was senior because it derived from the lien created by his earlier unsatisfied execution. The court agreed and held that the writ of *fieri facias* created a lien that was superior even though the garnishment by attachment was served on the garnishee first.[150] The outcome under the new law would be the same because a debt owed by a third party to the debtor is a chose in action that is subject to the lien of the *fieri facias* when the writ is delivered to the sheriff; the fact that the writ was returned unsatisfied is irrelevant as long as the subsequent garnishment arises before the lien ceases.[151]

Two consecutive holdings by the United States District Court for the Eastern District of Virginia have clouded the issue over priorities among garnishment creditors. In *First National Bank of Norfolk v. Norfolk & Western Railway*,[152] the court held that a judgment creditor's lien on a debt in the hands of a garnishee does not arise until the garnishment summons is issued; therefore, a tax lien perfected prior to issuance would prevail over the lien of the creditor.[153] Only a year later, however, the same court in *In re*

149. 53 Va. (12 Gratt.) 401 (1855).

150. *Id.* at 409. *See also* Erskine v. Staley, 39 Va. (12 Leigh) 406 (1841).

151. *See* note 55 *supra* & accompanying text.

152. 327 F Supp. 196 (E.D. Va. 1971).

153. *Id.* at 199. The court cited § 8-411 of the Virginia Code (the present § 8.01-478, *see* note 56 *supra*) which created a lien on tangibles and intangibles from the time the writ of *fieri facias* was delivered to the sheriff and § 8-441 (the present § 8.01-511) which imposed liability on the garnishee by reason of the lien of the writ of *fi.fa.* Although these two sections are consistent with the interpretation that a lien is created by the writ, not the issuance of the garnishment summons, the court made no reference to the writ or the date of its delivery to the sheriff. Because a live *fi.fa.* is a prerequisite to the issuance of a garnishment summons, note 158 *infra*, theoretically, the two cannot arise simultaneously. Consequently, had the writ issued before the tax lien was perfected, the judgment creditor should have prevailed even though the garnishment summons was subsequent to the tax lien. The court never addressed this possibility.

Acorn Electric Supply, Inc.[154] held that the writ of *fi.fa.* created the lien, not the garnishment summons. The court contended that the garnishment summons does not create the lien but is merely a means of enforcing it.[155] The court acknowledged the inconsistency between the two decisions but sought to justify its holding on the ground that the Virginia Code recognizes a lien created by garnishment summons in the context of prejudgment attachment and garnishment, but not when the summons is used in the postjudgment period.[156] This reasoning is sound given the explicit wording in the statute that the lien on intangibles arises at the moment the writ is delivered to the sheriff.[157] The garnishment itself does not create a lien upon specific property in the garnishee's possession; rather it creates a right in the creditor to hold the garnishee liable for the value of the property he holds if he delivers it to the debtor.[158] Accordingly, the relative priority among execution creditors to the amount held by the garnishee should be determined by the order in which the writs of *fieri facias* are delivered to the sheriff.[159]

The rights of a purchaser for value from the debtor also have been affected by the change in the statute relating to tangibles. In *McKinley v. Ensell*,[160] a bona fide purchaser of personal property took good title against the creditors of the seller only if he managed to take possession of the goods before the writ of execution was issued against the seller.[161] Under the present system, a bona

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154. 348 F Supp. 277 (E.D. Va. 1972).

155. *Id.* at 282.

156. *Id.* Both *First National Bank* and *Acorn Supply* involved garnishment in the postjudgment period. To add to the confusion, the court in *Acorn Supply* interpreted *First National Bank* to state that the lien was effective from the date the garnishment summons was *delivered* to the garnishee, when in fact the court explicitly stated that the lien is created when it is issued to the officer. *See* note 131 *supra*.

157. *See* note 55 *supra* & accompanying text.

158. Knight v. People's Nat'l Bank, 182 Va. 380, 391, 29 S.E.2d 364, 370 (1944). A garnishment summons issues on the request of a judgment creditor who has a writ of execution that is unsatisfied. This method allows the creditor to enforce the execution against the third party's liability to the debtor that is the object of the judgment. VA. CODE § 8.01-511 (Repl. Vol. 1977). The amount of money that the garnishee owes to the debtor must be ascertainable and absolute in order to be subject to garnishment. Lynch v. Johnson, 196 Va. 516, 84 S.E.2d 419 (1954).

159. *See* note 55 *supra* & accompanying text. *But see* D. EPSTEIN, DEBTOR-CREDITOR RELATIONS IN A NUTSHELL 58 (1973) (service of summons creates a lien).

160. 43 Va. (2 Gratt.) 334 (1845).

161. *Id.* at 340.

fide purchaser need only take possession before the levy is actually made in order to defeat the claims of the vendor's creditors. When the goods are levied on but left in the hands of the debtor,[162] however, the innocent purchaser is still prey to creditors regardless of the lack of notice of the levy.[163]

Third Party Claims

The creditor often may issue a writ of *fi.fa.* against personalty in the hands of the debtor only to find that it is claimed by a third party The procedures for resolving the title dispute differ depending on the level of court issuing the writ. When the circuit court is the source of the *fi.fa.*, Virginia law provides that either the creditor, the claimant, or the sheriff may apply to the circuit court where the property is located to try the claim.[164] If the claimant is the movant, he first must provide a suspending bond[165] and then, within thirty days, institute proceedings to settle the dispute over the title.[166] When the claimant fails to satisfy either of these requirements, he is barred thereafter from pursuing the claim, and the sheriff may levy against the property without fear of liability.[167]

The sheriff in possession of the writ also may intitiate proceedings in the circuit court unless the creditor has given him an indemnifying bond.[168] Generally, however, the sheriff always will re-

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162. *See* text accompanying note 73 *supra*.

163. *See* note 121 *supra* & accompanying text.

164. VA. CODE § 8.01-365 (Repl. Vol. 1977); United States v. Lawler, 201 Va. 686, 112 S.E.2d 921 (1960). The Code section is restricted to situations in which the lien already has been perfected against the goods. Accordingly, third party claims may not be asserted in anticipation of levy on tangibles or prior to the delivery of the writ to the sheriff in the case of intangibles.

165. The suspending bond has the effect of suspending the authority of the sheriff to execute the writ any further; thus, he cannot sell the goods levied on until the issue of title is resolved. The bond must be of an amount equal to double the value of the property and made payable to the officer. The bond may be sued upon in the name of the officer by any person who sustains injuries as a result of the suspension. VA. CODE § 8.01-370 (Repl. Vol. 1977).

166. *Id.*, Fields-Watkins Co. v. Hensley, 117 Va. 661, 86 S.E. 113 (1915).

167. VA. CODE § 8.01-367 (Repl. Vol. 1977); Bosewell v. Lipscomb, 172 Va. 33, 200 S.E. 736 (1939).

168. VA. CODE § 8.01-365 (ii) (Repl. Vol. 1977). The purpose of an indemnifying bond is to indemnify the sheriff against personal liability at the hands of third party claimants. Be-

quire a bond under such circumstances. If the judgment creditor refuses to provide one within a reasonable time, the officer may refuse to levy on the property or, when he already has levied, he may return the goods to the person who was previously in possession.[169] When the bond is provided, the officer is bound to execute the writ by levying on the property.[170]

Writs of execution issued by the general district courts are governed by different Code sections when a dispute arises over the title to the property, though the results are very similar. The claimant, the officer in possession of the writ, or the party who had the process issued, may apply to the court to try the title.[171] If the applicant files an affidavit stating that the value of the property does not exceed $5,000, then the court will issue a summons to both the debtor and the creditor requiring them to show cause why the property should not be discharged from the writ.[172] When the value of the property is over $1,000, any party may have the proceedings removed to the circuit court;[173] otherwise, the court will have a hearing to decide the question of title.[174] If the property involved is worth more than fifty dollars, an appeal of right is available to the losing party.[175]

Relief from Levy

A debtor whose property is subject to execution may continue to possess and use the goods by giving the levying officer a forthcoming bond payable to the creditor.[176] The bond is available as a mat-

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cause the execution creditor is the interested party, he must provide the bond. *See* Wheeler v. City Sav. & Loan Corp., 156 Va. 402, 157 S.E. 726 (1931).

169. VA. CODE § 8.01-367 (Repl. Vol. 1977); Huffman v. Leffell, 73 Va. (32 Gratt.) 41 (1879).

170. Stone v. Pointer, 19 Va. (5 Munf.) 287, 291 (1816).

171. VA. CODE § 16.1-119 (Cum. Supp. 1978).

172. *Id.* § 16.1-120.

173. *Id.* § 16.1-122.

174. *Id.* § 16.1-121 (Repl. Vol. 1975).

175. *Id.* § 16.1-122 (Cum. Supp. 1978).

176. *Id.* § 8.01-526 (Repl. Vol. 1977) provides as follows:

> The Sheriff or other officer levying a writ of *fieri facias* may take from the debtor a bond, with sufficient surety, payable to the creditor, reciting the service of such writ or warrant, and the amount due thereon, including the officer's fee for taking the bond, commissions, and other lawful charges, if any, with condition that the property shall be forthcoming at the day and place of

ter of right, and the levying officer must accept the bond if offered upon the condition that the debtor agree to deliver the goods on the day and at the place of sale.[177] The debtor remains liable for the goods during this period and failure to deliver the goods as agreed results in forfeiture of the bond.[178] The lien created by the levy remains in effect until the bond is forfeited, at which time it is extinguished and a judgment is created against the surety.[179] No execution may issue on the judgment, but the obligors on the bond are liable, and the creditor in whose name the bond was issued may recover by motion or action.[180]

Property Subject to Execution

The writ of *fieri facias* authorizes the sheriff to levy on money and bank notes as well as goods and chattels of the debtor.[181] Execution cannot levy on real estate[182] or property that has been exempted specifically by statute.[183] The general rule is that all the personalty of the debtor that can be transferred voluntarily may be subjected to execution;[184] the debtor, though, must have some vested interest in the property. Personalty on loan to the debtor cannot be levied on by his creditors on the basis of his possession of the property [185]

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sale; whereupon, such property may be permitted to remain in the possession and at the risk of the debtor.

Id.

177. Burks, Pleading and Practice, *supra* note 41, at 699. In certain cases, however, a forthcoming bond is precluded by statute. Va. Code § 8.01-531 (Repl. Vol. 1977). These situations arise when 1) the execution is on a forthcoming bond; 2) the execution is against the sheriff, his deputy or surety in specified circumstances; 3) the execution is required by law to be endorsed "no security taken." *Id.*

178. Lusk v. Ramsay, 17 Va. (3 Munf.) 417, 429-30 (1811).

179. Va. Code § 8.01-527 (Repl. Vol. 1977).

180. *Id.* § 8.01-528. *See* Allen v. Hart, 59 Va. (18 Gratt.) 722 (1868).

