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EXECUTION PRACTICE: ENFORCEMENT OF MONEY JUDGMENTS FROM LAW BOOKS TO  
STREET JUSTICE

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# Execution Practice: Enforcement of Money Judgments from Law Books to Street Justice<sup>1</sup>

## 1-1 HISTORICAL BACKGROUND

Adopted in 1960, the money judgment execution rules, Pa.R.C.P. 3101 et seq., created the singular writ of execution for levy of real or tangible personal property or attachment (garnishment) proceedings involving intangible personal property. Abolished were the former writs of *feri facias (fi. fa.)*, *testatum fieri facias*, *scire facias (sci. fa.)*, *levari facias (lev. fa.)*, *venditioni exponas (vend. ex.)*, *alias* and *pluries* writs, etc. The issuance of execution process is an ex parte exercise of power descended from the earliest days of our civil legal system when *capias ad respondendum* (arrest) followed by fixing bail and *capias ad satisfaciendum* (imprisonment for debts) were the order of a less kinder and gentler day. See *McCormick's Petition*, 56 Pa.D.&C. 314 (C.P. Beaver 1946); Charles Dickens, *David Copperfield* (1868).

## 1-2 COMMENCEMENT OF EXECUTION

### 1-2.1 Issuance of the Writ

Execution commences when the prothonotary issues the writ of execution, which is done only upon filing of a praecipe by the plaintiff. Pa.R.C.P. 3103(a). The form of the writ itself is identical for both real estate and personal property executions. Pa.R.C.P. 3102, 3252. Effective April 7, 2007, the form of the writ was modified to warn garnishee financial institutions not to place a “hold” on funds of an individual less than \$300 and any funds in a defendant’s account that receives electronically deposited funds identified as exempt, on a recurring basis. Samples of the praecipe and writ of execution forms employed by the author in many Pennsylvania counties are included as forms 1-13, 1-14,

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1. Written by Drew Salaman, Esq., of Salaman/Henry (A Professional Corporation).

and 1-15 in this book. Judicial approval for execution to enforce a money judgment is not required, except where the judgment debtor is deceased (and approval by the personal representative is not given), 20 Pa.C.S. § 3377.

Some prothonotaries, e.g., Allegheny, Delaware, Lancaster, Lehigh, Monroe, and the Municipal Court of Philadelphia, prefer, or even insist on, preparing the writ and attached notice to defend and claim forms even though this increases their workload, introduces the possibility of third-party error over which the plaintiff lacks control, and delays the plaintiff in the exercise of its remedies.

Elsewhere, the plaintiff may or must prepare these documents, often by completing blank forms made available by the prothonotary. Some prothonotaries stubbornly insist upon use of their own printed forms although there is no legal requirement for this. One who has a multi-county execution practice or lacks the forms of a given county may be tempted to substitute forms that comply with Pa.R.C.P. 3251–3252.

Because a plaintiff in execution is limited to recovery of the sums enumerated for the judgment, costs, interest, and accruing interest on the writ of execution, it is critical that these be accurately detailed on the praecipe and writ. For example, if interest accrued to date and a daily rate for accruing interest are not itemized on the praecipe and writ, the plaintiff in execution is obligated to satisfy judgment upon receiving tender of whatever smaller sum is set forth on the praecipe and writ, *Nationsbanc Mortgage Corp. v. Grillo*, 827 A.2d 489 (Pa.Super. 2003).

*Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980) (en banc) (former common pleas court judges Aldisert and Weis dissenting), held that prior Pennsylvania attachment execution procedures violated the federal constitutional guarantee of due process, among other things, by failing to advise judgment debtors of the \$300 state exemption and federal Social Security exemption. Also, the court of appeals opined that due process of law required, and that Pennsylvania then lacked, prompt postseizure remedies for those claiming exemptions from execution. Going far beyond these omitted “warnings” relevant only to natural persons, which were the source of concern to the court of appeals, the Pennsylvania Supreme Court added to the writ of execution for money judgments a mandatory “notice to defend” replete with a summary of exemptions, warning to consult an attorney, and the location of a legal aid or lawyer reference service. Although the notice is mandatory regardless of the subject of execution, Pa.R.C.P. 3102, 3252, some prothonotaries and sheriffs may not always require the *Finberg* forms in money judgment executions against corporations or real estate. *Query*: At what point does the plethora of notices become the antithesis of notice? In *Cinea v. Certo*, 84 F.3d 117, 122 (3d Cir. 1996), the court of appeals held that the Pennsylvania district justice court rules of execution similarly patterned to the current common pleas execution rules “satisfy the due process clause.”

Multiple writs may be issued at the same or different times without a prior return of any outstanding writ. Pa.R.C.P. 3103(d). Consult the prothonotary to see if a single praecipe will do or if multiple praecipies are needed for writs issued at the same time to sheriffs of different counties.

Effective June 1, 2007, new Pa.R.C.P. 3101.2 adopts a protocol for election to proceed on a single writ of execution against real and personal property of a debtor who gave an obligation secured by both.

### 1-2.2 Delivery of the Writ

According to the rules of procedure, the plaintiff has the theoretical option to obtain the writ and deliver it to the sheriff or require the prothonotary to do so. Pa.R.C.P. 3103(e). Some western prothonotaries, notably Allegheny, refuse to obey this rule. The practical need for prompt action and the priority created in some instances by the sheriff's receipt of the writ dictate that the plaintiff deliver the writ to the sheriff, if possible. Stamped envelopes addressed to each defendant must also be provided. Pa.R.C.P. 3108(b). Many sheriffs cling to requiring their own local "order for service" and sometimes other local forms. A generic order for service form is included as form 1-18A, with examples of forms used in other counties following. Check with the individual sheriff's office to determine the form requirements for that county. Other prothonotaries insist on delivering the writ to the sheriff, and decline to provide a copy to counsel, absent special request.

Writs are time-stamped as they are received by the sheriff. Pa.R.C.P. 3105. When levies are made against the same personal property under multiple writs, priority of distribution is determined by the time of delivery to the sheriff. Pa.R.C.P. 3137(a). Moreover, in accordance with the historic practice that preceded these rules, the lien of execution is retroactive to the time of delivery. *Williams Patent Crusher & Pulverizer Co. v. Reily*, 180 A. 156 (Pa.Super. 1935). Also see Procedural Rules Committee, *Explanatory Comments on Execution Rules*, paragraph 7; *Baldwin's Appeal*, 86 Pa. 483 (1878). This obscure rule of retroactivity can spell the difference between victory and defeat in measuring the preference period in a bankruptcy and in determining competition with the liens of secured creditors, taxing authorities, etc. Attachment priorities are determined by time of service on garnishee. Pa.R.C.P. 3137(b). What would you do if you represented an execution creditor who wished to proceed on a personal property sale but there was a prior lien of execution held by a creditor who was not interested in proceeding to sale? Compare *Gillespie v. Keating*, 36 A. 641 (Pa. 1897) (no distribution to junior execution creditor due, in part, to priority of older writs held by the sheriff). *In re Smith*, 401 B.R. 674, 690 (Bankr. E.D. Pa. 2009).

Since the sheriff no longer needs to take custody of the property unless the plaintiff directs, Pa.R.C.P. 3109, there is probably no reason for sheriffs to insist on the historic practice of "waiving the watchmen." This quaint custom is thought to be of great importance to sheriff's clerks who receive writs directing levies and the deputies who serve this process. However, the plaintiff's representative is always requested to sign the "waiver of watchman," which should accompany the "allied papers" if being delivered by mail to another county. Unfortunately, some sheriffs insist on use of their own special forms such as a "waiver of watchman" order for service, instructions to sheriff, certificate to sheriff, etc. Other sheriffs accept generic forms.

### 1-3 INDEXING

The writ was formerly indexed in the judgment index against the defendant upon praecipe, but now should be so indexed automatically, Pa.R.C.P. 3104(a)(1), usually in order to effect an enforceable lien upon real property acquired by the defendant after judgment, compare 42 Pa.C.S. §§ 707 and 4303 with Act of April 22, 1856, P.L. 532, § 3, 17 P.S. § 1922, repealed, Act of April 28, 1978, P.L. 202 (Act No. 53), or to continue a lien of judgment on real property of the defendant as if revived, pursuant to Pa.R.C.P. 3025 et seq. *Caveat*: The prothonotary of Philadelphia does not automatically index the writ as required by Pa.R.C.P. 3104(a)(1), and the conservative practitioner will praecipe for the same. Other county prothonotary offices should be checked as well.

Where the writ is issued to the sheriff of another county, it must be indexed against the defendant in the judgment index. "Such indexing shall have the same effect as the indexing of a judgment against the defendant," Pa.R.C.P. 3104(b), and has the effect of creating a lien upon real estate. *Public Fed. Sav's & Loan Ass'n v. Scott-Taylor, Inc.*, 43 Pa.D.&C.2d 615 (C.P. Chester 1967). Although this rule permits the plaintiff to require levy and attachment to precede docketing, most sheriffs demand that "their prothonotary" assign a docket number before execution. Is the life of the lien the same as the 90-day life of the writ? Perhaps the lien is good for an additional six months after levy? Or is the lien good for five years after indexing? Formerly there was no judicial guidance on this subject. Pa.R.C.P. 3104 now gives such a lien a life of five years.

The procedure for issuance of attachment execution against a garnishee holding legal title for a defendant permits a plaintiff to issue a tactically mandatory praecipe for the indexing of the writ as a *lis pendens* in that county against real property described. Pa.R.C.P. 3104(c). The indexing of the writ clouds title to the real estate in question pending adjudication of this special form of garnishment.

#### 1-4 LONG-ARM EXECUTION AND VENUE

If a money judgment is entered in one county, its prothonotary may issue a writ to the sheriff of any Pennsylvania county. Pa.R.C.P. 3103(b). However, when a judgment is transferred to another county, the transferee prothonotary may direct the writ only to the sheriff of that county. Pa.R.C.P. 3103(c).

For stay proceedings, Pa.R.C.P. 3121, venue on long-arm levies may be in either the county of issuance of the writ or the county of levy, at the option of defendant. Pa.R.C.P. 3122.

Venue for proceedings subsequent to a garnishee's appearance and pleading also may be in either the county of issuance or attachment, at the election of the garnishee. Pa.R.C.P. 3141(b). However, once the election is made, it may not be changed. See *Misher v. Bo's Auto Parts Inc.*, 557 A.2d 410 (Pa.Super. 1989).

Venue in proceedings under the Deficiency Judgment Act, 42 Pa.C.S. § 8103, is thought to be in the county from which execution issues. *Public Fed. Sav's & Loan Ass'n v. Scott-Taylor, Inc.*, above.

All other proceedings for relief from levy, such as interpleader and claims for exemption, are conducted only in the county of levy. Pa.R.C.P. 3122.

There are no rules for venue relative to confession of judgment. *Midwest Financial Acceptance Corp. v. Lopez*, No. 1896 MDA 2011 (Pa.Super. August 23, 2013).

Confession of judgment followed by long-arm execution will permit the petitioning for all forms of relief from judgment and execution in the county where the judgment was originally entered, in any county where the judgment has been transferred, or in any county where the sheriff by writ of execution has been directed to enforce the judgment. Pa.R.C.P. 2959(a). Wisdom may suggest confessing judgment in the county most convenient for the plaintiff and its counsel and, in that same county, garnishing the branch bank of the defendant who may be located in an adjoining county, a distant county, or that county. By foregoing a levy in the defendant's county in this scenario, defendant must then bring any petition to open judgment in the county selected by the plaintiff's counsel, not the defendant's hometown(ing) county. Remember, there are no venue rules

relative to confession of judgment, and the warrant of attorney typically authorizes plaintiff's counsel to appear for and confess judgment against the defendant in "any county of record."

Pa.R.C.P. 3117(a) authorizes the taking of deposition in aid of execution in any county. A plaintiff is not restricted to the county in which judgment has been entered. *Lizzio v. Lizzio*, 19 Pa.D.&C.3d 240 (C.P. Monroe 1981); 8 *Goodrich-Amram 2d*, § 3117(a):8. The treatise notes that discovery in aid of execution may be conducted elsewhere in the United States or in foreign countries pursuant to Pa.R.C.P. 4015.