181. Va. Code § 8.01-478, *supra* note 56.

182. Davis v. National Grange Ins. Co., 281 F Supp. 998 (E.D. Va. 1968). *See also* Allen v. Clark, 126 F 738 (4th Cir. 1903). The judgment creates a lien on the realty of the debtor that must be enforced by a bill in equity. *See* note 115 *supra.*

183. Properties exempt from levy are detailed in Va. Code §§ 34-1 to 28. *See also* CLE, Enforcement of Liens, *supra* note 61, at 176-78.

184. Freeman on Executions, *supra* note 21, § 110.

185. Sauls v. Andrews & Co., 163 Va. 407, 175 S.E. 760 (1934); Beale v. Digges, 47 Va. (6 Gratt.) 582 (1850); Rose v. Burgess, 37 Va. (10 Leigh) 193 (1839); Pate v. Baker, 35 Va. (8 Leigh) 80 (1837).

Stocks and Bonds

At common law, stocks and bonds were considered choses in action and therefore were not subject to seizure and sale under execution.[186] The Uniform Commercial Code (UCC), however, specifically provides for securities or shares of stock to be levied on by judgment creditors.[187] The UCC, like the Uniform Stock Transfer Act before it, has the effect of making stock certificates fully negotiable.[188] The certificates themselves constitute the property for purposes of levy In order for the shares to be subjected to levy, they must actually be seized by the officer enforcing the *fieri facias*.[189] When the shares have been returned to the corporation issuing them, the sheriff may levy on the stocks at the source.[190]

In contrast, when the debtor has pledged the securities as collateral, the requirement of actual seizure presents a dilemma to which the Code provides no answer. As presently written, the creditor of the pledgor has no way to levy on the pledgor's equity interest in the pledged security without depriving the pledgee of his collateral.[191] Furthermore, the prescription that the shares be seized physically is in conflict with the statutory section that allows levy on tangibles to take place when the goods are in view and capable of being levied on.[192] Though this issue has not been resolved, the Code provision has the effect of making stocks and securities a form of property distinct from either tangible or intangible personalty, at least insofar as the procedural requirements for perfecting the levy are concerned. Additionally, the Code provides the courts

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186. *See* FREEMAN ON EXECUTIONS, *supra* note 21, § 7.

187. VA. CODE § 8.8-317(1) (Added Vol. 1965) provides that

> [n]o attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

A security is defined broadly to include any instrument that "evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer." *Id.* § 8.8-102(1)(a).

188. *Id.* § 8.8-105(1). *See also* Frost v. Davis, 288 F.2d 497, 498 (5th Cir. 1961); RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 125 (1967).

189. VA. CODE § 8.8-317(1), *supra* note 187.

190. *Id.*

191. Kennedy, *The Rights of Levying Creditors Against Negotiable Property Under the Uniform Commercial Code*, 31 BUS. LAW. 1517, 1527-28 (1976).

192. *See* notes 73-74 *supra* & accompanying text.

with the power to compel the debtor to bring shares located out of state into Virginia and deliver them to the sheriff possessing a writ of execution.[193]

Negotiable Documents of Title

The UCC permits a judgment creditor to levy on a negotiable document of title.[194] Section 8.7-602 of the Code of Virginia provides that goods covered by a negotiable document of title can be reached by judicial process only when the document of title is surrendered to the bailee or after further negotiation of the document has been enjoined by a court.[195] The purpose of this restriction is to protect the bailee against conflicting claims by the holder of the document and the judgment creditor of the bailor.[196] Further protection is afforded the purchaser of a document of title who takes without notice of the injunction by allowing him to take free of the lien.[197] This section, like the section applicable to stock certificates, creates another exception to Virginia's law of execution by requiring actual seizure to perfect the levy. The idea that an injunction against further negotiation gives rise to a lien on the documents is unique to this particular type of instrument.[198] The most serious obstacle, however, is that an injunction against further negotiation can be effective only if the holder of the document is subject to the

193. Inter-Regional Financial Group, Inc. v. Hashemi, 562 F.2d 152, 155 (2nd Cir. 1977); Fleming v. Grey Mfg. Co., 352 F Supp. 724, 726 (D. Conn. 1973). *But see* Nederlandsche Handel-Maatschappj N.V v. Sentry Corp., 163 F Supp. 800, 803 (E.D. Va. 1958).

194. VA. CODE §8.7-602 (Added Vol. 1965) provides that

> [e]xcept where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by the judicial process.

Id.

195. *Id.*

196. *See id.* Official Comment 1.

197. One commentator has noted an evident lack of understanding by the draftsmen of the Code as to the distinction between judgment creditors and judgment liens. *See* Kennedy, *The Rights of Levying Creditors, supra* note 191, at 1517-18.

198. *See, e.g.*, note 189 *supra* & accompanying text.

court's jurisdiction.[199] Finally, the creditor should bear in mind that this Code section does not apply to nonnegotiable documents of title. In such cases, the judgment creditor may proceed directly against the goods themselves in the hands of the bailee, either through garnishment or the interrogatory procedure whenever practical.

Fixtures

Generally, fixtures are considered part of the realty and therefore are not subject to levy under a *fi.fa.* when the debtor owns both the real estate and the fixtures.[200] In order to reach the fixtures on the land, the creditor must proceed against the realty [201] Personalty is considered to be a fixture if it is permanent in character and so essential to the purposes of the building that it cannot be removed without lasting damage to either.[202]

Crops and Livestock

Growing crops, regardless of kind, cannot be subjected to levy until they have been severed from the land.[203] Livestock, including horses, may be levied on though the sheriff is responsible for their care while he is in possession,[204] which may prove both costly and impractical.

Property Subject to Prior Lien

Section 8.01-480 permits a judgment creditor to have a writ of *fi.fa.* levied on tangible personal property that is subject to a prior lien or in which the debtor has only an equitable interest.[205] This

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.199. Kennedy, *Rights of Levying Creditors, supra* note 191, at 1519-20.

200. Hasken Wood Vulcanizing Co. v. Cleveland Shipbldg. Co., 94 Va. 439, 447, 26 S.E. 878, 880 (1897).

201. *See* note 115 *supra* & accompanying text. *See, e.g.*, VA. CODE § 8.9-313 (Cum. Supp. 1979).

202. Green v. Phillips, 67 Va. (26 Gratt.) 752, 762-63 (1875). *See also* note 183 *supra*, at 447.

203. VA. CODE § 8.01-489 (Repl. Vol. 1977). *See id.* § 34-27 (Repl. Vol. 1976); Note, *Crops - Personalty or Realty in Virginia?*, 37 VA. L. REV. 1115 (1953).

204. VA. CODE § 8.01-490 (Repl. Vol. 1977).

205. *Id.* § 8.01-480 reads as follows:

Tangible personal property subject to a prior lien, or in which the execution

section derives from earlier law governing chattel mortgages and conditional sales contracts that now are governed by article 9 of the UCC, which rejects the common law "lien theory" as a basis for establishing security interests.[206] Accordingly, the statute has limited application at the present time. Technically, for example, it would apply to situations in which a prior creditor has levied on tangibles but allowed the property to remain in the hands of the debtor and thereby has become susceptible to levy by a subsequent judgment creditor.[207]

When the statute does apply, if the lien is due and payable when the levy is made, then the sheriff must sell the property free of the lien and apply the proceeds first to the prior lien and then the balance to the amount of the judgment.[208] If the lien is not due, then the goods can be sold subject to the lien.[209]

Estates in Personalty[210]

Virginia allows personal property to be held by joint tenancy with right of survivorship[211] or by tenancy in common.[212] The right to hold personalty as tenancy by the entirety apparently is recognized in Virginia as a result of the Supreme Court of Appeals decision in *Oliver v. Givens*.[213] In *Oliver*, the court held that the pro-

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> debtor has only an equitable interest, may nevertheless be levied on for the satisfaction of a fieri facias. If such prior lien be due and payable, the officer levying the fieri facias shall sell the property free of such lien, and apply the proceeds first to the payment of such lien, and the residue so far as necessary, to the satisfaction of the fieri facias. If such prior lien be not due and payable at the time of sale, such officer shall sell the property levied on subject to such lien.

Id. This statute was applied in Wheeler v. City Sav. & Loan Corp., 156 Va. 402, 157 S.E. 726 (1931).

206. *See* VA. CODE § 8.9-101, Official Comment. *See also* note 230 *infra* & accompanying text.

207. *See* note 328 *infra* & accompanying text. *But see* note 14 *supra*.

208. VA. CODE § 8.01-480, *supra* note 205.

209. *Id.*

210. *See generally* Murphy, *Cotenancies: A Critique for Creditors*, 48 VA. L. REV. 405 (1962).

211. Wallace v. Wallace, 168 Va. 216, 190 S.E. 293 (1937). *Cf.* VA. CODE §§ 55-20 to 21 (Repl. Vol. 1974) (by implication).

212. *See* King v. Merryman, 196 Va. 844, 86 S.E.2d 141 (1955); VA. CODE §§ 6-55.1, 20-111, 55-20.

213. 204 Va. 123, 129 S.E.2d 661 (1963). Section 20-111 of the Virginia Code, which extin-

ceeds from a sale of real estate owned by the entiretıes likewise are held by the entiretıes.[214] As will be indicated below, the particular type of cotenancy that owns the personal property determines whether the property may be subjected to the claims of judgment creditors.

In a tenancy in common, the cotenant is not considered to own the whole estate but rather a definite fractional part of the whole.[215] Each cotenant may freely dispose of his interest in the estate without permission from the others. There is no right of survivorship in such estates and, on the death of one tenant, his portion passes to his heirs or legatees.[216] From the creditor's viewpoint, this type of cotenancy is the most advantageous because the joint owner's interest is subject to levy both during his lifetime and after his death.[217] Personal property held by tenancy in common should be available for execution and sale and the proceeds used to pay the amount of judgment after the nonliable cotenants have been reimbursed for their interests.[218] This type of cotenancy is preferred by statute in Virginia and the creditor always should be prepared to argue that any jointly held property is held as a tenancy in common in the absence of a written instrument expressly showing a contrary intent.[219] With the exception of automobiles or mobile homes which require certificates of title, most types of personalty are unaccompanied by an instrument indicating the nature of the joint ownership.

Cotenants in a joint tenancy each own an undivided share of the whole property When one cotenant dies, the right of survivorship abolishes the decedent's interest, and the remaining cotenants continue to own the whole property[220] The individual interest of a

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guishes contingent property rights upon the entry of a valid divorce decree, recognizes, by implication, the right to own personalty as joint tenants or tenants by the entirety. *See* note 211 *supra* & accompanying text. *See also* Moore v. Glotzbach, 188 F Supp. 267 (E.D. Va. 1960).

214. 204 Va. at 126-27, 129 S.E.2d at 663.

215. Jenkins v. Jenkins, 211 Va. 797, 180 S.E.2d 516 (1971).

216. 2 AMERICAN LAW OF PROPERTY § 6.5 (A.J. Casner ed. 1952).

217. Murphy, *supra* note 210, at 409; *see, e.g.*, VA. CODE § 55-20 (Repl. Vol. 1974).

218. *See* Murphy, *supra* note 210, at 408.

219. VA. CODE § 55-21 (Repl. Vol. 1974). *See also* Allen v. Parkey, 154 Va. 739, 149 S.E. 615 (1930).

220. Jenkins v. Jenkins, 211 Va. 797, 180 S.E.2d 516 (1971).

joint tenant can be freely disposed of unilaterally The transfer of an interest converts the estate into a tenancy in common as between the transferee and the remaining cotenants.[221] The free transferability of interest during the cotenants' lifetimes likewise subjects the property to levy by creditors of the cotenants. The Virginia Code expressly makes real estate owned by joint tenants susceptible to partition for the benefit of lien creditors,[222] and by analogy, personalty similarly held also should be available to satisfy money judgments. The creditor must proceed against the property during the debtor's lifetime because his interest terminates at death. The creation of a joint tenancy has been made more difficult by a statute in Virginia that abolishes the right of survivorship except when the instrument creating the joint estate expressly indicates that survivorship is intended.[223] In the absence of an expression of intent, the property is subject to debts as if it were held as a tenancy in common.[224]

Tenancy by the entirety may exist only between husband and wife, and each spouse is considered to own the entire estate concurrently with the other. Upon the death of one, the estate remains in the survivor, and the dying spouse's interest is extinguished.[225] Neither spouse may transfer or dispose of his interest in the estate without the other joining in the conveyance.[226] Because the estate is nonseverable, a creditor of one spouse cannot levy on property held by the entirety [227] The creditor, however, is not completely without hope. The Virginia Code converts tenancies by the entirety into tenancies in common except when the instrument creating the estate expressly indicates an entirety is intended.[228] If the type of joint estate is ambiguous, the creditor should be able to challenge successfully any contention that the debtor intended to hold the property by the entirety Also, a judgment against both

221. Leonard v. Boswell, 197 Va. 713, 721, 90 S.E.2d 872, 877 (1956).

222. VA. CODE § 8.01-81 (Repl. Vol. 1977).

223. *Id.* § 55-21 (Repl. Vol. 1974).

224. *Id.* § 55-20.

225. 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952). See discussion in Vasilion v. Vasilion, 192 Va. 735, 66 S.E.2d 599 (1951). *See also* Grilliot & Yocum, *Tenants by the Entirety: An Ancient Fiction Frustrates Modern Creditors,* 17 AM. BUS. L. J. 341 (1979).

226. 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952).

227. *Id.*

228. VA. CODE § 55-21 (Repl. Vol. 1974).

the husband and the wife can be enforced by a levy on the property owned by the entireties because they are jointly and severally liable for the debt.[229] A valid divorce decree, however, has the effect of converting property owned as joint tenants or tenants by the entirety into tenancies in common.[230]

United States savings bonds warrant individual attention. In *Guldager v. United States*,[231] the Sixth Circuit addressed whether Series "E" Government bonds registered in coownership form to a husband "or" his wife created an estate by the entireties under state law, thereby precluding levy for the individual debts of the husband. The court contended that the estate created by the bonds was not an estate that arose under state law, but rather one created by federal contract and therefore subject to federal law.[232] The appropriate statutory authorization for the bonds provides that they are subject to the terms and conditions embodied in the Treasury Department regulations, which, under the court's holding, become part of the contract. Because the estate is created by an instrument that recognizes the rights of creditors in the severable interests of the coowner, the husband's creditors could subject that interest to execution.[233]

Current federal regulations provide that bonds issued in coownership form ("husband or wife") create a right of survivorship in the coowner.[234] The regulations specifically recognize that bonds

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229. *In re* Bishop, 482 F.2d 381 (4th Cir. 1973) (creditor of one spouse may not obtain lien against property or interest of spouse in entirety property); Reid v. Richardson, 304 F.2d 351, 355 (4th Cir. 1962) (entirety property may be sold to satisfy claims of all parties holding joint obligations); *In re* Reid, 198 F Supp. 689-691 (W.D. Va. 1961) (only joint creditors can participate in entirety property); Vasilion v. Vasilion, 192 Va. 735, 66 S.E.2d 599 (1951) (creditor of wife cannot sell entirety property by resort to attachment or levy).

230. VA. CODE § 20-111 (Repl. Vol. 1975).

231. 204 F.2d 487 (6th Cir. 1953).

232. *Id.* at 489.

233. *Id. See also* Simon v. Schaetzel, 189 F.2d 597 (10th Cir. 1951). *Contra, In re* Smulyan, 98 F Supp. 618 (M.D. Pa. 1951); Alcorn v. Alcorn, 364 Pa. 375, 72 A.2d 96 (1950).

234. 31 C.F.R. § 315.7(a)(2) (1977); *id.* § 315.62 provides in part that

> [i]f either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone.

Id. Id. § 315.60 of the regulations authorizes either coowner to cash the bond. Section 315.61(a)(1) provides that upon divorce, legal separation, or annulment, the bond may be reissued in the name of either coowner alone or with another person as the new coowner of

registered in coownership may be subjected to levy to satisfy a judgment against only one of the coowners.[235] Under such circumstances, however, the creditor is limited to the coowner's interest in the bond.[236] The regulations state that the interest *may* be established by an agreement between coowners, or by the judgment decree, or order of a court, provided both coowners are parties to the proceeding.[237] What form an "agreement" between the parties would have to take is uncertain, but there is no requirement of a writing or recordation. If, as the court in *Guldager* held, the regulations and not state law govern the contract, then to foresee the problems that inevitably will arise over establishing exactly what a coowner's interest is in the property is not difficult. The court in *Guldager* noted that the bonds in question had been purchased exclusively with the husband's funds, but it did not address the question of the interests of the respective spouses because an escrow agreement that existed between the parties to the suit already had resolved that issue.[238]

Property Fraudulently Conveyed

A judgment creditor may use the execution process to reach property fraudulently conveyed by the debtor.[239] The conveyance

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beneficiary.

235. 31 C.F.R. § 315.21(a) (1978) provides:

> Payment (but not reissue) of a savings bond registered in single ownership, coownership, or beneficiary form will be made to the purchaser at a sale under levy or to the officer authorized to levy upon the property of registered owner or coowner under appropriate process to satisfy a money judgment. Payment will be made to such purchaser or officer only to the extent necessary to satisfy the judgment and will be limited to redemption value current sixty days after the termination of the judicial proceedings. Payment of a bond registered in coownership form pursuant to a judgment or levy against only one of the coowners will be limited to the extent of that coowner's interest in the bond. This interest may be established by an agreement between coowner or by a judgment decree or order of court entered in a proceeding to which both coowners are parties.

Id.

236. *Id.*

237. *Id.*

238. 204 F.2d at 488.

239. Matney v. Combs, 171 Va. 244, 198 S.E. 469 (1938); *see* Rixey v. Dietrick, 85 Va. 42 (1888); Waller v. Johnson, 82 Va. 966 (1887); Saunders v. Waggoner, 82 Va. 316 (1886); Wray v. Davenport, 79 Va. 19 (1884); Lucas v. Claflin, 76 Va. 269 (1882); VA. CODE §§ 55-80

is considered void as to existing creditors and antecedent debtors.[240]

Property in Custodia Legis

Property in the custody of the law is not subject to execution. This is true of property in the hands of receivers.[241] When a receiver has been appointed but not yet qualified, however, property of the debtor may be levied on until the creditor's rights are preempted by qualification. The prohibition extends to money in the hands of a sheriff that represents the proceeds of an execution sale and personalty in the possession of administrators, executors, and guardians. The policy underlying the concept of legal custody is to prevent conflicts between courts of different jurisdictions and thereby encourage orderly administration of justice in the individual courts.[242]

Satisfaction of the Judgment

Sale of Tangible Personalty

In Virginia, the sheriff is empowered by statute to sell personalty to satisfy the *fieri facias*.[243] The officer conducting the sale must post notice of the time and whereabouts of the sale at least ten days before it transpires.[244] Under certain circumstances, the goods may be sold earlier, as when the personalty is perishable or the cost of storage is excessive.[245] The goods only can be sold to the highest bidder at the sale and only as much property as may be necessary to satisfy the judgment may be sold.[246] If the proceeds of the sale exceed the amount needed to satisfy the *fieri facias*, then

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to 82 (Repl. Vol. 1974).

240. *Id. See generally* G. Glenn, Fraudulent Conveyances and Preferences (rev. ed. 1940); Ulrich, *Fraudulent Conveyances and Preferences in Virginia*, 36 Wash. & Lee L. Rev. 51 (1979).

241. Frayser's Adm'r v. Richmond & A. R. R., 81 Va. 388 (1886).

242. *See generally* Freeman on Executions, *supra* note 21, §§ 129-35.

243. Va. Code § 8.01-492 (Repl. Vol. 1977).

244. *Id.* Notice must be posted near the residence of the owner of the goods if he lives in the locale where the sale is to take place. The sheriff also must post notice of the sale in two or more public places in the city or county. *Id.*

245. *Id.*

246. *Id.*

the balance must be returned to the debtor.[247] Also, if the debtor obtains an injunction or supersedeas to an execution after the sale but before the proceeds are paid over to the creditor, then the money must be given to the debtor.[248]

If the purchaser at an execution sale fails to comply with the terms of the sale, the sheriff may hold another sale either immediately or after properly advertising.[249] If the proceeds from the second sale are less than the first, the original purchaser is liable for the difference.[250]

Neither the sheriff nor the employees of any city or county, regardless of the sales location, may bid on goods sold under a writ of execution.[251] Proceeds from the sale must be turned over forthwith by the sheriff to the court or the clerk's office where the judgment is entered, or the creditor may hold the sheriff liable.[252] The sheriff may deduct from the amount of the sale a commission equal to five percent of the sale price of the goods plus expenses and costs.[253] The sheriff also must notify in writing the person entitled to receive the money from the sale within thirty days or be liable for a fine of between twenty and fifty dollars.[254] If the person to whom the sale money is owed lives outside the county or city where the sale is held, then the sheriff need not go beyond his jurisdiction to make payment.[255] The creditor must demand payment in the county or city in which the officer is located.[256] When the return on the writ of execution indicates that the property levied on has not been sold, the creditor may have a writ of *venditioni exponas* issued which directs the sheriff to sell the property in the manner discussed.[257]