## 1-5 TIME LIMITATIONS UPON EXECUTION

Execution may issue on common pleas judgments simultaneous with their entry or thereafter, regardless of pending motions or an appeal absent stay or supersedeas, 8 *Goodrich-Amram 2d*, § 3103(a):2. See section 1-18, below.

Execution on the lien of judgment against real estate may issue within five years after entry of judgment for money, 42 Pa.C.S. § 5526, or within five years from the last entry of a judgment of revival. This concept is cast in terms of a statute of limitations. What happens if revival is not affected in five years? The statute of limitations concept would seem to reverse the prior practice permitting late revival with lost priority for real estate still titled in the name of the judgment debtor. However, trial courts that have faced the issue have overridden the literal bar of the statute and continued the prior practice. *In re Lucas*, 41 B.R. 785 (Bankr. E.D. Pa. 1984); *Home Consumer Discount Co. v. Hashagen*, 35 Pa.D.&C.3d 668 (C.P. Luzerne 1985); *Mercer County State Bank v. Troy*, 27 Pa.D.&C.3d 751 (C.P. Mercer 1983); *Truver v. Hasker*, 20 Pa.D.&C.3d 769 (C.P. Carbon 1981). A few of these cases reason that the "saving clause" of the Judiciary Act Repealer Act, 42 P.S. § 20003(b), continues the prior practice under the repealed Judgment Lien Law of 1947, 12 P.S. §§ 877–884, since the Supreme Court of Pennsylvania has not yet promulgated rules of practice and procedure regulating the duration and scope of judgment liens. This writer previously queried: "Has the Supreme Court of Pennsylvania ever adopted rules of practice and procedure implementing a statute of limitations? This tortured reasoning was unnecessarily adopted by the Superior Court in the dicta of *Hertzog v. Jung*, 526 A.2d 425 (Pa.Super. 1987); *Allied Material Handling Systems v. Agostini*, 606 A.2d 923 (Pa.Super. 1992); see *Mid-State Bank & Trust Co. v. Globalnet Int'l, Inc.*, 710 A.2d 1187 (Pa.Super. 1998), *aff'd*, 735 A.2d 79 (Pa. 1999); and *Ricci v. Cuisine Management Services, Inc.*, 621 A.2d 163 (Pa.Super. 1993) (late revival ineffective against terre tenant). If the repealed Judgment Lien Law of 1947 and 42 Pa.C.S. § 5526 address the duration of judgment liens, why would it behoove the Supreme Court to address this subject via rule?" The propensity of courts to reach interpretations of 42 Pa.C.S. § 5526 that are at odds with its clear language is candidly explained in *Ricci v. Cuisine Management Services, Inc.*, 621 A.2d at 165–166: "courts have been unwilling to presume an intent . . . to revise established practice as to lien revivals, upon which the assumed state of so many interests in land depends." The Civil Procedural Rules Committee 1994 Explanatory Comments to Rules 3027 and 3030 correctly note that what the rules of procedure relative to revival did not address was the repeal of section 4 of the Judgment Lien Law of 1947, 12 P.S. § 880, providing for the lien effect of indexing the writ of revival. These notes each observe that the 1994 amendments to the rules of procedure address the effect of issuance of the writ of revival as a lien "so that the relevant portion of the Judgment Lien Law of 1947 insofar as it has become part of the common law is abolished." If the

dicta of *Ricci* was ever reliable, it would appear doubtful today as a result of these comments. But see *Shearer v. Naftzinger*, 747 A.2d 859, 860, n.1 (Pa. 2000) (more dicta recognizing the continuation of the prior practice now coming from the Supreme Court). Finally, in 2003, effective July 1, 2004, the Supreme Court adopted rules defining the five-year duration and scope of judgment liens against real estate, Pa.R.C.P. 3022, 3101.1, and 3104.

Execution against personal property may issue within 20 years following entry of judgments for money. 42 Pa.C.S. § 5529. Notwithstanding lower court and affirming Superior Court panel opinions to the contrary, the affirming opinions (*on other grounds*) by the Supreme Court definitively establish that revival (which our rules provide solely to extend the life of the lien of judgment against real estate) may not extend the 20-year limitation on personal property executions. See, e.g., *Shearer v. Naftzinger*, 747 A.2d 859 (Pa. 2000), rev'g 714 A.2d 421 (Pa.Super. 1999).

The writ has a life of 90 days for service, Pa.R.C.P. 3106(d), and must thereafter be reissued if the desired levy or attachment has not been effected.

The writ may be reissued any time and any number of times by endorsement of the word "reissued" thereon by the prothonotary, upon praecipe. Pa.R.C.P. 3106(b). A reissued writ may name a garnishee not originally named. Pa.R.C.P. 3106(c).

Unless either the time for sale is extended by the court or the proceedings are stayed, the sale should be held within six months after levy, Pa.R.C.P. 3120, because pursuant to that rule, the sheriff may abandon the writ after that time. The periods of stay should be added to the six-month period. Some sheriffs abandon the writ on the 181st day. Others never abandon the writ until the next sheriff is elected. In Philadelphia, the sheriff leaves the writ open past six months if others come in against the same debtor. Does this not make it difficult for energetic junior writs versus timid or less interested older writs that have technical priority? Compare *Gillespie v. Keating*, 36 A. 641 (Pa. 1897).

## **1-6 SERVICE OF THE WRIT OF EXECUTION**

### **1-6.1 Tangible Personal Property: Levy**

A levy is the prerequisite to service of the writ for tangible personal property. Pa.R.C.P. 3108. The rules do not define what a levy is or prescribe what procedure the sheriff must follow in order to levy.

A levy is a symbolic act of dominion by an executing officer over personal property or realty. A sheriff may levy by professing to levy upon, and assuming control of, the property where it is in his or her view. *Trainer v. Saunders*, 113 A. 681 (Pa. 1921); 12 *Standard Pennsylvania Practice 2d*, §§ 72:120 and 72:122.

The term "levy" means the actual or constructive seizure of the judgment debtor's property by the sheriff who, in effect, asserts title to the property and thereby legally divests the judgment debtor of possession of the property.

8 *Goodrich-Amram 2d*, § 3108(a):(1), citing *Simmons v. Simmons*, 514 A.2d 128, 129 (Pa.Super. 1986) (Beck, J.), app. denied, 533 A.2d 93 (Pa. 1987):

In the context of an execution upon a judgment, a levy consists of a sheriff's actual or constructive seizure of the judgment debtor's property . . . "The levy is an assertion of title by the sheriff, amounting at least to a legal dives-

titure of the possession of the [judgment debtor], and such as would subject the officer making it to an action of trespass, but for the protection of the execution.”

(Citations omitted.) Accordingly, it would be conceptually incorrect to instruct a sheriff to levy intangible personal property. The latter is subject to attachment execution, Pa.R.C.P. 3108(a)(4), and the rules for garnishment.

Personal property already subject to the possession and dominion of one executing officer (e.g., federal marshal, internal revenue agent, constable, state revenue agent, sheriff, etc.) appears to be property in custody of the law and not subject to later execution by an execution officer of another jurisdiction. 12 *Standard Pennsylvania Practice 2d*, § 72:35. Since federal and some Pennsylvania corporate tax liens are perfected upon tangible personal property simply by their docketing, it is a good practice *not* to proceed to sheriff sale without checking whether there are priorities that one would not want to challenge and that would result in exposure of liability to these taxing authorities. Also, see section 1-11, below, as to the status of UCC-1–secured parties vis-à-vis judicial sales.

In practice, the sheriff prepares a brief inventory of goods levied upon (see, generally, *Appeal of Earl*, 13 Pa. 483 (1850)), leaves a copy at the site of the levy, and mails a copy to the plaintiff. Some sheriffs will conclude their schedule of property levied upon with an expression such as “all other sundry personal property on the premises,” but others will not. Some sheriffs, especially those in the latter category, refuse to sell property not noted in this document even though:

- A levy on part of the goods on a subject premises is a levy on all goods then situate thereon, *Lewis v. Smith*, 2 Serg. & Rawle 142 (1815); compare *Dixon v. White Sewing Machine Co.*, 18 A. 502 (Pa. 1889).
- The levy extends to debtor’s after-acquired tangible personal property, *Shafner v. Gilmore*, 3 Watts & Serg. 438 (1842); *Wilson, Sieger & Co.’s Appeal*, 13 Pa. 426 (1850) (cited with approval in *Bloom v. Hilty*, below). (The writer recalls the derisive laughter of the elected sheriff of one county, now a judge, when asked to apply the holdings of these two cases never overruled, or otherwise diminished. “Counsel, you don’t expect me to follow cases almost 150 years old, do you?” Is that not what *stare decisis* is about?)
- A description of some specific items of personal property and a catchall reference to “all other personal property of defendant” appears to have been adequate description in *Greater Pittsburgh Business Development Corp. v. Braunstein*, 568 A.2d 1261 (Pa.Super. 1989), app. denied, 592 A.2d 1301 (Pa. 1990); see *Bloom v. Hilty*, 232 A.2d 26 (Pa.Super. 1967) (“not necessary for a sheriff to itemize every particular item on which he has levied”), rev’d on other grounds, 234 A.2d 860 (Pa. 1967).

Ironically, sheriffs who follow their *ipse dixit* policies of refusing to end their brief inventories with a catchall “all other sundry personal property on the premises” and then sell only those items noted in the schedule of property levied upon are reluctant to follow this author’s efforts to cope by giving instructions to inventory every finite item of personal property and return to the premises for a supplementary levy just prior to sale. Insistence on selling only items noted in the sheriff’s inventory coupled with refusal to inventory all items creates a conundrum that tests counsel’s patience, ingenuity, and advocacy skills.

The unattended dwelling, unattended contractor's garage, and "entry refused" are recurring and frustrating situations preventing an effective levy. In Philadelphia, the sheriff formerly might perform a "doorstep levy" and later post handbills for psychological purposes but decline to conduct a sale. This practice has been abandoned. The sheriff's deputies of some counties will make "window levies." A motion for supplementary relief in aid of execution, Pa.R.C.P. 3118, directing the sheriff to employ force to gain entry (i.e., the "break motion") is the typical, time-consuming, perhaps self-defeating procedure. However, there is good authority that property not in view due to wrongful acts of the defendant or his or her representative is subject of a valid levy. *Commonwealth ex rel. French v. Weglein*, 24 A.2d 633 (Pa.Super. 1942). Compare *Winkler v. Policare*, 58 Luz. L. Reg. 121 (1968) (dictum). This legal theory is generally not recognized by the ultimate arbiter of most execution issues: Pennsylvania sheriffs. Sometimes service of the "break motion" will arouse the defendant from slumber.

A plaintiff should consult the sheriff for the local practice on executions against motor vehicles. Most sheriffs require a department of transportation computer printout of title before levy. In some other counties, sheriffs will levy with (and some others will levy without) descriptions of vehicles. Those who levy without descriptions sometimes extend themselves on the plaintiff's behalf by phoning the appropriate bureaus for the title information. A defendant's title and lien printout is a practical prerequisite of sale, and the form for obtaining it is included as form 1-19. How do you get the tag (or VIN number) that the form requires? One of many solutions the writer has employed is to discreetly observe the defendant's car when parked at the courthouse or district justice office. Each sheriff has a set deposit for recovery and storage charges for motor vehicles. A house trailer is personal property or real estate depending upon how permanently, if at all, it is secured to the ground. Consult the local sheriff relative to levy and execution of unregistered motor vehicles.

If the sheriff has already made a levy on personal property, subjecting it to his or her technical dominion, it "shall" be a levy as to every other writ in the sheriff's hands. The sheriff may make subsequent "paper levies" by noting the subsequent interests under the first levy and sending copies of the inventory to the plaintiff and defendant. However, subsequent execution creditors may direct the sheriff to take manual possession or post a watchman. Pa.R.C.P. 3115. Some sheriffs decline to follow the "paper levy" rule.

After levy, the sheriff is required to mail a copy of the writ, notice to defend, claim form, and exemption notice to each defendant at his or her last known address. Pa.R.C.P. 3108(b). A search to determine the defendant's whereabouts is not required. *Bornman v. Gordon*, 527 A.2d 109 (Pa.Super. 1987). Most sheriffs accept an envelope addressed to the judgment debtor prepared by the plaintiff or counsel and bearing the return address of the plaintiff or counsel. Sheriffs typically do not make a record of where their own mailings of these envelopes are sent. Consider the possibilities for fraud and/or error.