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247. *Id.* § 8.01-495. *See also id.* § 8.01-373.
248. *Id.* § 8.01-495.
249. *Id.* § 8.01-494.
250. *Id.*
251. *Id.* § 8.01-498.
252. *Id.* § 8.01-499. This changes the old rule under former § 8-429 which required the officer to return the money within 30 days.
253. *Id.* § 8.01-499.
254. *Id.* § 8.01-500.
255. *Id.* § 8.01-496.
256. *Id.*
257. *Id.* § 8.01-485. The writ also issues when an earlier sale was held but either there were no bidders or no bid received was satisfactory, in which case the advertisement for the sale ordered by the writ must take notice of that fact. *Id.*

A purchaser at an execution sale receives no implied warranty of title as to the property he buys.[258] The old common law rule of *caveat emptor* applies to these sales, meaning that the buyer acquires no better title to the goods than the debtor had.[259] A purchaser is charged with knowledge of any errors that can be discovered from the record, including whether the proper persons were parties to the suit.[260] This has the inevitable effect of diminishing the value that can be realized from the sale, to the detriment of the debtor. When the property is sold under an indemnifying bond, however, and the purchaser later is forced to surrender the property to someone with superior title, the buyer may sue under the bond in the name of the officer for any damages he suffered as a consequence.[261]

Interrogatory Procedure

Under Virginia law, a judgment creditor with a valid writ of *fieri facias* has a supplementary procedure available that allows him to subject the debtor to examination about his personal estate. Under this interrogatory system, the creditor may summon the debtor, as well as any bailee or debtor of the debtor, before the court or an appointed commissioner.[262] This procedure is summary in nature; no trial by jury is available nor are pleadings required. The persons summoned then may be questioned by the creditor or the court concerning any personal estate of the debtor that may be used to satisfy the judgment.[263] A recent addition to the interrogatory system allows the creditor to require the production of books of accounts or other writings that contain evidence of the debtor's estate, provided that the creditor gives an affidavit stating that he believes the books exist and identifies them with reasonable cer-

258. BURKS, PLEADING AND PRACTICE, *supra* note 41, at 698.

259. *Id.* Compare the UCC section governing sale of collateral by the secured party under Article 9. VA. CODE § 8.9-504(4) & Official Comment 4.

260. Lamar v. Hale, 79 Va. 147 (1884).

261. VA. CODE § 8.01-370 (Repl. Vol. 1977).

262. *Id.* § 8.01-506 (Cum. Supp. 1978). General district courts have been given the same power. *Id.* § 16.1-103 (Cum. Supp. 1979). The following persons may be summoned: the debtor, any officer of the corporation if the debtor is a corporation that has an office in Virginia, a debtor of the execution debtor or a bailee of the debtor. *Id.*

263. *Id.* § 8.01-506.

tainty [264] Resort to this summary procedure against the debtor is limited by statute to once in any six month period except when the creditor can show good cause.[265] The creditor must furnish the court with a certificate to the effect that he has not interrogated the debtor within the past six months whenever he seeks to employ the procedure; if he knowingly asserts false information in the certificate, he is guilty of a misdemeanor.[266]

The language used in section 8.01-506 has not been amended to comport with the changes under section 8.01-478 which make the lien on tangibles effective only from the date of levy. Consequently, the wording "to ascertain the personal estate on which a writ of fieri facias is a lien"[267] arguably can be interpreted to restrict the scope of the interrogatory inquiry on personalty only to intangible property because no lien exists on tangibles until levy has occurred. Although this result obviously was unintentional, because under the old system delivery of the writ to the sheriff created a lien on all personalty, the debtor's counsel should argue that it is the only logical interpretation of the statute in its current form. This certainly creates problems as far as tangible personalty is concerned and has the effect of encouraging the debtor to secrete or otherwise dispose of such property to avoid subjecting it to liability on the judgment.

The interrogatory procedure is also one method for reaching intangible property that is not subject to levy.[268] When intangible property is discovered, the court may compel the person in possession or in control of the property to deliver it to the officer holding the unsatisfied *fi.fa.*[269] The court also can order the party to assign

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264. *Id.* § 8.01-506.1 (Cum. Supp. 1978).

265. *Id.* § 8.01-506(C).

266. *Id.*

267. *Id.* § 8.01-506(A) reads:

> *To ascertain the personal estate on which a writ of fieri facias is a lien,* and to ascertain any real estate, in or out of this Commonwealth, to which the debtor named in a judgment and fieri facias is entitled, upon the application of the execution creditor, the clerk of court from which such fieri facias issued shall issue a summons against the execution debtor, having an office in this Commonwealth, or any debtor to, or bailee of, the execution debtor.

Id. (emphasis supplied).

268. *See* note 55 *supra* & accompanying text.

269. VA. CODE § 8.01-507 (Repl. Vol. 1977) states in appropriate part as follows:

> [A]ny money, bank notes, securities, evidences of debt, or other personal es-

the property to the creditor in a manner specified in the order.[270] Evidences of indebtedness owed by third persons to the debtor likewise can be collected under the interrogatory procedure by directing that payment be made to the sheriff for the benefit of the creditor within sixty days after evidence of the debt has been delivered to the sheriff.[271]

The court or commissioner has the power to arrest and imprison any person summoned under this procedure who fails to appear and answer or otherwise refuses to cooperate.[272] The person so arrested may be kept in custody until he complies.[272.1] The harshness of these sanctions has resulted in a general reluctance on the part of the courts to employ them.

Federal Court Judgments

Applicable federal law provides that money judgments issued by federal district courts are enforceable in Virginia in the same manner as judgments rendered by the state courts.[273] A judgment of a federal court sitting in Virginia creates a lien on the property of the judgment debtor "to the same extent and under the same conditions as a [state] court of general jurisdiction, and shall cease to be a lien in the same manner and time."[274] Accordingly, the federal judgment, under Virginia law, would not create a lien on personalty when docketed as it does on realty.[275] The Federal Rules of

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> tate, tangible or intangible, which it may appear by such answers are in possession of or under the control of the debtor or his debtor or bailee, shall be delivered by him or them, as far as practicable, to such officer, or to some other, or in such manner as may be ordered by the commissioner or court.

Id.

270. *Id.*

271. *Id.* § 8.01-510.

272. *Id.* § 8.01-508 (Cum. Supp. 1978). *See* Vail v. Quinlan, 406 F Supp. 951 (S.D.N.Y. 1976), *rev'd on other grounds sub. nom.* Judice v. Vail, 430 U.S. 327 (1977) (New York statute that allowed a judgment debtor to be imprisoned for failing to comply with a disclosure subpoena concerning his ability to satisfy a judgment was held to violate due process; the procedure under the statute permitted the debtor to be held in contempt, fined and imprisoned without a hearing).

272.1. *Compare* Drake v. National Bank of Commerce of Norfolk, 168 Va. 230, 190 S.E. 302 (1937).

273. 28 U.S.C. § 1962 (1970). *See* U.S. Const. art. 4, § 1.

274. 28 U.S.C. § 1962 (1970).

275. *See* Va. Code § 8.01-447 (Repl. Vol. 1977) provides that

Civil Procedure provide in rule 69(a) that the process for enforcing money judgments is by a writ of execution unless the court directs otherwise.[276] The Rule requires that the execution procedure be carried out in accordance with the practice and procedure of the state in which the remedy is sought.[277] The writ of execution issuing on the judgment is enforceable by a United States Marshal anywhere in the State of Virginia.[278] Therefore, any personal property subject to levy under Virginia law may be levied on by the marshal.[279] The lien on intangibles arises when the writ is delivered to the federal officer[280] and the lien on tangible personalty is deferred until an actual levy is made on the property.[281] Property levied on by the federal marshal may be sold in accordance with the Virginia procedures for execution sales.[282]

Rule 69(a) also provides that the judgment creditor may employ the discovery procedures of federal courts or the state courts of Virginia to discover the assets of the debtor.[283] This option pro-

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[j]udgments and decrees rendered in the circuit court of appeals or a district court of the United States within this Commonwealth may be docketed and indexed in the clerk's offices of courts of this Commonwealth in the same manner and under the same rules and requirements of law as judgments and decrees of courts in this Commonwealth.

276. FED. R. CIV. P 69(a) states the following:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held

Id.

277. Mission Bay Campland, Inc. v. Sumner Fin. Corp., 71 F.R.D. 432, 433 (M.D. Fla. 1976); Invor B. Clark Co. v. Hogan, 296 F Supp. 398, 402 (S.D.N.Y. 1968), *modified on other grounds*, 296 F Supp. 407 (S.D.N.Y. 1969); United States v. English Constr. Co., 95 F Supp. 763, 764 (S.D.N.Y. 1951); Schram v. Spivack, 68 F Supp. 451, 453 (E.D. Mich. 1946).

278. 7 MOORE'S FEDERAL PRACTICE ¶ 69.03[2] (2d ed. 1979); *see* Edmonston v. Sisk, 156 F.2d 300 (10th Cir. 1946).

279. Hayes v. Schaefer, 399 F.2d 300 (5th Cir. 1968).

280. *See* note 55 *supra* & accompanying text. *See also* United States v. Pearson, 258 F Supp. 686, 691 (S.D.N.Y. 1966).

281. *See* note 56 *supra* & accompanying text.

282. It has been held that rule 69(a) precludes the use of federal procedures for judicial sales in 28 U.S.C. §§ 2001-2002 (1970) in execution sales. *See* Weir v. United States, 339 F.2d 82 (8th Cir. 1964).

283. Rule 69 authorizes the use of all discovery devices that are available in the Federal Rules of Civil Procedure. United States v. McWhirter, 376 F.2d 102, 106 (5th Cir. 1967). *See also* 7 MOORE'S FEDERAL PRACTICE ¶ 69.05[1] (2d ed. 1979); FED. R. CIV. P 69, NOTES OF

vides the creditor with a range of discovery devices unavailable under state law, including the use of written interrogatories[284] and depositions.[285] Third parties, as well as the judgment debtor, may be examined to discover hidden or concealed assets of the debtor.[286] Any person interrogated under this procedure can seek a protective order from the court to prevent harassment or abuse.[287] Also, rule 69 has been held to incorporate state law on arrest and body execution into federal practice in aid of execution.[288]

Uniform Commercial Code and Execution

Adoption of the UCC in Virginia has had the effect of preempting prior law dealing with conditional sales and chattel mortgages, and statutes otherwise regulating security interests in personal property.[289] A survey of the UCC and its effect on the personal property of the debtor is beyond the scope of this Note;[290] however, the article 9 section dealing with lien creditors is particularly relevant to the focus of this study. Section 8.9-301(1) subordinates an unperfected security interest to a person who becomes a lien creditor before the security interest is perfected,[291] except in the case of a purchase money security interest, when the Code allows the secured creditor a ten-day grace period in which to file.[292] In order for a lien creditor to qualify under this section, the lien must be perfected according to applicable Virginia law. This means that in the case of tangibles, the goods in question actually must be levied on.[293] The revision of the Code in 1972 omitted the require-

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Advisory Committee on 1970 Amendments to Rules.

284. United States v. McWhirter, 376 F.2d 102, 106 (5th Cir. 1967).

285. *Id.*

286. Caisson Corp. v. County West Bldg. Corp., 62 F.R.D. 331 (E.D. Pa. 1974).

287. *Id.*

288. United Refrigerator Co. v. Gershel, 276 F.2d 573 (2d Cir. 1960).

289. Va. Code § 8.9-102 (Cum. Supp. 1979).

290. *See generally* G. Gilmore, Security Interests in Personal Property (1965); S. Riesenfeld, Creditors' Remedies, *supra* note 116, at 127-39; J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code (1972); Dugan, *Creditors' Postjudgment Remedies, Part 1*, 25 Ala. L. Rev. 175 (1972); Kripke & Felsenfeld, *Secured Transactions: A Practical Approach to Article 9 of the Uniform Commercial Code*, 17 Rutgers L. Rev. 168 (1962).

291. Va. Code § 8.9-301(1) (Cum. Supp. 1979).

292. *Id.* § 8.9-301(2).

293. *See* note 56 *supra*.

ment that a lien creditor must be without knowledge of the unperfected security interest at the time the lien arises in order to take priority over it.[294] Consequently, a lien creditor may levy on goods in the hands of the debtor that the creditor knows are subject to an unperfected security interest without jeopardizing the seniority of his claim to the property.[295]

The Code distinguishes between when a security interest "attaches" and when it is "perfected." When the security interest attaches, the secured party has an interest in the particular property that is effective against the debtor. When the security interest is perfected, the secured party has an interest in the property that is good against third parties.[296] Attachment occurs when the debtor signs the security agreement, gives value, and has rights in the collateral.[297] Perfection of the security agreement may occur at the same time or later but not before attachment.[298] The method for perfecting a security interest varies depending on the type of collateral. In the case of tangible personalty, a financing statement must be filed to perfect the security interest.[299] Several exceptions apply to this requirement. No filing is required to perfect when the collateral remains in the possession of the secured party or when there is a purchase money security interest in consumer goods.[300] A security interest in motor vehicles, though, can be perfected only by proper notation on the certificate of title if the vehicle is used for consumer purposes or as equipment.[301] On the other hand,

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294. *See* VA. CODE § 8.9-301 (1964) (amended 1973).

295. *Id.*

296. *In re* Certified Packaging, Inc., 8 UCC REP. SERV. 95, 99 (D. Utah 1970). *See also* Wiseman & King, *Perfection, Filing and Forms Under Article 9 of the Uniform Commercial Code*, 9 WAYNE L. REV. 580 (1963).

297. VA. CODE § 8.9-203 (Cum. Supp. 1979).

298. *Id.* § 8.9-203 (Added Vol. 1965).

299. *Id.* § 8.9-302(1) (Cum. Supp. 1979).

300. *Id.* §§ 8.9-302(1)(a), (d).

301. *Id.* §§ 8.9-302(3), (4); *id.* §§ 46.1-69 to 71 (Repl. Vol. 1974). This applies to automobiles, trailers, semitrailers and mobile homes. *In re* McCroskey, 19 UCC REP. SERV. 1394, 1395 (W.D. Va. 1976) held that Virginia law clearly requires notation of a lien on the certificate of title in order to perfect a lien on a mobile home. *See also In re* Smith, 311 F Supp. 900 (W.D. Va. 1970), *aff'd sub. nom.* Callaghan v. Commercial Credit Corp., 437 F.2d 898 (4th Cir. 1971). A nonresident who fails to register his automobile in Virginia as required by state law, and therefore has no certificate of title indicating liens from a conditional sale, may be subject to attachment because the liens are not recorded. C.I.T. Corp. v. Crosby & Co., 175 Va. 16, 7 S.E.2d 107 (1940).

when the vehicles are held as inventory for sale, the security interest must be perfected by filing.[302]

Virginia has adopted the dual filing requirement alternative under the UCC which, with certain exceptions,[303] provides that the financing statement be filed with both the State Corporation Commission and the clerk of the circuit court where the debtor does business, if there is only one place of business, or where the debtor resides, if he has no place of business.[304] If the personalty is consumer goods, however, the security interest must be filed in the county or city where the debtor resides or, if he lives outside Virginia, the locale of the goods.[305] Improper filing is good against a lien creditor only if the creditor has knowledge of the contents of the financial statement that was filed erroneously[306] If the lien creditor has no such knowledge, his lien subordinates the security interest to his claim in the goods.[307]

The distinction between attachment and perfection is especially important in cases dealing with purchase money security interests.[308] As mentioned, the Code carves out a ten-day grace period in which to perfect the security interest.[309] The judgment creditor

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302. VA. CODE § 8.9-302(3)(b) (Cum. Supp. 1979).

303. When the collateral is related to farming, then filing must be made in the county or city of the debtor's residence, except when he is a nonresident of the state, in which case filing is required in the county or city in which the goods are located. *Id.* § 8.9-401(1)(a). If the collateral is in timber, minerals, or fixtures, then the filing is required whenever a mortgage on the real estate would be filed. *Id.* § 8.9-401(1)(b).

304. *Id.* § 8.9-401(1)(c).

305. *Id.* § 8.9-401(1)(a).

306. *Id.* § 8.9-401(2). *See In Re* County Green Ltd. Partnership, 438 F Supp. 693, 697 (W.D. Va. 1977).

307. 438 F Supp. at 696-97.

308. VA. CODE § 8.9-107 (Added Vol. 1965) defines a purchase money security interest as a security interest that 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.

Id.

309. *Id.* § 8.9-301(2) reads as follows:

> 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, 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

should be aware that the grace period begins not when the security interest attaches, but rather when the debtor receives actual physical possession.[310] Because attachment and possession can occur at different times, a security interest filed later than ten days after it attaches possibly would have priority over the claim of a lien creditor whose lien arose between attachment and levy [311] In the case of a purchase money security interest in consumer goods, no filing is required to perfect the security interest; perfection can occur no later than the time of possession and the ten-day grace period therefore is irrelevant.[312]

The rights of a lien creditor in secured collateral recently was examined by the United States District Court for the Eastern District of Virginia in *In re Mathews Dominion National Bank of Richmond v. Starr* [313] The case involved a debtor who had pledged certain shares of stock as collateral for a loan from the bank. The bank's security interest in the shares was perfected properly under Virginia law because the bank, as the secured party, was in possession of the stock.[314] Later, the stock split and the debtor was issued additional shares equal to the number possessed by the bank.[315] When the bank learned of the existence of the new stock from the debtor's trustee in bankruptcy, it sued for recovery alleging a possessory security interest in the shares.[316] Because the trustee in bankruptcy assumes the status of a lien creditor on the date the petition is filed,[317] the claim to the shares is determined by whether the bank's security interest was perfected prior to the date

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filing.

Id. (emphasis supplied).

310. *Id.* The Fourth Circuit has held that when the collateral is in several pieces, then the purchaser receives "possession" only when he receives the last piece. *In re* Automated Bookbinding Servs., Inc., 471 F.2d 546, 553 (4th Cir. 1972). *See also* Brodie Hotel Supply, Inc. v. United States, 431 F.2d 1316 (9th Cir. 1970).

311. Henson, *Some Thoughts on Lien Creditors Under Article 9,* 1974 U. ILL. L.F 237, 244-45.

312. VA. CODE § 8.9-302(1)(d) (Cum. Supp. 1979).

313. 475 F Supp. 37 (E.D. Va. 1978).

314. *Id.*

315. *Id.* at 38.

316. *Id.*

317. VA. CODE § 8.9-301(3) (Cum. Supp. 1979) defines a lien creditor as "a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes a trustee in bankruptcy from the date of filing of the petition " *Id.*

of filing. Under the UCC, the only way a security interest in shares of stock can be perfected is by taking actual physical possession of the security.[318] Because the bank did not have possession, it had only an unperfected security interest. The court therefore concluded that the trustee, as lien creditor, had a claim to the property that was superior to the unperfected security interest of the bank.[319]

Lien creditors seeking property owned by the debtor that is subject to a valid security interest should ascertain whether the security interest has been perfected properly. In Virginia, the filing requirements are fairly complicated and susceptible to error. For example, it has been held that a financing statement cannot add collateral that is not described in the security agreement.[320] Likewise, when dual filing is mandatory, a security interest filed in the wrong place is ineffective to perfect the security against claims of a lien creditor.[321] The financing statement also must be sufficiently descriptive of the collateral secured or it is subject to challenge.[322] A financing statement that omits the name and address of either the debtor or the secured party may be defective.[323] Close scrutiny of the financing statements may reveal defects that permit the lien creditor to subordinate the security interest to the amount of his lien.[324] The adoption of the UCC in every state, except Louisiana, has generated a wide range of case law in this area that is available

318. 25 UCC REP. SERV. at 308. *See* VA. CODE § 9-304(1) (Cum. Supp. 1979).

319. 25 UCC REP. SERV. at 308.

320. *In re* Mann, 318 F Supp. 32, 36 (W.D. Va. 1970).

321. *In re* Hurt Enterprises, Inc., 321 F Supp. 1307, 1309-10 (W.D. Va. 1971).

322. *In re* Mann, 318 F Supp. at 36. A financing statement that itself does not disclose the terms of the security agreement cannot also serve as a security agreement. *Id.* at 35. *But see In re* Varney Wood Prods., Inc., 458 F.2d 435 (4th Cir. 1972) that has held that a financing statement need only be sufficiently descriptive so as to reasonably generate further inquiry. *Id.* at 437.

323. *See In re* Gibson's Discount Pharmacy, Inc., 15 UCC REP. SERV. 233 (E.D. Tenn. 1974).

324. The Virginia Comment following VA. CODE § 8.9-402 states that

> [a] failure to comply with any of the formal requisites set forth in the Virginia statutes means that the instrument has not been validly recorded, docketed or filed so it fails to accomplish the purpose of recordation - perfecting a security interest. Virginia has adopted a rule of strict compliance with formal requisites for recordation, so that recorded instruments have frequently failed of their purpose. *See In re* Adkins, 197 F Supp. 287, 288 (E.D. Va. 1961).

Id.

as a basis for challenging article 9 security agreements.[325]

Finally, a perfected security interest has the effect of vesting certain rights and remedies in the secured party against the debtor in the event of default. The security interest, however, does not bar a subsequent judgment creditor from enforcing his rights by levying on the property that is subject to the security interest. Section 8.9-311 allows the judgment creditor to subject the debtor's rights in collateral to levy even if the security agreement prohibits any transfer or makes the transfer a default.[326] The creditor's rights run only against the debtor's equity in the collateral and the secured party is entitled to priority as to the proceeds of any sale.[327] This section is consistent with the non-UCC section of the Virginia Code discussed earlier that permits a levying creditor to reach goods subject to a prior lien.[328] Consequently, a purchaser at an execution sale takes the goods free of the security interest if the levy constitutes default on the agreement, or subject to the security agreement if the agreement remains in effect.[329]

Effect of the New Bankruptcy Code

The new Bankruptcy Code enacted in the Bankruptcy Reform Act of 1978[330] constitutes a major revision of existing bankruptcy

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325. *See, e.g.*, Walker, *The Collection of Debts from Insolvent and Fully-Mortgaged Debtors*, 43 Tenn. L. Rev. 399 (1976).