Neither the writ, nor case law, nor statute grants a sheriff discretion to levy less than all of a judgment debtor's personal property, yet some sheriffs exercise that discretion. When asked why his deputy levied only one piece of heavy equipment on the premises, one elected sheriff advised the writer, "Well, that equipment should be enough to satisfy your judgment." The writer replied, "Sheriff, what if that equipment is leased, subject to UCC-1 financing statements, or just not desired by the bidders who would like to purchase other items your deputy declined to levy?" The reply: "Counsel, this is the way we do things here; you are asking me to 'over levy'." The sheriff was not impressed by the

proposition that Pa.R.C.P. 3119(2) empowered the court (not the sheriff) to release property from an excessive levy situation following the due process of law of a motion, notice, and hearing.

May a sheriff validly levy and sell a cemetery plot as tangible personal property? A monument? A mausoleum? Is a cemetery lot real property? The “purchase of a lot in a cemetery, although [in the form of] a deed and containing words of inheritance,” is truly a license or privilege to use the lot for burial purposes, i.e. a right of sepulture. See *Petition of First Trinity Evangelical Lutheran Church*, 251 A.2d 685 (Pa.Super. 1969). Such a right, including the use of a mausoleum, has been characterized as an “incorporeal hereditament.” *In re Leonard’s Estate*, 22 A.2d 676 (Pa. 1941). How would one best proceed to execute against such property rights? See section 1-9.1, below, Garnishees.

Historically, there was grave doubt about whether licenses granted by the Pennsylvania Liquor Control Board (LCB) were subject to execution. When the legislature took the lead and defined a license as “a personal privilege” and not property, 47 P.S. § 4-468(b.1), a sharply divided Supreme Court ultimately ruled that execution would not lie against liquor licenses. *1412 Spruce, Inc. v. Commonwealth of Pennsylvania Liquor Control Board*, 474 A.2d 280 (Pa. 1984). The multiple opinions in this case reflected a lack of consensus concerning fundamental concepts underlying execution practice. In 1987, the legislature reversed this state of affairs by adding the following sentence to the statute:

The license shall constitute a privilege between the board and the licensee. As between the licensee and third parties, the license shall constitute property.

47 P.S. § 4-468(d). Thus, liquor licenses are now subject to execution. What the sheriff really sells is the right permitting the successful bidder or bidder’s assignee to apply to the LCB for transfer of the license subject to all the material issues and considerations of that specialized area of legal practice.

Initially, execution upon the licenses involved instructing the sheriff to levy and seize the license physically. The LCB subsequently requested that sheriffs only levy the licenses and not pull them off the wall. The theory of LCB counsel is that the license is a privilege to serve alcoholic beverages that is extended to the licensee debtor by the Commonwealth and that should not be interrupted by a private litigant’s seizure of a piece of paper—the license. The writer has been unsuccessful in attempting to persuade LCB counsel that levy of the licensed premises and its inventory of alcoholic beverages places the same in the custody of the sheriff, that the debtor licensee should not be disposing of levied goods, which is a crime, 18 Pa.C.S. § 4110, and that seizure of the physical license simply preserves the status quo as required by the civil and criminal law.

What other licenses that are bought and sold commercially are amenable to execution process? Philadelphia taxicab medallions, 53 Pa.C.S. § 5713. What others? The Pennsylvania Public Utility Commission does not recognize executions against certificates of public convenience, although it will recognize sale of the same in bankruptcy proceedings.

If goods levied upon are removed or sold with intent to defeat the levy, those responsible could be subject to criminal sanction, 18 Pa.C.S. § 4110, if the local district attorney can be motivated to pursue an appropriate private criminal complaint. See Pa.R.Crim.P. 506. Consider the principals of a store formed as a corporation or limited liability company who, post-levy, orchestrate the sale of their inventory in the ordinary course of business or otherwise. Do they not have liability in conversion to the plaintiff in execution?

If agreeable to all plaintiffs in execution, merchandise, inventory, or stock in trade of the defendant engaged in a trade or business may, after levy, be sold by the defendant in the ordinary course of the trade or business subject to the sheriff's supervision and collection of the receipts. Pa.R.C.P. 3126. Unfortunately, numerous sheriffs simply refuse to obey this rule.

### 1-6.2 Real Estate

Service of the writ is irrelevant to distribution priority in real estate executions. Accordingly, its "service" is performed by the sheriff simply by noting a brief description of the real property levied upon (provided by plaintiff) and a statement that he or she has levied. Pa.R.C.P. 3108(a). A copy of the writ is also mailed to defendant. Pa.R.C.P. 3108(b). At common law, one was required to execute against tangible personal property prior to execution against real estate. Pa.R.C.P. 3107 suspends that practice and permits execution against real and personal property in any order.

### 1-7 MANUAL POSSESSION AND RETENTION OF CUSTODY

Under the rules, the sheriff may, on his or her own motion, or must, upon direction of the plaintiff, take physical possession of tangible personal property levied upon or leave watchmen to maintain custody thereof, Pa.R.C.P. 3109(a), pending sale. A plaintiff might direct seizure at any time after levy. See 8 *Goodrich-Amram 2d*, § 3109(a):3; 12 *Standard Pennsylvania Practice 2d* § 72:129. When requiring a sheriff to seize valuable goods, e.g., jewelry, it is practical for counsel to be present with a qualified appraiser to advise the deputy as to the value of the goods. A deputy sheriff might be reluctant to seize substantially more than is believed to satisfy the writ on forced sale due to uncertainty of the value of the goods to be seized.

Knowing that counsel was coming with deputy sheriffs to seize his inventory of valuable first-class merchandise, the owner of Philadelphia's premier juvenile furniture store assembled numerous mismatched store-worn and obsolete pieces in a corner of the store. Not wanting to "over levy," the deputies were at first satisfied that these goods were enough. After counsel's appraiser persuaded the deputies that these goods were of little value and that seizure of all goods on the entire first-floor showroom was necessary to produce enough "forced sale" value to satisfy judgment, the debtor immediately paid in full.

The sheriff may demand a bond or deposit for anticipated expenses of storing property seized, e.g., automobiles. Pa.R.C.P. 3109(d). It is wise to consult the sheriff in advance and plan for the precise method of seizing and storing unique items, e.g., jewelry store contents, ships, airplanes, safes, large quantities of merchandise, and gasoline.

The most frequent manual seizure made by the sheriff is of cash register contents. Some sheriffs profess uncertainty about what to do with cash seizures, as there are no pertinent rules of procedure. The writer recommends preparation of a schedule of distribution, Pa.R.C.P. 3136. The writer recommends against the practice he encountered once in a suburban Philadelphia county: auctioning the cash.

Seizure is generally required to effect a levy upon certificated investment securities, 13 Pa.C.S. § 8102, § 8312. The Professional Corporation Law, 15 Pa.C.S. § 2901 et seq., restricting the issuance and transfer of shares in a professional corporation, does not prohibit seizure of stock issued to a judgment debtor. Like other stock, the stock of professional corporations may be seized, *Gulf Mortg. & Realty Invs. v. Alten*, 422 A.2d 1090

(Pa.Super. 1980). Remember, stock of a professional corporation may be owned only by professionals of that profession, and, accordingly, such securities are not usually held as tenancies by the entireties. What would the successful bidder do with a minority of shares in a closely held corporation? A majority of shares?

“[I]t is not an abuse of process for the sheriff to lock the premises after levying on the property therein. Locking the premises, such as a store, precludes public access to the property or goods inside.” 8 *Goodrich-Amram 2d*, § 3109(a):5. A plaintiff has ample remedies in the discretionary powers of the court to grant relief from execution in the form of full or partial stay, subject to conditions under Pa.R.C.P. 3121, or release from levy. Pa.R.C.P. 3119. Compare *Valente v. Northampton National Bank*, 13 Adams L.J. 91 (1971). Sheriffs of many counties often padlock stores and businesses at the request of the plaintiff. Others refuse to do so without a court order. If a defendant in execution violates the levy by selling or disposing of goods subject to levy, it would appear highly appropriate to secure supplementary relief in aid of execution under Pa.R.C.P. 3118 to preserve the status quo by ordering the sheriff to padlock the premises. What about requesting that the sheriff padlock the pumps at an automobile service (gasoline) station?

## 1-8 EXECUTION AGAINST SAFE-DEPOSIT BOX CONTENTS

Execution against a safe-deposit box may be accomplished by levy on the custodian or depository of the box, Pa.R.C.P. 3110(a), or attachment. Pa.R.C.P. 3101(b)(2); 12 *Standard Pennsylvania Practice 2d* § 72:123.

Service of the writ enjoins the custodian of the box from opening it or permitting its opening pending court order. Pa.R.C.P. 3110(b).

On plaintiff's petition and rule upon defendant, custodian, and others who have the right to enter the box, the court may order it opened by force if necessary, in the presence of the sheriff, upon plaintiff's furnishing indemnification for losses caused to the custodian by the opening. Pa.R.C.P. 3110(c), (d). A sample petition is included as form 1-43.

Although the rules of civil procedure do not provide guidance for execution against rented storage lockers, the writer recommends garnishment of the storage locker company and thereafter following the practice of Pa.R.C.P. 3110.

## 1-9 ATTACHMENT PRACTICE

### 1-9.1 Garnishees

Garnishees are served with the writ only by the sheriff in the same manner as original process. Pa.R.C.P. 3111(a) and 402(a). The rules do not permit service by other competent adults. Compare Pa.R.C.P. 400.1. The sheriff will provide an additional copy of the writ to the garnishee for each defendant. Pa.R.C.P. 3111(a).

When the same garnishee is served with the attachment executions of competing plaintiffs, “priority of distribution between them shall be determined by the *date* of service of their respective writs.” Pa.R.C.P. 3137(b) (emphasis added). However, garnishment for support has priority over others. 42 Pa.C.S. § 812(b), Pa.R.C.P. 3159(b)(10).

Where a garnishee, such as a tenant, is not named in the writ of execution, upon service of the writ, the sheriff should add the name of the garnishee to the writ and return of service, Pa.R.C.P. 3111(a), 8 *Goodrich-Amram 2d*, § 3111(a)(3). This rule may be of critical assistance in garnishing a judgment debtor's tenants whose names are unknown.

One would imagine that potential garnishees located outside of Pennsylvania but doing business here or having other Pennsylvania “minimum contacts” would be amenable to joinder as garnishees via mail service of attachment execution process, 42 Pa.C.S. §§ 5301–5308 and 5323 and Pa.R.C.P. 402–403. In fact, Pa.R.C.P. 3112 so provides relative to those who hold Pennsylvania real estate interests for the benefit of a judgment debtor, but reside out-of-state. However, in *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa.Super. 1991), the Superior Court of Pennsylvania read Rule 3112 to preclude mail service of potential out-of-state garnishees holding an interest in a judgment debtor’s personal property.

More recently, it has been held that although only a sheriff may properly serve a writ of execution within Pennsylvania, a garnishee’s failure to object to out-of-state service via certified mail followed by filing answers to interrogatories in attachment constituted a waiver of defective service and consent to jurisdiction. *Korman Commercial Props., Inc. v. Furniture.com, LLC*, 81 A.3d 97 (Pa.Super. 2013). It is known that many large financial and banking institutions employ clerical staffs to handle response to garnishment proceedings and that these units will respond positively to certified mail, fax, or e-mail of writs of execution.

There are special rules for serving as garnishees persons who hold title to real estate for defendants in judgment, their mortgagors, and their judgment debtors. See Pa.R.C.P. 3112 and 3113.

After service of the writ on the garnishee, a copy is also mailed to the defendant by the sheriff. Pa.R.C.P. 3108(b). Defendants later get a copy of the writ from the garnishee. Pa.R.C.P. 3140(a).

### 1-9.2 Who May Be a Garnishee; Immunities

Pa.R.C.P. 3101(b) provides that a plaintiff may attach any person who is deemed to have possession of the defendant’s property by virtue of:

- owing a debt to the defendant
- having the defendant’s property in his or her possession or control
- holding as fiduciary property in which the defendant has an interest
- holding legal title to the property of the defendant
- owning or possessing real property subject to a mortgage, judgment, or other lien in which the defendant has an interest

A “person” includes not only a natural person but also a corporation, partnership, or association. It does not include a “tenancy by the entireties” if one of the co-tenants is a defendant according to *Garden State Standardbred Sales Co. v. Seese*, 611 A.2d 1239 (Pa.Super. 1992). The writer suggests that any precedential value of this decision is limited to its procedural and substantive facts, i.e., where a spouse conveys to himself and his wife, the creditor issues attachment execution and tries to test the conveyance as fraudulent in that context. If spouses jointly owe a debt to a judgment debtor, this decision could not mean that it is inappropriate to joint them as garnishees, could it?

The Commonwealth and its subdivisions are ordinarily immune from attachment, *Security Bank & Trust Co. v. Rollin, Inc.*, 502 A.2d 232 (Pa.Super. 1985), but may not choose to assert that immunity. What about immunity from execution made by the City of Phil-

Philadelphia Board of Directors of City Trusts or a nonprofit corporation formed by a municipality to effect city functions? See *Caplen v. Burcik*, 847 A.2d 56 (Pa. 2004), and *Sphere Drake Ins. Co. v. Philadelphia Gas Works*, 782 A.2d 510 (Pa. 2001). However, if the state or municipal governmental units are engaged in proprietary or private activities, attachment may lie particularly if the appropriate enabling statute permits the agency “to sue and be sued.” *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810 (Pa. 1965) (housing authority subject to attachment as it could “sue and be sued”). What about the Pennsylvania Liquor Control Board in its capacity of operating the “state store” system? Also, a statute creating a governmental agency could provide for a limited waiver of immunity in situations involving judicial orders, thus making it subject to attachment. *Smith, Inc. v. Belle*, 35 Pa.D.&C.3d 563 (C.P. Cumberland 1985) (Pennsylvania Lottery Commission); *Livingston v. Unis*, 659 A.2d 606 (Pa.Cmwlth. 1995). Whether federal agencies are subject to attachment also depends upon whether they are amenable to state court process, i.e., may they “sue and be sued.” See *Clarise Sportswear Co. v. U & W Mfg. Co.*, 223 F.Supp. 961 (E.D. Pa. 1963).

Although *Tominello v. Jamesway*, 573 A.2d 218 (Pa.Super. 1990), notes a practice of attachment execution against the former Commonwealth of Pennsylvania Medical Professional Liability Catastrophic Loss (CAT) Fund, the defense of sovereign immunity enjoyed by the CAT Fund (see *Deveaux v. Palmer*, 558 A.2d 166 (Pa.Cmwlth. 1989)) was not raised therein. At least one trial court has considered and granted the former CAT Fund’s preliminary objections to attachment on the basis of sovereign immunity and related grounds.

Federal funds received by an organization as a grant for specific, appropriated purposes retain their “federal character” in the hands of the organization, in the form of bank deposits, and have sovereign immunity from execution. *Palmiter v. Action, Inc.*, 733 F.2d 1244 (7th Cir. 1984); see *Johnson v. Johnson*, 332 F.Supp. 510 (E.D. Pa. 1971) (Medicare program administrator was acting as agent for United States Secretary of Health, Education, and Welfare and was entitled to sovereign immunity relative to funds due physician for his service, and therefore was not subject to support order garnishment). Would not these same concepts be relative to the funds of other sovereigns, i.e., states and municipalities, held in the hands of grant recipients and agents?

Property held by the court or its officers in their official capacity is also immune. This is the doctrine of custodia legis. See Note, Pa.R.C.P. 3101; 13 *Standard Pennsylvania Practice 2d* § 77:18, 8 *Goodrich-Amram 2d*, § 3101(b)(3). Several Superior Court panel majorities have applied the doctrine of custodia legis to immunize from normal lien priority and execution tenancy-by-entirety property following divorce but before final conclusion of divorce litigation, and have provoked sharply critical comparison opinions. See *Keystone Sav’s Ass’n v. Kitsock*, 633 A.2d 165 (Pa.Super. 1993) (Beck, J., concurring and dissenting); *Fidelity Bank v. Carroll*, 610 A.2d 481 (Pa.Super. 1992); *Klebach v. Mellon Bank, N.A.*, 565 A.2d 448 (Pa.Super. 1989) (Johnson, J., dissenting), app. granted, 593 A.2d 420 (Pa. 1990). Would the same concept be applied by the courts to immunize marital property titled in the name of one spouse only and subject to a potential or actual order for equitable distribution? See *Livingston v. Unis*, above. In *Mid-State Bank & Trust Co. v. Globalnet International, Inc.*, 735 A.2d 79 (Pa. 1999), four justices joined in the opinion of Justice Newman criticized (and largely eviscerated) the application of the doctrine of custodia legis to marital property pending equitable distribution. But see *City of Easton v. Marra*, 862 A.2d 170 (Pa.Cmwlth. 2004).

It is said that the immunity of execution due to property being held in the custody of the law, i.e., *custodia legis*, expires when the purpose for which that property has been held is achieved and merely awaits distribution, *Weicht v. Automobile Banking Corp.*, 47 A.2d 705 (Pa. 1946). When the public purpose for holding the funds has been discharged, they are no longer in *custodia legis*, *Wheatcroft v. Smith*, 362 A.2d 416 (Pa.Super. 1976). Thus surplus funds in the hands of the sheriff, awaiting distribution to a judgment debtor, are subject to execution, *Appeal of Herron*, 29 Pa. 240 (1857). This whole analysis was questioned by the Commonwealth Court, in *Ramins v. Chemical Decontamination Corp.*, 560 A.2d 836 (Pa.Cmwlt. 1989). Although the expiration of *custodia legis* immunity would not appear to disturb the protection of sovereign immunity, the Commonwealth Court recently assumed the contrary, *Koken v. Colonial Assurance Co.*, 885 A.2d 1078 (Pa.Cmwlt. 2005), *aff'd*, 893 A.2d 98 (Pa. 2006).

### 1-9.3 What Property Is Subject to Attachment

Illustrative examples of subjects of attachment include money on deposit; unpaid fire or business insurance proceeds; tenant's maturing debt for rent due; debt owing for goods sold and delivered; debt owing for services performed; legacies and interests in trusts and decedent's estates; debts owing to a corporation from principals or to principals from a corporation; dividends declared; patent rights, copyrights, and royalties; pledged, leased, or bailed property; automobile insurance; interest in a partnership; sums owing from credit card issuers to merchants; an insurer's duty to an insured to pay a claim; and a successor's agreed obligation to a judgment debtor to undertake its lease payments or other debts. What about Corporation of Mine II relative to the payments it submits for the loan or lease of Corporation of Mine I with or without any explicit agreement between the two corporations? If corporate officers breach their fiduciary duty to procure workers' compensation insurance for their company, 77 P.S. § 501, are they not indebted to their company and thus subjects of garnishment proceedings?

Sums owing from banks to deposit customers are the classic intangible personal property subject to attachment. However, the same principles would apply to cash and money orders given to a bank, post-garnishment, in order to purchase cashier's checks, even though there is no deposit. *Witco Corp. v. Herzog Bros. Trucking, Inc.*, 863 A.2d 443 (Pa. 2004). Also subject to attachment are securities in a custodial account managed by a garnishee. *Royal Bank of Pennsylvania v. Selig*, 644 A.2d 741 (Pa.Super. 1994), *app. denied*, 655 A.2d 516 (Pa. 1995).

Unliquidated claims in trespass, *Eaton v. Pittsburgh Terminal Coal Corp.*, 84 F.2d 364 (3d Cir. 1936), or *assumpsit* are not subject to attachment. 8 *Goodrich-Amram 2d*, § 3101(b):6. After settlement or verdict, the then-liquidated claims become subject to attachment. If your judgment debtor secured a significant negligence verdict or settlement, whom would you garnish? Your judgment debtor's negligence defendant, the negligence defendant's carrier and/or defense counsel (or firm), and/or the judgment debtor's negligence counsel (or firm)? Answer: be conservative and garnish all of the foregoing.

Funds deposited on account of future expenses may be the proper subject of garnishment proceedings. *Wade v. Field*, 30 Pa.D.&C.5th 299 (C.P. Dauphin 2013) (attachment of funds that were prepaid to assisted living facility for anticipated future expenses and were subject to refund were capable of being seized via attachment execution). Would a lawyer's or other professional's refundable retainer be treated any differently?

After recovery of judgment, a plaintiff may garnish the judgment debtor's insurance carrier on the theory that it owes a liquidated obligation of indemnification to its allegedly insured judgment debtor and has property of such debtor in its possession. *Brown v. Candelora*, 708 A.2d 104 (Pa.Super. 1998), app. granted, 725 A.2d 176 (Pa. 1999) (and appeal withdrawn March 25, 1999); *Adamski v. Miller*, 681 A.2d 171 (Pa. 1996); *Butterfield v. Giuntoli*, 670 A.2d 646 (Pa.Super. 1995), app. denied, 683 A.2d 875 (Pa. 1996). A garnishee insurance carrier may raise as defenses each and every basis it had to deny indemnity coverage. May a judgment creditor have attachment execution to pursue its judgment debtor's potential bad-faith claim pursuant to the Act of February 7, 1990, P.L. 11, No. 6, § 3, 42 Pa.C.S. § 8371? This writer suggests that the Supreme Court of Pennsylvania would have upheld the negative decision of *Brown v. Candelora*, above, because the Superior Court correctly concluded that a bad-faith claim is unliquidated. See also *Marks v. Nationwide Ins. Co.*, 762 A.2d 1098 (Pa.Super. 2000).

There is authority that money due under a support order is not a "debt" and therefore not subject to attachment. *Gimbels v. Farkas*, 44 Pa.D.&C.2d 791 (C.P. Chester 1968). Very old lower court cases recognize alimony to be the subject of attachment for debts incurred subsequent to the entry of the divorce decree. See cases cited in the superseded 10 *Standard Pennsylvania Practice*, ch. 42, § 51, p. 92. For a modern trial court decision holding that alimony may not be garnished to the extent that it is intended to be support following marriage dissolution, see *Megnin v. Martin*, 8 Pa.D.&C.4th 185 (C.P. Armstrong 1990). More recently, without citation of any of the foregoing, the Superior Court of Pennsylvania has conclusively held that child support and alimony payments were not "debt" subject to garnishment. *Boback v. Ross*, 114 A.3d 1042 (Pa.Super. 2015).

Certain property is exempt from execution under Pennsylvania or federal law and may not be garnished. See Note, Pa.R.C.P. 3123.1, and chapter 4 of this book.

That the property subject to attachment execution may be outside the Commonwealth of Pennsylvania presents no jurisdictional issue because of the partly in rem and partly in personam nature of garnishment proceedings, *Bianco v. Concepts "100", Inc.*, 436 A.2d 206 (Pa.Super. 1981) (insurance policy).

Right to sepulture, i.e., the use of burial plots and mausoleum slots, is likely best addressed via attachment execution. See the discussion at section 1-6.1, above.

#### **1-9.4 Execution Against Partnership Shares and Limited Liability Company Membership**

A general partnership share is subject to a court's "charging order" in aid of execution, 15 Pa.C.S. § 8345, Pa.R.C.P. 3148(a)(3). Pursuant to the statute, a court may simply order a judgment debtor's partnership interest charged with payment of the debt or "make all other orders . . . which the circumstances of the case may require." Among the remedies contemplated by the statute is "foreclosure." The court enjoys broad discretion in the selection and timing of these various remedies, *Shor v. Miller's Flower Shop*, 84 Pa.D.&C. 164 (C.P. Philadelphia 1953); *Frankil v. Frankil*, 15 Pa.D.&C. 103 (C.P. Philadelphia 1931). The rights of the judgment creditor in execution against the share of a partner in a limited partnership may be narrower, 15 Pa.C.S. § 8563. The latter provision does not speak in terms of "all other orders," or "foreclosure," but only addresses itself to charging the partnership interest with payment of the unsatisfied judgment amount. However, the plaintiff in execution benefitting from a charging order against a limited partnership share "has the rights of an assignee of the partnership interest,"

including the opportunity to apply to the court for dissolution, 15 Pa.C.S. § 8572. Does Pa.R.C.P. 3148(a)(3) permit a broader remedy against a limited partnership share than that set forth in 15 Pa.C.S. § 8572? A leading treatise implies that “the statute can no longer be viewed as the exclusive means of obtaining a judgment in the form of a charging order,” 8A *Goodrich-Amram 2d*, § 3148(a)(4). See also *In re Allen*, 228 B.R. 115 (Bankr. W.D. Pa. 1998), interpreting Pa.R.C.P. 3108(a)(3), and *Auburn Steel Co. v. American Steel Engineering Co.*, Civil Action No. 91-5747 (E.D. Pa. July 2, 1993) (allowing judicial sale of limited partnership interest via charging order). Depending upon the membership agreement for the same, a limited liability company membership may not be amenable to judicial sale, at least where there is more than one member. *Zokaites v. Pittsburgh Irish Pubs, LLC*, 962 A.2d 1220 (Pa.Super. 2008), app. denied, 972 A.2d 523 (Pa. 2009). What is the effect of transferring a partnership interest or LLC membership subsequent to the service of a writ of attachment execution?