326. Va. Code § 8.9-311 (Added Vol. 1965) provides that

> [t]he 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.

Id. For a discussion of the particular jurisdictional problems that are created when a creditor seeks to levy on pledged securities see Kennedy, *Rights of Levying Creditors, supra* note 191, at 1527.

327. *See* Shaw Mudge & Co. v. Sher-Mart Mfg. Co., 16 UCC Rep. Serv. 847, 851-52 (N.J. Super. 1975). *See also* Citizens Bank v. Perrin & Sons, Inc., 253 Ark. 639, 488 S.W.2d 14 (1972) (in all security interests the debtor's interest in collateral subject to claims of creditors); Humble Oil & Ref. Co. v. Pathological and Diagnostic Laboratories, Inc., 11 UCC Rep. Serv. 386, 386-87 (N.Y. Civ. Ct. 1972) (secured creditors cannot make motion to vacate execution sale of secured collateral brought about by valid levy); Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co., 11 UCC Rep. Serv. 843 (Del. 1972) (secured creditor is entitled to priority of the proceeds from execution sale of collateral).

328. *See* note 205 *supra* & accompanying text.

329. *See* notes 206-07 *supra* & accompanying text.

330. 11 U.S.C.A. §§ 101 to 1501 (West. Supp. 1979). The Bankruptcy Reform Act of 1978

laws. The substantive provisions of the new legislation will apply to all bankruptcy proceedings that commence on or after October 1, 1979.[331] Section 547 of the 1978 Code,[332] which deals with preferences, is of primary concern to a lien creditor of the bankrupt. The law of preferences aims at promoting an equitable distribution of the bankrupt's estate by prohibiting preferential treatment of some creditors at the expense of others.[333] Under the new law, the trustee in bankruptcy may avoid any transfer of the property of the bankrupt that was obtained 1) within ninety days of the filing of bankruptcy, 2) while the debtor was insolvent, and 3) that enables the creditor to receive more than such creditor would receive had the transfer not been made.[334] A transfer, as defined under the 1978 Code, includes a judicial lien obtained by levy.[335]

The period before the institution of bankruptcy proceedings within which the trustee may avoid the lien has been shortened from four months[336] to ninety days.[337] This change benefits the judgment creditor by granting him an extra month to levy on the debtor's property There are several new pitfalls that did not exist under the old Act, however, that create additional problems for the

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has four titles: Title I is codified under Title 11 of the United States Code and is the section dealing with the substantive law of bankruptcy that is of concern here; Title II amends Title 28 of the United States Code and establishes a new bankruptcy court and defines its jurisdiction; Title III amends certain nonbankruptcy statutes that apply to bankruptcy cases; Title IV is the provision for the transitory period between the old and new acts.

331. Bankruptcy Reform Act of 1978, tit. IV § 402(a) (1978).

332. 11 U.S.C.A. § 547 (West Supp. 1979).

333. J. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY 283 (1956).

334. 11 U.S.C.A. § 547(b) (West Supp. 1979). These requirements are virtually the same as under the old law.

335. *Id.* § 101(40) defines a transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest." A judicial lien is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceedings." *Id.* § 101(27).

336. Bankruptcy Act of 1898 § 60(a)(1), 11 U.S.C. § 96 (1970) (repealed 1978).

337. 11 U.S.C.A. § 547(b)(4)(A) (West Supp. 1979). When the transfer is made to an "insider," the trustee may void any such transaction that takes place within one year before bankruptcy. *Id.* § 547(b)(4)(B). An "insider" is defined under the new Act in different terms, depending on whether the transferee is an individual, a corporation, partnership, municipality or agent of the debtor. A common characteristic of all is a close, intimate relationship with the bankrupt. *Id.* § 101(25). Preferential transfers are subject to attack between 90 days and one year of filing only when a showing can be made that the "insider" had "reasonable cause to believe the debtor was insolvent." *Id.* § 547(b)(4)(ii).

creditor's attorney The trustee no longer has the burden of proving that the bankrupt was insolvent at the time of transfer because the new law establishes a presumption of insolvency for the ninety days prior to the filing of the petition.[338] Furthermore, the trustee is not required to prove that the creditor had reasonable cause to believe the debtor was insolvent at the time of transfer;[339] the knowledge of the creditor is irrelevant under the 1978 Code. Finally, the new legislation appears to have deemphasized, if not erased, the "class of creditor" distinction that caused so much confusion under the 1898 Act.[340] Previously, a preferential transfer was one that would allow the preferred creditor "to obtain a greater percentage of his debt than some other creditor of the same class."[341] The new language omits any reference to the class of creditors; instead, a preferential transfer is one that would enable "such creditor to receive more than such creditor would receive if . the transfer had not been made."[342] "Such creditor" conceivably could be interpreted to mean "creditor of such class," but the omission of any reference to a class in the language, coupled with the confusion created by the wording under the old law, suggest that the oversight was intentional.

In determining whether the transfer is voidable by the trustee in bankruptcy, several factors are important. First, a transfer of personal property is perfected under the 1978 Code when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.[343] For personalty, this is the point in time at which the execution lien becomes perfected under state

338. 11 U.S.C.A. § 547(f) (West Supp. 1979). *Compare* FED. R. EVID. 301 (current burden of proof) *with* Aulick v. Largent, 295 F.2d 41 (4th Cir. 1961)(burden of proof under the old law).

339. *See* Bankruptcy Act of 1898 § 60(b), 11 U.S.C. § 96 (1970) (repealed 1978). Note, however, that this rule is inapplicable under the 1978 Code when the transferee is an insider. *See* note 337 *supra*.

340. *See generally* V COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 450-51 (2d ed. 1974); D. EPSTEIN, DEBTOR-CREDITOR RELATIONS IN A NUTSHELL 217-20 (1973). Certain classes, of course, still seem to exist, such as secured creditors whose security is not subject to avoidance by the trustee, 11 U.S.C.A. § 724(b)(1) (West Supp. 1979), and wage claimants who have not been paid for wages earned within 90 days of bankruptcy. *Id.* § 507(a)(3).

341. Bankruptcy Act of 1898 § 60(a)(1), 11 U.S.C. § 96 (1970) (repealed 1978).

342. 11 U.S.C.A. § 547(b)(5)(B) (West Supp. 1979).

343. *Id.* § 547(e)(1)(B).

law. In Virginia, the distinction between tangible and intangible personal property once again is underscored. The lien is established on tangible personal property when the sheriff levies on the goods or chattels,[344] whereas for intangibles, the lien arises when the writ is delivered to the sheriff.[345] For example, consider a writ of execution issued against a debtor who owns a car that is fully paid for and who is in possession of a promissory note from a third person. The writ is delivered to the sheriff ninety-one days before a petition in bankruptcy is filed. The sheriff is unable to levy on the automobile or deliver the garnishment summons to the obligor on the note for several days. The debtor's trustee in bankruptcy may set aside the lien on the car but not the garnishment on the third party because the lien on the latter arose outside the time limit established under the new law.[346] If, on the other hand, a levy had been made on the automobile more than ninety days before the petition was filed, the trustee could not have set aside the transfer as a preference even though the execution sale did not take place until less than ninety days prior to bankruptcy.

Although at first blush the judgment creditor who levies within the ninety-day period before filing may feel that any further effort to enforce the lien would be futile, it is important to bear in mind that preferences are not void but merely voidable. The 1978 Code, like the old law, does not automatically invalidate liens that arise within the specified period. Instead, either the trustee or the debtor must act affirmatively to set aside the lien.[347] Admittedly, their task is facilitated by the new law, but the outcome is not necessarily a *fait accompli* to the creditor.

The 1978 Code adds an additional weapon to the debtor's arsenal. In the case of an involuntary transfer of property, it allows the debtor to assume the avoidance powers of the trustee when the trustee fails to exercise them, if the debtor could have exempted such property had it not been transferred.[348] The debtor may recover the property from subsequent transferees as well as from the

344. *See* note 56 *supra* & accompanying text.

345. *See* note 55 *supra* & accompanying text.

346. *See* note 158 *supra* & accompanying text.

347. *See, e.g.*, Fisher v. Pauline Oil & Gas Co., 309 U.S. 294 (1940). *See also*, CLE, ENFORCEMENT OF LIENS, *supra* note 61, at 288-92.

348. 11 U.S.C.A. §§ 522(g), (h) (West Supp. 1979).

initial transferee.[349] The debtor then is permitted to exempt the recovered property to the extent that he otherwise could have exempted the property.[350] In order to exercise this avoidance power, however, the debtor must intervene in any cause of action initiated by the trustee.[351] If he fails to do so, he may not sue later to avoid the transfer.[352]

The new Bankruptcy Code also strengthens the automatic stay provisions activated by the filing of a petition in bankruptcy. Under the 1898 Act, filing automatically stayed all lien enforcement against the property of the bankrupt, including liens created by levy, that arose within four months of bankruptcy.[353] The 1978 Code makes no such distinction. Instead, the filing of a petition automatically stays a number of enforcement procedures relevant to the execution creditor: 1) any enforcement of a judgment obtained before the commencement of the case;[354] 2) any act to create, perfect, or enforce any lien against the property of the estate;[355] 3) any act to create, perfect, or enforce any lien against property of the debtor that secured a prebankruptcy petition.[356] The judgment creditor must affirmatively request relief from the automatic stay provisions from the bankruptcy court, at which time the court, after notice and hearing, may annul, modify, or condition the stay for cause.[357] The stay will terminate automatically as to the party requesting relief, if the court does not order the stay continued within thirty days.[358] The 1978 Code also provides that time periods, such as statutes of limitation, that affect actions that are stayed, are tolled during the period that the stay is in effect.[359]

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349. *Id.* § 522(i). *See* S. REP. No. 989, 95th Cong., 2d Sess. 75, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787, 5863.

350. *Id.* Section 522(i) states that the debtor may exempt property under § 522(h) only to the extent that he has exempted less property than allowed under § 522(b).

351. *See* S. REP. No. 989, *supra* note 349, at 5863.

352. *Id.*

353. Bankruptcy Act of 1898 § 67(a)(1), 11 U.S.C. § 107 (1970) (repealed 1978).

354. 11 U.S.C.A. § 362(a)(2) (West Supp. 1979).

355. *Id.* § 362(a)(4).

356. *Id.* § 362(a)(5).

357. *Id.* § 362(d).