### 1-9.5 Effect of Attachment

Service of the writ upon a garnishee literally enjoins the garnishee from paying any debt to or for the account of the defendant and from delivering any property of the defendant or otherwise disposing of it. Pa.R.C.P. 3252. Service of the writ attaches a judgment debtor’s property acquired by a garnishee after service of the writ. Pa.R.C.P. 3111(b). Violation of this mandate may be enforced by contempt proceedings, Pa.R.C.P. 3111(d), possibly resulting in the imposition of a fine against the garnishee to the use of the plaintiff. See *Royal Bank of Pennsylvania v. Selig*, 644 A.2d 741 (Pa.Super. 1994). “A garnishment is, in fact, an injunction and disobedience ... is punishable, under certain circumstances, by contempt.” *Goodstein v. Goodstein*, 11 Pa.D.&C.4th 294, 304 (C.P. Philadelphia 1991); *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1262 (3d Cir. 1994); *Finberg v. Sullivan*, 634 F.2d 50, 61 (3d Cir. 1980). Classic contempt jurisprudence allows a court wide latitude to award counsel fees against a contemnor. *Wood v. Geisenhemer-Shaulis*, 827 A.2d 1204 (Pa.Super. 2003); 1 *Standard Pennsylvania Practice 2d* § 5:46. Counsel fees were awarded against a contumacious garnishee in the matter of *In re Main, Inc.*, Civil Action No. 99-2296, No. 99-2326 (E.D. Pa. August 23, 1999).

The word “garnishment” is derived from the Norman French word “garnir,” meaning to warn. (citations omitted). Thus, a summons of garnishment under our statutes is a warning to the garnishee not to pay the money or deliver the property of the judgment debtor in his hands, upon penalty that if he does *he may subject himself to personal judgment*.

*In re Sowers*, 164 B.R. 256, 258 (Bankr. E.D. Va. 1994).

The lien of attachment and injunction of the writ continue and are *not* disturbed by opening (as distinguished from striking) judgment. *In re FRG, Inc.*, 919 F.2d 850 (3d Cir. 1990). Would not the injunction of the writ restrain Corporation of Mine II from paying the loans and leases of Corporation of Mine I? See the discussion in section 1-9.3, above. Obviously, post-garnishment exchange of cash for cashier’s checks between a garnishee bank and a judgment debtor is a violation of Pa.R.C.P. 3111, subjecting the bank to liability, *Witco Corp. v. Herzog Bros. Trucking, Inc.*, 863 A.2d 443 (Pa. 2004).

Effective April 7, 2007, in the absence of a court order, “service of the writ upon a bank or other financial institution as garnishee shall not attach *any* of the defendant’s funds on deposit ... in an account in which ... funds are deposited electronically on a recurring basis and are identified as ... exempt” or do not exceed \$300. Pa.R.C.P. 3111.1 (emphasis

added). In 2009, the Procedural Rules Committee of the Supreme Court of Pennsylvania rejected a proposal to reverse Pa.R.C.P. 3111(b) and limit the effect of the writ to presently held property and not include after-acquired property.

At common law, attachment of the bank account of joint tenants with right of survivorship severed the relationship into a tenancy in common, *American Oil Co. v. Falconer*, 8 A.2d 418 (Pa.Super. 1939), entitling a plaintiff in execution to the judgment debtor's fractional share. The writer took the view that if the judgment debtor had the right to draw on 100 percent of the account, so could the plaintiff. As to the joint accounts of individuals, 20 Pa.C.S. § 6303 provides that prior to death the account belongs to the co-depositors in proportion to their contributions, unless there is clear and convincing evidence of a different intent, e.g., that an inter vivos gift was intended, *Deutsch, Larrimore, & Farnish, P.C. v. Johnson*, 848 A.2d 137 (Pa. 2004) (plurality); compare *Cannuni v. Schweiker*, 740 F.2d 260 (3d Cir. 1984) (qualification for benefits); *In re Johnson*, 269 B.R. 324 (Bankr. M.D. Pa. 2001) (bankruptcy estate had no interest in funds deposited by another in joint account titled in the name of debtor and mother).

The garnishee has the right to set off its claims against a defendant's depository account as they mature. See *Almi, Inc. v. Dick Corp.*, 375 A.2d 1343, 1348 (Pa.Cmwlth. 1977). But "[i]f the claim is not then ripe for action it cannot be set off." *Mathews v. Malloy*, 272 A.2d 226 (Pa.Super. 1970). The right to set off by a bank is less clear where it is not the custodian of general funds of a judgment debtor but is, rather, the custodian of securities. In *Royal Bank of Pennsylvania v. Selig*, 644 A.2d 741 (Pa.Super. 1994), the Superior Court found that the garnishee bank had no right of set-off against the debtor's securities, which it held and disposed of in violation of the injunction of the writ. However, even though this constituted contempt, the bank's conduct was excused due to its security interest via pledge. At least one major bank known to the writer has pleaded new matter of doubtful soundness that it has a duty to honor potential claims for returned merchandise and goods not received relative to merchant debtors against whom attachment execution issues—hence, the possibility for such future charges to merchant accounts is a present set-off. See, generally, 15 U.S.C. § 1666. Garnishees sometimes will "bluff" by asking the plaintiff to discontinue attachment because of a claimed right of set-off. A plaintiff is well advised to put the garnishee to the test of exercising that right. *Query*: Will a garnishee bank actually exercise its right of set-off against your judgment for \$10,000 where its customer/judgment debtor has \$200,000 on deposit and a \$300,000 demand loan? Is the bank prepared to prevent its favored customer from meeting the payroll and otherwise continuing operations? Attachment of business bank accounts subject to a loan set-off does not automatically result in set-off and may engender delicate negotiations and mutual compromise by the plaintiff and garnishee. Remember, the garnishee bank must either exercise its right of set-off against the whole deposit or let the plaintiff prevail. The garnishee bank having a right of set-off and/or secured position is not thereby excused from obeying the injunction in the writ and, therefore, may not disburse funds to or for the account of the defendant, e.g., the defendant's trade creditors, employees, taxing authorities, etc. The right of set-off is the garnishee's own shield, but it may not use its shield to protect a defendant from attachment execution.

The writ operates to attach property of the defendant acquired after service, Pa.R.C.P. 3111(b), until judgment is entered against the garnishee. *Caddie Homes, Inc. v. Falic*, 235 A.2d 437 (Pa.Super. 1967).

### 1-9.6 Interrogatories in Attachment and Litigation Between Plaintiff and Garnishee

The plaintiff may file interrogatories with the prothonotary when commencing execution or afterwards. Pa.R.C.P. 3144(a). They may be delivered to the sheriff for simultaneous service with the writ, or the plaintiff may wait until after the writ is served and then serve the interrogatories in accordance with Pa.R.C.P. 440, since they are not the “original process” served on a garnishee. The latter procedure saves expenditure of costs and sometimes surprises prothonotaries, sheriffs, and garnishees who are accustomed to the former practice. It behooves the plaintiff to make sure that a sheriff’s return of service for the writ of execution and a sheriff’s return or certificate of service of the interrogatories in attachment are docketed of record prior to entering judgment by default.

Interrogatories must substantially be in the form prescribed by Pa.R.C.P. 3253, but may include other appropriate interrogatories. To discourage literally correct “cute answers” that acknowledge the garnishee’s obligation to the defendant but state no amount, the sample interrogatories included as form 1-16 are recommended. The use of the interrogatories in attachment as exactly set forth in Pa.R.C.P. 3253 is strongly disfavored.

Effective April 1, 2007, the form of interrogatories in attachment was amended, Pa.R.C.P. 3253, to reflect the requirement of new Pa.R.C.P. 3111.1 that no funds of an individual less than \$300 and no account receiving recurring electronic deposits of exempt funds be subjected to garnishment.

The interrogatories reflect the nature of the relationship between the plaintiff and garnishee. It is as if the interrogatories were a complaint and the answers were an answer in a civil action. Pa.R.C.P. 3145(a); *PaineWebber, Inc. v. Devin*, 658 A.2d 409 (Pa.Super. 1995). Local procedures should be consulted to obtain compulsory arbitration or trial listings. Compare *Hanchey v. Elliott Truck Brokerage Co.*, 218 A.2d 743, 745 (Pa. 1966) (plaintiff “could put the issue down for trial immediately”). Listing a matter for trial between a plaintiff and a garnishee does not fit computer-driven scheduling in some counties and is so relatively rare as to fluster judicial personnel responsible for administratively assigning such trial dates. Interrogatories in attachment are designed to frame the plaintiff’s litigation of the issue of the judgment debtor’s property in the hands of the garnishee; they are not discovery in aid of execution. *PaineWebber, Inc.*, above.

The garnishee or the defendant may file preliminary objections raising the defense of immunity, exemption, or jurisdiction over the garnishee. Pa.R.C.P. 3142. Unless these defenses are raised by the garnishee (or defendant) prior to the entry of judgment by default (or otherwise), they are deemed to be waived. *Jefferson Bank v. Morris*, 639 A.2d 474 (Pa.Super. 1994), app. denied, 648 A.2d 789 (Pa. 1994); *Ramins v. Chemical Decontamination Corp.*, 560 A.2d 836 (Pa.Cmwlt. 1989). See Pa.R.C.P. 3142(a) note and 3145(b)(2) note.

In the answer under “new matter,” the garnishee may assert the defenses of immunity or exemption or any defense or counterclaim that it could assert against the defendant. Pa.R.C.P. 3145(b).

The garnishee may challenge record defects in service of the complaint on defendants in order to raise the issue of lack of personal jurisdiction over them and thus avoid garnishment by having the judgments stricken. *Dubrey v. Izaguirre*, 685 A.2d 1391 (Pa.Super. 1996).

**1-9.7 Garnishee's Duties****1-9.7.1 Substantive Duties to Investigate and Restrain Funds**

Garnishees served with writs of execution have a duty to refrain from transferring judgment debtor values in their possession or control to or for the account of a defendant. Pa.R.C.P. 3111(d). Per Pa.R.C.P. 3252, the writ of execution actually contains an injunction to the garnishee that states the following:

[T]he garnishee is enjoined from paying any debt to or for the account of the defendant and from delivering any property of the defendant or otherwise disposing thereof;

When a garnishee receives a writ of execution it has a duty to ascertain what, if any, debtor values it possesses or controls. “[A] garnishee . . . is a party to the litigation and, as such, is required to exercise a high degree of care in protecting the rights of the other parties until a legal result has been regularly reached.” *Shipman v. Seiwel*, 101 Pa. Super. 95, 100 (1931).

Proper identification of the defendant by plaintiff's counsel at the litigation outset is critical. Name variations can spell the difference between success and difficulty when that defendant name is searched for in the computer records of a financial institution. In *Adams Apple Products Corp. v. Monmouth Products Co.*, 85 F.Supp. 797, 798–99 (E.D. Pa. 1949), it was held that a writ of execution issued against “Monmouth Products Co.” was close enough to the account titled as “Monmouth Products Co., Inc.” that even the most unreasonable person should have been put on inquiry notice just by looking at the names.