358. *Id.* § 362(e).

359. *Id.* § 108(c).

The net effect of the Bankruptcy Code of 1978 is to facilitate the twofold purpose of bankruptcy law, debtor relief and equal treatment of creditors, by removing many of the impediments that have resulted from the seemingly endless amendments and court interpretations of an old law ill-suited to the modern-day economy To the extent that the new Code is successful, the judgment creditor's position *vis-a-vis* other creditors must suffer accordingly

CONSTITUTIONAL ISSUES

Background

As mentioned at the beginning of this Note, the postjudgment procedures available to the creditor have been part of Virginia law since the colonial period.[360] Yet only recently have a few scattered courts[361] and an ever-increasing group of commentators[362] begun to consider the question of the constitutionality of these statutes. The catalyst for the recent focus on postjudgment procedures derives from the Supreme Court decisions in *Sniadach v. Family Finance Corp.*,[363] *Fuentes v. Shevin*,[364] *Mitchell v. W.T Grant Co.*,[365] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[366] Although these decisions deal with prejudgment remedies available to creditors, they have the effect of imposing minimum due process protections

360. *See generally* Riesenfeld, *Collection of Money Judgments, supra* note 1; Riesenfeld, *Enforcement of Money Judgments, supra* note 1.

361. *See* notes 390, 397 *infra* & accompanying text. A majority of courts considering the issue of due process have held that notice and hearing is not required before executions. Katz v. Ke Nam Kim, 379 F Supp. 65 (D. Hawaii 1974); Langford v. Tennessee, 356 F Supp. 1163 (W.D. Tenn. 1973); Moya v. DeBaca, 286 F Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969); Phillips v. Bartolomie, 46 Cal. App. 3d 346, 121 Cal. Rptr. 56 (1975); Raigoza v. Sperl, 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973); Wilson v. Grimes, 232 Ga. 388, 207 S.E.2d 5 (1974). One state court has held that notice and hearing is required. Luskey v. Steffron, Inc., 461 Pa. 305, 336 A.2d 298 (1925), *aff'd on rehearing*, 469 Pa. 377, 366 A.2d 223 (1976).

362. *See, e.g.*, Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating Sniadach and Its Progeny*, 65 GEO. L.J. 1 (1976); Dunham, *Post-Judgment Seizures: Does Due Process Require Notice and Hearing?*, 21 S.D.L. REV. 78 (1976); Greenfield, *A Constitutional Limitation on the Enforcement of Judgments - Due Process and Exemptions*, 1975 WASH. U.L.Q. 877.

363. 395 U.S. 337 (1969).

364. 407 U.S. 67 (1972).

365. 416 U.S. 600 (1974).

366. 419 U.S. 601 (1975).

on the enforcement stage of the collection process. Consequently, the analogy to the postjudgment process has been inevitable, although the Supreme Court as yet has been unwilling to address the issue in any definitive manner.[367]

In 1924 the Supreme Court apparently rejected categorically due process requirements in the postjudgment stage. In the case of *Endicott Johnson v. Encyclopedia Press*,[368] the Court held that notice to the debtor in the underlying action that resulted in the judgment adequately alerted the debtor that further action by the creditor might be necessary to enforce the judgment and, accordingly, no further notice or hearing would be required before his property could be reached.[369] Twenty-two years later, in *Griffin v. Griffin*,[370] the Supreme Court delivered an opinion that appeared at odds with the holding in *Endicott Johnson*, yet made no effort to overrule or distinguish it. In *Griffin*, the Court held that a judgment based on support arrearages could not be enforced by execution because the husband had not been given notice and hearing before the judgment was docketed.[371]

Although the Supreme Court has refused to overrule *Endicott Johnson*,[372] a number of commentators have questioned its continued viability in light of *Griffin* and the due process requirements wrought by *Sniadach* and its progeny.[373] In *Sniadach*, the Court struck down a Wisconsin statute that permitted a debtor's wages to be garnished prior to judgment without providing an opportunity for notice and hearing to challenge the garnishment.[374] Justice Douglas, writing for the majority, held that the fourteenth amend-

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367. The Supreme Court twice had the opportunity to consider cases relying on *Endicott Johnson v. Encyclopedia Press*, *infra* notes 372-75, dealing with postjudgment procedures, but instead dismissed *certiorari* previously granted. *See* Moya v. DeBaca, 395 U.S. 825 (1969) (*certiorari* dismissed); Hanner v. DeMarcus, 390 U.S. 736 (1968) (*certiorari* dismissed as improvidently granted).

368. 266 U.S. 285 (1924).

369. *Id.* at 288-89.

370. 327 U.S. 220 (1946).

371. *Id.* at 235.

372. 266 U.S. 285 (1924).

373. *See* note 325 *supra*. *See also* Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521, 545 (1973); Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in Light of the English Experience*, 5 CONN. L. REV. 399, 434-38 (1973).

374. 395 U.S. at 342.

ment requirement of procedural due process necessitated that the debtor be given an opportunity to be heard before a prejudgment garnishment of his wages.[375]

Three years later, in *Fuentes*, the Court struck down prejudgment replevin statutes in Florida and Pennsylvania as unconstitutional.[376] The challenged statutes allowed the creditor to take out an ex parte writ of seizure that authorized the sheriff to seize the debtor's personalty before judgment.[377] The procedure made no provision for notice or hearing to the debtor to dispute the creditor's claim.[378] The Court stated that any significant taking of property was protected by the fourteenth amendment even if the deprivation were only temporary.[379] Because the statutes failed to provide for notice and an opportunity to be heard before the property could be seized, the statutes were unconstitutional.[380]

Two years after *Fuentes*, the Court's decision in *Mitchell*[381] seemingly retreated from the absolute requirement that notice and hearing precede any prejudgment taking. *Mitchell* involved a challenge to the constitutionality of Louisiana's sequestration procedure, which made no provision for notice and hearing before the officer took possession of the merchandise.[382] The majority opinion, written by Justice White, employed a balancing of interest test to sustain the Louisiana law. Unlike *Sniadach* and *Fuentes*, both parties had an interest in the specific property at issue, the creditor on the basis of his vendor's lien and the debtor because of his right of possession and title to the goods.[383] Consequently, when dual interests are involved, due process may be satisfied without a prior hearing.[384] The Louisiana procedure was found to contain sufficient safeguards to meet constitutional standards. First, the writ of sequestration could be issued only when the creditor provided a

375. *Id.*
376. 407 U.S. at 85-93.
377. *Id.* at 73-74.
378. *Id.*
379. *Id.* at 85, 90.
380. *Id.*
381. 416 U.S. 600 (1974).
382. *Id.* at 601-08.
383. *Id.* at 604-06.
384. *Id.* at 608-10. See the analysis of this approach in Rendleman, *Analyzing the Debtor's Due Process Interest*, 17 WM. & MARY L. REV. 35 (1975).

sworn affidavit containing specific factual allegations.[385] Second, authorization for the writ had to be granted by a judge rather than a clerk of court.[386] Third, facts relevant to obtaining the writ were restricted to documentary proof of the creditor's lien and debtor's default. This has the effect of minimizing the danger of mistaken seizure that the adversary hearing sought to prevent in the earlier cases.[387] Fourth, the debtor was entitled to an immediate hearing following seizure wherein the creditor had to justify the sequestration.[388]

The last in the line of prejudgment cases was *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[389] which involved a commercial debtor whose bank account had been garnished at the beginning of the suit brought by the creditor. No dual interest was involved because the creditor had no prior interest in the property sought, the amount on deposit in the account. Accordingly, one would assume that notice and hearing would be required. But the majority opinion, written by Justice White, struck down the Georgia laws at issue because they failed to satisfy the criteria in *Mitchell*: the affidavit upon which the garnishment was based had been provided by an attorney with no firsthand knowledge of the facts, the writ was authorized by a clerk of court, not a judge, and no provision was made for an immediate hearing to test the validity of the garnishment.[390]

Postjudgment Cases

The applicability of these cases to the postjudgment collection process is uncertain. Two recent lower court decisions have reached opposite conclusions. In *Brown v. Liberty Loan Corp.*,[391] the Fifth Circuit Court of Appeals reversed a district court holding that Florida's garnishment statute was unconstitutional because it authorized postjudgment garnishment of wages without providing

385. 416 U.S. at 616.
386. *Id.*
387. *Id.* at 618.
388. *Id.*
389. 419 U.S. 601 (1975).
390. *Id.* at 607.
391. 539 F.2d 1355 (5th Cir. 1976). The district court opinion can be found at 392 F. Supp. 1023 (M.D. Fla. 1974).

for notice and hearing on the issue of exemption.[392] The court noted that although the debtor had a substantial interest in notice and a hearing, the state's interest in facilitating the enforcement of judgments and the creditor's interest in satisfying his judgments from the debtor's assets outweighed the debtor's interest.[393] In upholding the Florida statute, the court stated that a significant factor in its decision was that the debtor apparently had available the opportunity for a prompt judicial hearing on his exemption claim.[394] Echoing *Endicott Johnson,* the Fifth Circuit also noted that the proceedings leading to judgment provided the debtor with notice that further action by the creditor would be necessary to satisfy the judgment.[395] Furthermore, the debtor had additional protections in the restrictions on the amount of wages that could be garnished as well as a federal law curbing discharge because of garnishment.[396]

The opposite result was reached by the United States District Court in Hawaii in *Betts v. Tom,*[397] which struck down Hawaii's postjudgment garnishment procedures.[398] The court employed the same balancing test used in *Brown,* but with a different result. In evaluating the creditor's interest in collecting the judgment as quickly and cheaply as possible and the state's interest in providing an efficient collection system to encourage commercial transactions, the court nevertheless concluded that debtor's need to provide for his family's welfare outweighed the other interests.[399] The slight delay in execution in order to provide a notice and hearing could not affect significantly the creditor's interest. The court concluded that the statute therefore was unconstitutional in its present form but suggested two acceptable alternatives: first, a procedure that provided for preseizure notice and hearing;[400] second, a procedure requiring an affidavit by the creditor stating why the

392. 539 F.2d at 1362.
393. *Id.* at 1363.
394. *Id.* at 1368.
395. *Id.*
396. *Id.*
397. 431 F Supp. 1369 (D. Hawaii 1977).
398. *Id.* at 1378..
399. *Id.* at 1376.
400. *Id.* at 1377.

proceeds sought by the garnishment are not exempt, which then would be evaluated by the judicial officer who issued the writ.[401] These alternatives, coupled with an opportunity for a hearing on the validity of the garnishment within a short period, would satisfy constitutional requirements of due process.[402]

There is a common thread of reasoning in what facially appear to be two inconsistent holdings. Both courts concluded that *Mitchell* provides the basic minimal constitutional requirements for evaluating any given postjudgment system.[403] Neither court, however, evaluated the statutes in terms of the single versus dual interest dichotomy.[404] In any judgment execution situation, by definition, no dual interest is involved that would justify applying the *Mitchell* relaxed due process requirements. Consequently, the stricter standard of notice and hearing should be available to the defendant before his property is taken. Prior to judgment, a question always exists whether the plaintiff will prevail on the merits to establish the claim to goods he already has attached. After judgment, however, his claim against the debtor is established and all that remains is conversion of that claim into cash. Nevertheless, constitutional problems persist in the postjudgment period during which the debtor's property can be taken without notice or hearing, because he may have available a number of defenses to execution that due process requires he have an opportunity to assert: property exemptions, accord and satisfaction of the judgment, par-

401. *Id.* at 1377-78.