In *Sojitz Corp. v. Prithvi Information Solutions Ltd.*, No. 2:12mc471 (W.D. Pa. October 9, 2015), the writ contained the word “Limited” in the defendant name designation, while the bank account name ended with the word “Ltd.” Finding that the garnishee was at fault in not identifying the “Ltd.” account and entering summary judgment for nearly \$600,000, the court held:

Under Pennsylvania law, “when the defendant is not known to the garnishee by the name used in the writ of attachment, payment by the garnishee in ignorance of the defendant's identity will relieve the garnishee from liability unless he has notice of facts which put him on inquiry as to the defendant's identity.” *Adams Apple Products Corp. v. Monmouth Products Co.*, 85 F. Supp. 797, 798–799 (E.D. Pa. 1949) (citing *Greco et ux. v. Rainal et al.*, 134 Pa. Super. 99, 103, 4 A.2d 232 (Pa. Super. 1938); *Shipman v. Seiwel*, 101 Pa. Super. at 100). The Court finds facts sufficient to put PNC on inquiry of the debtor's identity and that PNC fell woefully short of the required “high degree of care in protecting the rights” of *Sojitz* in this matter.

**1-9.7.2 Procedural Duties to Defendant**

The garnishee must “promptly” forward a copy of the writ to each defendant, Pa.R.C.P. 3140(a), even though the sheriff has already done so. Pa.R.C.P. 3108(a). Pity the defendant who receives writs served by the sheriff, mailed by the sheriff, and mailed by the garnishee.

The garnishee must “promptly” forward a copy of his or her answers to interrogatories to the defendant. Pa.R.C.P. 3140(b).

The garnishee has no duty to resist or defend attachment if it forwards these documents to the defendant as required. Pa.R.C.P. 3141(a).

## **1-9.8 Judgment Against Garnishee**

### **1-9.8.1 By Admission**

If the garnishee admits in answers to interrogatories that it owes money to the defendant, the plaintiff may take judgment and assess damages for what is admitted, upon praecipe to the prothonotary. The plaintiff may still proceed against the garnishee concerning other property. Judgment may be entered in a maximum sum of the judgment, interest, and costs. Pa.R.C.P. 3146(b). “The entry of judgment [by admission] shall not bar the right of the plaintiff to proceed against the garnishee as to any further property.” *Id.* However, once judgment is entered, the writ no longer has the effect of attaching property of the debtor coming into the hands of the garnishee. Pa.R.C.P. 3111(b). For the convenience of the prothonotary, a copy of the admissions may be attached to the praecipe. Without benefit of state or local rule, some prothonotary offices, such as Philadelphia’s, require that a copy of the answers be attached to the praecipe.

### **1-9.8.2 By Default**

Ten days following notice of intention to take default, Pa.R.C.P. 237.1, judgment by default may be entered against the garnishee. The amount of the judgment against the garnishee is assessed by the court of motion. A hearing is held if the garnishee chooses to give testimony. Absent presentation of evidence by the garnishee, judgment should be entered against it for the amount of the judgment against the defendant, and the court may award the plaintiff reasonable expenses, including attorney’s fees. Pa.R.C.P. 3146(a).

### **1-9.8.3 On Pleadings or After Trial**

The court may enter judgment for the defendant’s property in the garnishee’s possession, but money judgments will not exceed the amount of judgment against defendants, interest, and costs. Pa.R.C.P. 3147.

### **1-9.8.4 Judgment for Specific Property**

Judgment against the garnishee may be entered for specific property of the defendant in the hands of the garnishee. Pa.R.C.P. 3147.

### **1-9.8.5 Time Limitation on Entering Judgment Against Garnishee**

Judgment against the garnishee may not be entered earlier than 20 days after service of the writ. If an exemption claim is pending, a money judgment can be entered against the garnishee only by leave of court. Pa.R.C.P. 3123.1(c).

## **1-9.9 Time Limits on Attachment Practice**

If the writ is served on the garnishee without the filing of interrogatories, the garnishee may, upon praecipe, require the plaintiff to do so in 20 days or suffer non pros. Pa.R.C.P. 3143(f). Upon filing its answer to interrogatories, the garnishee may, upon praecipe, require the plaintiff to enter judgment by admission, place the matter on the trial list, or suffer non pros. Pa.R.C.P. 3143(g). The entry of non pros dissolves the attachments. If the plaintiff does not prosecute attachment “with diligence,” the court may dissolve it upon petition of any party. Pa.R.C.P. 3143(h).

**1-9.10 Execution Against Garnishee**

If a money judgment is entered against the garnishee, the plaintiff may have execution against the garnishee. Pa.R.C.P. 3148(b). To enforce a judgment against a bank or savings and loan association, one might consider garnishing the Federal Reserve Bank of Philadelphia or the Federal Home Loan Bank of Pittsburgh, respectively.

If judgment for specific property is entered against the garnishee and it fails to make the property available, the plaintiff may:

- have the sheriff seize the property, Pa.R.C.P. 3127; or
- proceed to seek judgment against the garnishee for the value of the property.

Compare Pa.R.C.P. 3148(c).

**1-9.11 Dissolution of Attachment**

Attachment may be dissolved by posting a bond or cash with the prothonotary on the condition that the plaintiff be paid the amount finally determined due by the court in judgment. Obviously, this should occur before judgment is entered against a garnishee. Attachment may also be dissolved by the court on petition upon finding that the value of property attached is excessive. Pa.R.C.P. 3143. In *Hagel v. United Lawn Mower Sales & Service, Inc.*, 653 A.2d 17, 20 (Pa.Super. 1995), the Superior Court recognized the principle that an order releasing property from attachment “must be premised upon the filing of a bond or [appropriate] security” but strangely relied upon Pa.R.C.P. 3119 pertaining to levies of tangible personal property instead of considering the parallel Rule 3143 relating to attachment of intangible personal property.

**1-9.12 Garnishee’s Costs**

Garnishees who enter an appearance in an attachment prior to discontinuance of the attachment answer or who are “found” to have no property of the defendant except such as has been admitted by the answer filed are entitled to “reasonable” counsel fees as part of the taxable costs. 42 Pa.C.S. § 2503(2) and (3). House counsel tends to ask for modest fees if at all. Outside counsel tends to ask for relatively high fees. Does the word “found” mean “adjudicated”? *Query*: If judgment is entered by admission, without trial or hearing, is it “found” that the garnishee has no other property of the defendant? The garnishee bank typically charges its customer a fee for processing an attachment. Is such garnishee truly permitted to “double dip” by having costs assessed and charged to the plaintiff as well? This latter practice is detrimental to both plaintiff and defendant.

**1-10 RELIEF FROM EXECUTION****1-10.1 Setting Aside Execution**

Any party in interest, not necessarily a defendant, may move the court to set aside the service or levy of the writ on the grounds of technical defects, exemption, immunity, or other legal or equitable grounds. Pa.R.C.P. 3121(d).

For example, a void judgment obtained contrary to law and conferring no jurisdiction upon a court is no judgment at all and will not sustain the execution process. *Harris v. Harris*, 239 A.2d 783 (Pa. 1968) (execution on void judgment does not pass title); *Mancurie v. Concord-Liberty Sav’s & Loan Ass’n*, 445 A.2d 744, 746 (Pa.Super. 1982) (“void

judgment is one that does not warrant the issuing of [a writ of] execution”); *Cover v. Brown, Sutter & Co.*, 7 Pa.D. 19 (C.P. Jefferson 1897) (levy founded on void judgment set aside).

The foregoing applies to *facially void* judgments only, i.e., those subject to being stricken on petition to strike the same. Such a petition should be filed simultaneously with a corresponding motion to set aside a writ of execution. That a judgment might be *voidable* on a petition to open judgment based upon facts outside the record would not invoke the above-cited case law.

### 1-10.2 Stay of Execution

In an order staying execution, the court may impose terms and conditions and limit the length of the stay to a reasonable time. Pa.R.C.P. 3121(c). This equitable power is primarily a substitute for the suspended Acts of Assembly requiring inquisition and condemnation prior to sale of real property. Pa.R.C.P. 3121(c) (comment).

Resulting from the waves of personal economic tragedies that roiled across America during the Great Depression of the 1930s, the Deficiency Judgment Act, now found at 42 Pa.C.S. § 8103, *presumes* that real estate sold at execution is of sufficient value to satisfy the executing judgment, *unless* the plaintiff judgment creditor timely petitions to fix its fair market value. Although no similar statute or rule of court specifically regulates the sale of personal property for this purpose, at least one lower court jurist has read Pa.R.C.P. 3121(d) as a vehicle to preclude a second execution where it was claimed that goods sold for costs and one dollar at an earlier judicial sale had value more than sufficient to satisfy the judgment, *Osterlund v. Osterlund*, 26 Pa.D.&C.4th 275 (C.P. Cumberland 1994). See *Capozzi v. Antonoplos*, 201 A.2d 420 (Pa. 1964) (sale by sheriff of shares of stock for \$58.30 set aside upon proof that their value was \$20,000); *Greater Pittsburgh Bus. Dev. Corp. v. Braunstein*, above.

The grant of a stay of execution should be more than the application of idiosyncratic judicial favor flowing from a personal sense of justice. When faced with a defense request for a stay of execution, plaintiff's counsel should always endeavor to persuade the court to condition the stay upon bonding that is adequate for the circumstances. After all, since the judge is “giving” something to the defense side, is it not “solomonic” to give something to the plaintiff's side as well? Do you know (or can you imagine) what a bonding company requires before it becomes a surety for the payment of a judgment upon dissolution of a stay of execution following a defendant's loss on the merits?

In general, a court will not disrupt the rights of creditors to collect valued judgments by any legal means. . . . Pennsylvania law has long recognized the inherent power of a court to stay an execution proceeding where necessary to protect the rights of the parties . . . A court does not exercise this power capriciously; unless the facts warrant an exercise of that judicial discretion, a court should not stay an execution. . . . *In order to merit a stay of execution, the law and equities in the case of the party seeking relief must be plain and free from doubt or difficulty.* (Emphasis added.)

*Morgan Guaranty Trust Co. v. Staats*, 631 A.2d 631, 634–35 (Pa.Super. 1993) [citations omitted], app. dismissed, 637 A.2d 288 (Pa. 1994). Would that those words were better known to many judges who often seem to grant stays just because the defendant filed a petition to open judgment, regardless of the merit of the petition.

A defendant may claim exemption or immunity of property from levy by filing with the sheriff the claim form that accompanies the writ. Pa.R.C.P. 3252(a). The sheriff presents the claim to the court, which must hear the claim within five business days. Pa.R.C.P. 3123.1. This rule was adopted in an attempt to render execution practice constitutional after *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980), by requiring a prompt post-seizure hearing where debtors could expeditiously present their exemption claims. Unfortunately, some courts ignore their obligation to list these claims rapidly. One southeastern Pennsylvania county is known to take months to schedule the hearing that the Supreme Court of Pennsylvania requires in five business days.

Any person in interest, not only the judgment debtor, may petition the court to release specific property from levy if its value is excessive compared to the judgment, interest, and costs. Pa.R.C.P. 3119(2); *Commonwealth Bank v. Iorio*, 679 A.2d 820 (Pa.Super. 1996) (enforcement of judgment in connection with note and mortgage).

Any party in interest may obtain a stay by entering a bond for the judgment, interest, and costs conditioned upon paying the amount due within 90 days. Pa.R.C.P. 3121(a)(2).

The debtor may claim a statutory exemption in cash or kind before the date of the sale by notifying the sheriff and designating property. Pa.R.C.P. 3123(a).

Also, see section 1-11, below, relative to a UCC-1–secured party's opportunity to move for relief from execution.

#### **1-11 THIRD-PARTY PROPERTY CLAIMS AND SHERIFF'S INTERPLEADER**

This practice and procedure pertains exclusively to claims that tangible personal property levied upon belong to someone other than the judgment debtor. Pa.R.C.P. 3201. In the strange case of *Leopold v. Tuttle*, 549 A.2d 151 (Pa.Super. 1988), the claim proceeded to judgment in the trial court and determination in the Superior Court as a property claim subject to these rules, even though the property in question was real estate. Correct and contra, *DiGiorgis v. 3G's Contracting, Inc.*, 62 A.3d 1024 (Pa.Super. 2013); *Reliance Ins. Co. v. Schoolfield Constr. Co.*, 14 Pa.D.&C.4th 490 (C.P. Chester 1992). That which is permanently affixed to the land, such as a central water and sewer system, is a fixture, constitutes real estate, and is not subject to the property claim process. *Virginia Lots Corp. v. Escape, Inc.*, 26 Pa.D.&C.4th 442 (C.P. Pike 1994). A claim to ownership of intangible personal property is not appropriately made via Pa.R.C.P. 3201–3216. *DiGiorgis*, above.