402. *Id.*

403. 539 F.2d at 1369; 431 F Supp. at 1377-78.

404. *See* Rendleman, *supra* note 384. Rendleman's interpretation of the Court's analytical mode requires an initial determination that a constitutionally protected property interest is involved. Greenfield, *supra* note 362, at 898-906, considered this issue in the postjudgment context of statutory exemptions and concluded that "the judgment debtor's interest in his assets, as conferred by the exemption statutes, is 'property' within the meaning of the fourteenth amendment." *Id.* at 906. This conclusion seems applicable to any situation in the postjudgment period in which the judgment debtor stands to lose at a minimum, present enjoyment of the property that the creditor seeks to subject to execution. Likewise, the Supreme Court has evidenced an inclination to interpret liberally the debtor's property interest in the collection process. *See Fuentes*, 407 U.S. 67, 86. Once a determination is made that a cognizable constitutional interest is involved, then the required procedure is dependent on whether a dual or sole interest exists in the property. Rendleman does not address the applicability of the analysis to the postjudgment period, but Greenfield suggests the analogy is appropriate.

tial payment of the debt, indigency, and invalidity of the judgment. A system that denies the debtor access to a forum to raise these issues is of questionable constitutionality

Until the Supreme Court directly addresses the postjudgment process, the proper procedure will remain a matter of conjecture leading inevitably to varying interpretations throughout the states. It may be helpful, however, to analyze the Virginia statutes in terms of both the strict *Sniadach-Fuentes* requirement of notice and hearing as well as the less stringent test of *Mitchell.*

Virginia Postjudgment Execution Procedure

The law in Virginia dealing with postjudgment execution against debtor's personalty does *not* require notice or hearing before issuance of the writ of *fi.fa.*, at the time of levy or even after levy [405] In fact, under Virginia law a default judgment could be rendered, execution issued, personalty then levied on, seized, and sold without the debtor's knowledge. The failure to require notice to the debtor to perfect levy raises serious questions about the constitutionality of the Virginia execution procedures.

The law does provide the debtor with an opportunity for a hearing to consider the validity of the writ if he takes affirmative action. This is effectuated by a motion to quash the execution.[406] The motion results in an order by the court staying the proceedings on the execution until completion of the hearing.[407] This procedure, however, likewise contains a flaw that raises constitutional questions in that the order staying execution of the writ does not become effective until the debtor provides a bond that is satisfactory

405. Virginia statutes have no requirement that the officer levying the writ give notice to the debtor. *See, e.g.,* VA. CODE § 8.01-478, *supra* note 56. The Fourth Circuit has held that although notice to the debtor is advisable, it is not mandatory. Palais v. DeJarnette, 145 F.2d 953 (4th Cir. 1944). *See* text accompanying notes 77-78 *supra.*

406. VA. CODE § 8.01-477 (Repl. Vol. 1977) provides in part that

> [a] motion to quash an execution may, after reasonable notice to the adverse party, be heard and decided by the court which issued the execution. Such court, on the application of the plaintiff in the motion, may make an order staying the proceedings on the execution until the motion be heard and determined, the order not to be effectual until bond be given in such penalty and with such condition, and either with or without surety, as the court may prescribe.

407. *Id.*

to the court.[408] Therefore, the hearing is available not as a matter of right, but only when the debtor can afford to provide the bond. More importantly, the ability of the debtor to take advantage of this procedure presumes that he has notice of the levy in the first place, which is not required by law. Although there is no time limitation on making the motion,[409] the practicalities of the situation effectively impose one. For example, Virginia permits the debtor to claim his homestead exemption at any time before the execution sale.[410] If he fails to do so, he waives his right to assert it later. Because the debtor is not required to be notified of the levy, he may lose his right to claim an exemption in the property seized if it is sold without his knowledge; the debtor likewise loses his right to use the goods in the period between levy and sale.[411] Because execution can issue on a writ at anytime within twenty years of the judgment[412] without notice to the debtor prior to levy and, consequently, without an effective opportunity to raise possible defenses to execution at a hearing, the execution process under the *Sniadach* and *Fuentes* schemes does not appear to pass constitutional muster.

The same result would obtain even under the more relaxed requirement of *Mitchell.* First, Virginia does not require the creditor to provide a sworn affidavit when applying for the writ alleging that the judgment has not been satisfied, the property sought is not exempt, or other facts that would justify levy on the property.[413] Virginia procedure requires no more than a simple request to the clerk of court for an execution.

Second, there is no requirement that a judicial officer authorize or issue the writ of *fieri facias.* Once the clerk of court issues the writ, it is merely delivered to the sheriff for execution, who is considered to be acting on behalf of, and under the control of, the

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408. *Id.*

409. Lowenbach v. Kelly, 111 Va. 439, 69 S.E. 352 (1910).

410. VA. CODE § 34-17 (Repl. Vol. 1976).

411. Likewise, the availability of the forthcoming bond as a means of maintaining use and possession of the goods is also undercut where no notice is given. *See* note 176 *supra* & accompanying text.

412. *See* note 42 *supra* & accompanying text.

413. *See* VA. CODE § 8.01-466, *supra* note 25.

creditor from that moment on.[414] Therefore, no government official is responsible for determining that the execution is justified. The sheriff may request an indemnifying bond if he has any question concerning the validity of the seizure, but this is to protect him, not the creditor, from liability Once the bond is provided, the officer must levy on the personalty specified by the creditor even if it does not belong to the debtor.[415] Third, that the creditor post bond before execution is issued is not required. As mentioned earlier, the sheriff may request an indemnifying bond, but this is not mandatory Consequently, nothing deters the creditor from assuming the risk of erroneous levy Because the debtor can waive his homestead exemption by not filing it before the execution sale, the creditor may be encouraged to levy on property he believes to be exempt in the hope that the debtor will neglect to file in time.[416] Finally, Virginia has no requirement for an immediate postseizure hearing to determine the validity of the execution. Although the debtor may have a hearing by making a motion to quash, that the debtor does not have to be notified of the levy negates the effectiveness of the hearing.[417] The requirement that the debtor provide a bond to utilize the motion to quash may discourage the debtor from taking advantage of the proceeding.

The existing postjudgment enforcement system in Virginia may have the effect of favoring the judgment-creditor to an extent that raises serious constitutional questions. At the same time, a recent study of changes made in prejudgment proceedings in response to *Sniadach* and its progeny indicates that the due process requirements that have been imposed make very little difference and that the beneficial effect upon the debtor is miniscule.[418] In fact, the study revealed that the debtor was in substantially the same position as he was before the Supreme Court decisions.[419] Nevertheless, the current Virginia system needs only certain minor modifications to make it comport with constitutional standards set down in

414. Rowe v. Hardy, 97 Va. 674, 34 S.E. 625 (1899).

415. Wilson v. Butler, 17 Va. (3 Munf.) 559 (1813).

416. *See* Greenfield, *supra* note 362, at 921-22.

417. *See* note 373 *supra.*

418. Shuchman, *Prejudgment Attachments in Three Courts of Two States,* 27 BUFFALO L. REV. 459, 486-87 (1978).

419. *Id.* at 487.

Sniadach and *Fuentes*. First, the validity of the levy should depend on effective notice to the debtor.[420] The levy itself could be perfected by the notice[421] or, if seizure is desired, then possession could be taken after a specified interval following the notice of the levy This time interval, for example, two weeks, would give the debtor an opportunity to quash the execution by making the appropriate motion to the court. The hearing on the motion to quash should be available as a matter of right to all debtors and the requirement that a bond be provided should be deleted. If the debtor chooses not to exercise his right to a hearing, then the goods levied on could be seized and sold in accordance with the present procedures.

The one problem area involves personalty in the form of money of the debtor. Levy by notice generally would have the effect of denying the debtor his right to alienate the personalty levied on, but would allow him to maintain possession and use; accordingly, there is no "taking" in constitutional terms that requires protection.[422] When funds of the debtor are involved, however, a restriction on alienation has the effect of "taking" because the money has no other use. In such circumstances, an immediate hearing should follow notice of levy or garnishment, but no restriction should be placed on the debtor's access to the money At the time of levy, the debtor could be notified that the funds have been levied on and that he will have to justify any expenditures on the basis that they were necessary and essential to his support and maintenance. Alternately, when the debtor's money is sought, notice and hearing could be required before levy.[423]

These changes should provide the necessary constitutional safeguards to allow Virginia law to satisfy the due process requirements of the fourteenth amendment without seriously upsetting the procedures as they exist currently The creditor's interest in

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420. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

421. *See, e.g.*, Greenfield, *supra* note 362, at 923.

422. *See, e.g.*, Black Watch Farms, Inc. v. Dick, 323 F Supp. 100 (D. Conn. 1971) (attachments of real estate are not considered taking in constitutional terms).

423. See Brabham, *Sniadach Through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes*, 12 U. RICH. L. REV. 157 (1977), which concludes that the Virginia prejudgment statutes are probably constitutionally sound since they were modified to comport with the *Sniadach* line of cases.

finding assets to satisfy the judgment are not jeopardized by these changes, yet the debtor's rights in his property are protected without increasing significantly the costs of collection. Likewise, by making the system fair to all parties, the state interest in providing a reasonable method of enforcing its judgments while encouraging commercial transactions is advanced.

Conclusion

Virginia procedures for enforcing money judgments against personalty have remained relatively unchanged since the colonial days even though the economy has undergone radical transformation. Most of the case law in this area is from the previous century when the execution was the primary mode of collection for the diligent creditor. The virtual absence of any recent Virginia Supreme Court decisions in this area suggests that, at least where personalty is of a value sufficient to justify the cost of appeal, the UCC security interest probably provides a more attractive alternative to the creditor. Although the execution process generally involves little expense to the creditor because it can be implemented without interference from the court, it is unattractive to the creditor because it depends on liquidating the property by means of a forced sale that recovers only a small percentage of the value of the goods. A writ of execution today is used primarily to force the debtor into settlement of the debt or as a means to employ garnishment proceedings. Nevertheless, the execution process continues to be the kingpin in understanding the postjudgment collection system as a whole in Virginia, and for that reason alone, the practicing attorney must master the many statutory procedures available.

Ralph G. Santos