The claimant files a property claim in writing with the prothonotary and with the sheriff in the prescribed form, Pa.R.C.P. 3258 and Pa.R.C.P. 3260, identifying the property, value, and source of "ownership." Pa.R.C.P. 3202. All averments in the claim are deemed denied. Pa.R.C.P. 3206(b). A third-party property claim must be signed by a "claimant" or someone on the claimant's behalf. A commercial defendant in judgment making and signing a claim on behalf of unidentified customers does not satisfy Pa.R.C.P. 3202(b). *Waterbury Assocs., Inc. v. Waterbury Kitchens, Inc.*, 34 Pa.D.&C.5th 209 (C.P. Chester 2013).

The filing of the claim stays execution against the claimed property only. No bond is required. Debtors sometimes encourage the filing of third-party property claims by closely affiliated persons to gain the relief provided by the stay.

The sheriff sends a copy of the claim to the plaintiff, defendant, and all execution creditors. Unless appraisal is requested, Pa.R.C.P. 3205(b), the sheriff will accept the value set forth in the claim. Pa.R.C.P. 3203. Any party may appeal this appraisal. You represent a property claimant who is closely affiliated with the defendant and who asserts title to goods levied upon as property of an individual judgment debtor. Does your client (and “friend”) have an incentive to value the household goods at a mere \$300? See 42 Pa.C.S. § 8123(a) (\$300.00 general exemption). Creditor’s counsel, beware!

Claimants are well advised to corroborate their claims with documentation, especially where non-household personalty is involved. A naked allegation of ownership may be too weak to support a prima facie determination in favor of the claimant. Execution creditors may respond with their factual claims and legal points if desired.

Within 10 days of filing the claim, the sheriff must determine whether the claimant is a prima facie “owner” of the property in whole or in part, Pa.R.C.P. 3204, and notify all parties. Pa.R.C.P. 3206(a), 3207(a). The sheriff is permitted by these rules to make his or her determination on the papers submitted; this is the practice of the sheriff of Philadelphia. In many other counties, local customs or rules allow the sheriff (or one of the sheriff’s deputies) to conduct a hearing prior to this determination.

A recurring issue—lacking clear appellate guidance—is the competing claims of the execution judicial lien creditor and the Uniform Commercial Code—secured party. Compare *Klingner v. Pocono Int’l Raceway, Inc.*, 433 A.2d 1357 (Pa.Super. 1981) (reversing denial of UCC-1—secured party’s motion to set aside sheriff’s levy), with *Wells v. Alexis Golden Triangle, Inc.*, 496 A.2d 828 (Pa.Super. 1985) (UCC-1—secured party had right to attempt to participate in, and except to, the sheriff’s schedule of distribution, Pa.R.C.P. 3136). Ostensibly claiming “ownership,” secured parties who have not yet discharged their debtors’ interest under 13 Pa.C.S. § 9601 et seq. frequently file property claims although their interest is a lien only. There was no doubt that the UCC permitted a debtor’s rights in the collateral to be “involuntarily transferred (by way of . . . levy, garnishment or other judicial processes).” 13 Pa.C.S. § 9311, repealed. The comments thereto strongly amplified the intent of the drafters to permit the sale of debtors’ interest subject to the rights of the secured party. However, more recently adopted 13 Pa.C.S. § 9401(a) leaves the issue of involuntary transfer of a judgment debtor’s interest in secured collateral to “law other than [in] this division.” The comment invites judicial resolution of the question. An excellent discussion of this problem area by a Pennsylvania practitioner who criticizes courts reaching results at odds with former 13 Pa.C.S. § 9311 is found in “Secured Parties and Judgment Creditors—The Courts and Section 9-311 of the Uniform Commercial Code,” 30 *The Business Lawyer* 433 (1975). This writer believes that secured parties who file property claims asserting “ownership” when all they have is a lien position expose themselves to liability for counsel fees, 42 Pa.C.S. § 2503, and claims for abuse of process. 42 Pa.C.S. § 8351 et seq. But compare *Edgcomb Metals Co. v. Hydro-Temp, Inc.*, 34 Pa.D.&C.3d 129 (C.P. Berks 1984), and cases cited therein.

Within 10 days after the date of mailing, any execution creditor, claimant, or defendant may object to a sheriff’s determination or valuation in favor of a claimant by filing objections with the prothonotary in the required form. Pa.R.C.P. 3206(b), 3207(b), 3260. Upon filing an objection, the interpleader is at issue, in which the claimant is the plaintiff and all other parties are defendants. The only pleading is the claim, and all averments are treated as denied.

If the claimant objects, unless otherwise ordered by the court, the plaintiff may proceed with execution absent the posting of a bond by the claimant. Pa.R.C.P. 3207(d) and (e). As to household goods and furnishings in a claimant's home, the claimant "may file his own bond without security." Pa.R.C.P. 3208(b). In other instances, it must be with security and in an amount double the valuation of the property or outstanding writs, whichever is less. Pa.R.C.P. 3207(d). The proceeds of the sale may not be distributed until the claimant's objections are disposed of. Pa.R.C.P. 3207(e).

If the plaintiff objects, the property continues to be subject to the levy unless the claimant files the required bond. Pa.R.C.P. 3206(e). Read Pa.R.C.P. 3202(b)(2) in conjunction with Pa.R.C.P. 3203 and 3206(e) to understand why the often-overlooked procedure for valuation of property claimed may assume critical importance.

Note that pretrial discovery is available to assist in avoiding some of these issues. Pa.R.C.P. 4001 et seq.

Some counties, e.g., Philadelphia, submit these matters to arbitration pursuant to Pa.R.C.P. 1301. A jury trial may be demanded if issues of fact exist. *ESB Brands v. Kaplan*, 38 Pa.D.&C.2d 786 (C.P. Philadelphia 1966); Pa.R.C.P. 3126. If no questions of fact are involved, summary judgment procedure is available. 8 *Goodrich-Amram 2d*, § 3213:2. At trial, although the value determined by the sheriff is prima facie evidence, the parties may prove a different value. Pa.R.C.P. 3112.

In *Miner's Inc. v. Alpine Equipment Corp.*, 722 A.2d 691 (Pa.Super. 1998), the Superior Court held that a creditor might litigate the technique of piercing the corporate veil in property claim proceedings but reversed the lower court for so finding without adequate proof. Tactically, the litigation of that issue in interpleader proceeding is unwise except in the most egregious of cases. The spectre of counsel fees that may be awarded if unsuccessful in sheriff's interpleader proceedings is reason enough to counsel the creditor to file a separate civil action to pursue a claim for veil piercing.

A successful claimant may seek an award of special damages. Following trial, any prevailing party may seek an award of reasonable counsel fees as part of the costs. Pa.R.C.P. 3213; 42 Pa.C.S. § 2503(5); *Royal Bedding Co. v. Lorenz*, 561 A.2d 800 (Pa.Super. 1989). Unless special damages and counsel fees are sought as part of the interpleader proceedings prior to judgment, these claims will be deemed to be waived. *First Nat'l Bank v. Gooslin*, 582 A.2d 1054 (Pa.Super. 1990) (reargument denied), app. denied, 596 A.2d 157 (Pa. 1991). Does not 42 Pa.C.S. § 2503(5) also permit counsel to file a bill of costs upon prevailing with respect to an unappealed sheriff's determination?

An unappealed sheriff's determination bars subsequent claims from the same claimant. *Magid Robinson Co. v. Rondo Slade Dep't Stores, Inc.*, 9 Pa.D.&C.3d 729 (C.P. Philadelphia 1978), aff'd per curiam, 400 A.2d 621 (Pa.Super. 1978). Compare *Miller v. Feldstein*, 216 A.2d 619 (Pa. 1966) (decided under the repealed act regulating sheriff's interpleader, 12 P.S. § 2358 et seq.). Were it otherwise, what rule of law would prevent a disappointed property claimant from filing claims over and over again, always getting that cheap, unbonded stay of execution? But see *Koffman v. Smith*, 682 A.2d 1282 (Pa.Super. 1996) (footnote 3) suggesting that the sheriff's determination may not have preclusive effect.

Many third-party claims are simply the natural, logical effort of the non-judgment-debtor spouse claiming the household goods as his or her property or both spouses claiming ownership as the execution-proof tenancy by the entireties. In fact, counsel who

takes this scenario as far as sale should not be surprised when the assigned deputy sheriff encourages the filing of such a property claim right at the premises, moments before auction.

Other property claims are the transparent efforts of the principal of an enterprise, frequently a corporation, to suggest (for the purpose of obtaining an easy, cheap, temporary stay without bonding) that the goods belong to either a closely related corporation or the principal himself or herself. These weak claims may be swiftly tested by investigation and discovery. In what name is the fictitious corporation registered? In what name are the business tax permits and health or other licenses held? What do the tax returns of the judgment debtor and claimant indicate about who is taking depreciation for the subject equipment? Odd, is it not, that the goods or the premises of A Depressed Business, Inc. (Ira Insolvent, president), or Ira Insolvent trading as Last Chance Economics are claimed to be the property of Mrs. Insolvent, whose name fails to appear in any of the business paperwork?

Perhaps Mrs. Insolvent claimed that she and Ira owned the business and that it was not his proprietorship but a tenancy by the entireties ownership. Again, reference to the tax permits, licenses, and municipal tax returns would be most illuminating. Even if Mrs. Insolvent were correct about having a joint interest in the business with Ira, it would be better characterized as a husband and wife partnership, not a husband and wife tenancy by the entireties. *Vacco v. Marcus*, 485 A.2d 506 (Pa.Super. 1984); *Northampton Brewery Corp. v. Lande*, 10 A.2d 583 (Pa.Super. 1940). Plaintiff's counsel, who obtained judgment and issued execution against one person who appeared to be the operator of an unincorporated business only to be surprised by a spouse's property claim based upon an assertion of co-ownership, should attempt to characterize that alleged co-ownership as a partnership. If the plaintiff entirely prevails on the property claim, execution continues. If spousal co-ownership is established by stipulation or adjudication, garnishment of the judgment debtor's partnership interest would be the next logical step. At least one case suggests that fraudulent transfer litigation can occur in the context of third-party property claim litigation, *Alloway v. Martin*, 644 A.2d 201 (Pa. 1994), app. denied, 668 A.2d 1119 (Pa. 1995).

## 1-12 DISCOVERY IN AID OF EXECUTION

After judgment, before or after issuance of the writ, the plaintiff may take testimony of any person by way of deposition to discover assets of the defendant. Pa.R.C.P. 3117. A deponent must be served with a subpoena. The plaintiff may also issue written interrogatories to be served on the defendant, Pa.R.C.P. 3117(a); *Hanchey v. Elliott Truck Brokerage Co.*, 218 A.2d 743 (Pa. 1966), as well as a request for production of documents. *Noris v. Jonnett*, 23 Pa.D.&C.3d 155 (C.P. Allegheny 1982) (Wettick, J.) (methods of discovery permitted by rules of civil procedure are applicable to discovery in aid of execution). Income tax returns of a judgment debtor are not privileged and are subject to postjudgment discovery. *Kine v. Forman*, 209 A.2d 1 (Pa.Super. 1965). An excellent discussion of the methodology and scope of discovery in aid of execution is found in *PaineWebber, Inc. v. Devin*, 658 A.2d 409 (Pa.Super. 1995) (Beck, J.) (recognizing requests for documents and interrogatories to defendant as proper post-judgment discovery).

Why not a subpoena upon a person not a party for production of documents and things *in aid of execution*, pursuant to Pa.R.C.P. 4009.21? Your judgment debtor has just given you discovery responses of “few assets.” Consider issuing a “records subpoena” to his or her mortgage company or bank pursuant to Rule 4009.21 et seq. and see if his or her loan application was just as “thin.” A records subpoena to the judgment debtor’s employer could produce depository bank information on the reverse side of paychecks.

Consider a request pursuant to Pa.R.C.P. 4009.31 and 4009.32 to permit entry upon your judgment debtor’s premises to inspect, measure, survey, or photograph *in aid of execution*. Maybe it is not worthwhile to send the sheriff to make a levy until plaintiff or plaintiff’s representative can evaluate the tangible personal property by viewing the same and perhaps videotaping it.

Periodically, the author has encountered answers to motions to compel discovery in aid of execution that challenge the underlying judgment as voidable by way of asserting grounds to open the same. In *Kaplan v. I. Kaplan, Inc.*, 619 A.2d 322 (Pa.Super. 1993) (Beck J.), the Superior Court of Pennsylvania held that the validity of a judgment may not be raised as a defense to a petition for supplementary relief in aid of execution. The same analysis applies to challenge the motions to compel discovery for execution.

All reasonable expenses in discovery may be taxed against the defendant as costs if the proceeding produces information that the defendant has property available for execution. Pa.R.C.P. 3117(b).

A judgment debtor compelled to testify in aid of execution receives “transactional immunity” from state and federal prosecution, but the privilege to avoid self-incrimination is not available to prevent discovery. 42 Pa.C.S. § 5941(b). Also see *Bill Heard Leasing Inc. v. Fineberg*, 401 A.2d 834 (Pa.Super. 1979). Is not transactional immunity greatly desired by the defense in criminal matters? Consider the possibilities!

An out-of-state defendant and his or her documents are subject to execution discovery. *Hurt v. Stirone*, 114 Pitts. Leg. J. 182 (1965), *aff’d*, 206 A.2d 624 (Pa. 1965), cert. denied, 381 U.S. 925 (1965).

The writer has observed general hesitation among judges faced with requests to penalize for noncompliance with orders compelling discovery in aid of execution by citation and arrest for contempt. Observe, these are the same judges who issue warrants (or orders for attachment of the person) for failure to appear at criminal or family court hearings as ordered. These are the same judges who have fiduciaries taken into custody after disobeying orders to account. Our civil society is diminished if the judiciary avoids placing the force of law behind the rule of law so as to compel compliance with discovery in aid of execution. Contrary to Pa.R.C.P. 440, judges seeking to avoid having to enforce by contempt orders compelling discovery in aid of execution sometimes erect an individual idiosyncratic standard of “personal service” of such orders as if they were original process. See Pa.R.C.P. 402. Should orders compelling discovery in aid of execution be less favored in the law so as to require their personal service prior to attachment of the person while first-class mail service of orders to account or attend family court hearings is sufficient foundation to arrest those who fail to comply? Are orders to compel discovery in aid of execution the “children of a lesser god”? You be the judge!

### 1-13 SUPPLEMENTARY RELIEF IN AID OF EXECUTION

On petition of the plaintiff (see Pa.R.C.P. 3118) after notice and hearing, the court in which the judgment has issued may, before or after issuance of the writ of execution, grant such relief as the following:

- enjoining the disposition or concealment of property of the defendant subject to execution
- directing persons to preserve collateral security or any security interest levied or attached
- ordering disclosure to the sheriff of the whereabouts of property of the defendant
- ordering delivery to the sheriff (or making available for execution) property removed or concealed for the propose of avoiding execution
- other appropriate relief

The petition must state a proper basis for requesting relief and may not be granted *ex parte*: a motion to direct the sheriff to break into a contractor's unattended shed for levy must first be served upon the defendant. Even an order to preserve the status quo may not be obtained without notice and hearing and the resulting opportunity for unscrupulous judgment debtors to undo the status quo.

The final catchall provision of the rule, "other appropriate relief," has been generally limited to effecting the same purpose as the other sections—that is, maintaining the status quo. *Greater Valley Terminal Corp. v. Goodman*, 202 A.2d 89 (Pa. 1964); but see *Gulf Mortg. & Realty Invs. v. Allen*, 422 A.2d 1090 (Pa.Super. 1980) (ordering defendant to surrender shares of professional corporation to sheriff preserved the status quo by preventing those securities from being dissipated). 13 Pa.C.S. § 8112 furnishes additional authority for judicial order to surrender securities for execution.

The rule is not intended as a substitute for execution or equitable actions. *Beltrami v. Rossi*, 726 A.2d 401 (Pa.Super. 1999); *Chadwin v. Krouse*, 386 A.2d 33 (Pa.Super. 1978); *National Recovery Sys. v. Pinto*, 18 Pa.D.&C.3d 684 (C.P. Bucks 1981); *Commercial Credit Corp. v. Repsch*, 19 Pa.D.&C.3d 241 (C.P. Lancaster 1981). In fact, in a proceeding under the rule, the requirements for injunctive relief are inapplicable. *Kaplan v. I. Kaplan, Inc.*, 619 A.2d 322 (Pa.Super. 1993) (Beck, J.). The rule is not a substitute for trying title disputes or fraudulent transfers. *Greater Valley Terminal Corp. v. Goodman*, above.

The validity of the underlying judgment may not be considered in a proceeding pursuant to the rule. *Kaplan*, above.

The petition and rule may not be served outside the Commonwealth. Pa.R.C.P. 3118(b). For the manner of service, see Pa.R.C.P. 440.

Pa.R.C.P. 3118 has been referenced by courts exercising discretion to order all sorts of novel relief in aid of execution against "duckers-and-avoiders"—in judgment. *State Farm Mutual Auto. Ins. Co. v. American Rehab & Physical Therapy, Inc.*, Civil Action No. 03-5595 (E.D. Pa. July 15, 2009) (insurance defrauder who had "substantial income but [had] structured his financial arrangements to spend all of his income so that he owns no assets ... earns a substantial income ... [but] refuses to make any payments to Plaintiffs ..." engaged in "obstructive behavior ... detrimental to the rule of law" and was ordered to pay plaintiff \$3700 monthly "to protect ... plaintiff from ... dissolution of

the assets from which he can satisfy his claim”); *Chadwin v. Krouse*, 386 A.2d 33 (Pa.Super. 1978) (proof that stock certificates were transferred out of state to avoid execution warranted order to deliver the same to the sheriff); *Commonwealth ex rel. Messer v. Mickelson*, 175 A.2d 122 (Pa.Super. 1961) (concealment of funds by depositing funds in bank under a fictitious name warranted ordering defendant to turn those sums over to sheriff.) *Hansen v. Hansen*, 16 Pa.D.&C.5th 241 (C.P. Delaware 2010) (Burr, J.) (for failure to turn over shares of stock as ordered and to pay judgment despite ability to do so, one defendant was ordered to deliver to the sheriff all nonexempt funds coming due; both defendants were ordered to report to the court and counsel, every 30 days, concerning all cash and property received and the location of same. Both defendants were ordered to account to the court and counsel, every 30 days, for all payments made on behalf of defendants); but compare *National Recovery Sys. v. Pinto*, 18 Pa.D.&C.3d 684 (C.P. Bucks 1981) (Rule 3118 will not allow the court to order defendant to “turn over all his cash” to plaintiff as well as securities and jewelry).

#### 1-14 SALE OF REAL PROPERTY

The plaintiff must file with the prothonotary an affidavit stating to the best of his or her knowledge, information, and belief, the name and last known address of the defendant and of the owner of the real estate and every person with an interest in the real estate. A copy of the affidavit must be delivered to the sheriff with the writ. Pa.R.C.P. 3129.1. The careful plaintiff in execution will, for this purpose, secure a title search to identify all such parties in interest and will give pro forma notice to various taxing and other governmental authorities, domestic relations branches of courts, etc.

Notice of the sale must be given in the following manner. First, handbills must be posted by the sheriff 30 days before the sale. Pa.R.C.P. 3129.2. Second, written notice prepared by the plaintiff in the required form must be served by the sheriff, 30 days before sale, on the defendant and on the owner. The manner of service upon a defendant and owner must be in the manner provided for service of a writ of summons in a civil action or by mail with a return receipt requested, as the plaintiff may elect. Pa.R.C.P. 3129.2. Service by mail on other parties in interest is accomplished with a certificate of mailing; nondelivery does not affect or delay the sale. Pa.R.C.P. 3129.2. Third, the written notice prepared by the plaintiff in the required form must be published in a manner that meets the requirements of Pa.R.C.P. 3129.2.

The writ must contain the short legal description of the real property levied upon on the form provided by the sheriff, Pa.R.C.P. 3108(a)(6), and a full legal description for the printer.

When the plaintiff or another lien creditor entitled to receive all or some of the sale proceeds is the successful bidder, the sheriff must accept, on account of the purchase price, the receipt of the purchaser up to the amount of the proceeds to which he or she is entitled, but may require cash payment of the costs distributable. Pa.R.C.P. 3133; *Federal Home Loan Mortg. Corp. v. Arrott Assocs., Ltd.*, 60 F.3d 1037 (3d Cir. 1995). In theory, per the rule, the successful bidder (“attorney on the writ”) tendering such receipt may be required to satisfy the sheriff that he or she is in line for distribution to the extent of the amount of the receipt. However, in practice, sheriffs typically require no proof and simply allow the “attorney on the writ” to “credit bid.” Consider that a judicial sale on a writ of execution and mortgage foreclosure where a judgment creditor has a judgment lien prior to the subject mortgage allowing that mortgagee to “credit bid” means no funds coming to

the sheriff for preparation of scheduled distribution. Pa.R.C.P. 3136. How would such a lien creditor seek protection from this conundrum? Declaratory judgment action? Title claim on the mortgagee's policy? Of course, third-party bidders must provide an attorney's check or a cashier's check to the sheriff, as personal checks are not accepted and cash itself is less and less welcome.

Some sheriffs have had customs concerning conducting "second sales" in their own office quarters if the successful bidder fails to complete and later forfeits his or her bid, e.g., *Allegheny County v. Golf Resort, Inc.*, 974 A.2d 1242 (Pa.Cmwlt. 2009) (implicitly accepting the practice but invalidating the sale for irregularities).

A party may challenge a sheriff's sale of real estate on any material ground before a deed is delivered. Pa.R.C.P. 3132, 3135(a). Thereafter, such a judicial sale may only be challenged on the grounds of fraud or lack of authority to make the sale. *Mortgage Electronic Registration Sys., Inc., v. Ralich*, 982 A.2d 77 (Pa.Super. 2009). The delivery of the sheriff's deed cures formal errors in the proceedings. 13 *Standard Pennsylvania Practice 2d* § 76:49.

## 1-15 SALE OF PERSONAL PROPERTY

Handbills must be posted six days before the sale. Pa.R.C.P. 3128(a). There is no requirement in the rules that the handbills describe the personal property to be sold, although this is the custom in many counties. The notice that the handbills must contain is set forth at Pa.R.C.P. 3128(a) and (b). The rules do not require that the sheriff describe the personal property being sold, and a reference to all personal property of the defendant would appear to suffice. *Greater Pittsburgh Bus. Dev. Corp. v. Braunstein*, 568 A.2d 1261 (Pa.Super. 1989), app. denied, 592 A.2d 1301 (Pa. 1990); see *Bloom v. Hilty*, 232 A.2d 26 (Pa.Super. 1967), rev'd on other grounds, 234 A.2d 860 (Pa. 1967). Of course, the purpose of posting handbills is to notify the defendant as well as publicize the sale. The handbill is posted at the premises where the sale of personal property conducted, typically the defendant's home, office, or other place of business—"the place of levy," Pa.R.C.P. 3128(a). If the "place of levy" is an unattended garage or other place where posting does not give notice to the defendant, plaintiff's counsel is well advised to mail the handbill to the defendant or defendant's counsel of record to fill the constitutional gap in the notice required by Rule 3128(a). Compare Pa.R.C.P. 3129.2, mandating a more rigorous methodology of notice for judicial sales of real estate. Why?

The attorney or an experienced person must attend the sale for the plaintiff. Almost all counties conduct personal property sales at the premises where the goods were levied, and it is prudent to bring a locksmith and at least one bidder who has cash and a truck and is prepared to remove the property promptly. The locksmith is needed to allow the sheriff to break and enter pursuant to Pa.R.C.P. 3127, if necessary. In Philadelphia County, the sheriff refuses to allow the locksmith to drill out the locks for sales at unattended premises and requires the locksmith to state that (s)he can pick the lock without disturbing the tumblers so that the judgment debtor will be able to access the premises later, with the original key. Why not have your locksmith double as a true bidder?

Emotions can run high at a court-ordered forced public auction conducted on the judgment debtor's turf, and counsel is well advised to be extremely sensitive to security issues and defer at all times to the assigned deputy sheriffs. Regardless of whether the sale premises are believed to be occupied or unoccupied, it is a good practice to let the

deputies enter the premises first to make sure that they are secure. The writer once had the unsettling experience of deputies gaining access to a funeral home via locksmith, only later to find the proprietor secluded and waiting in a darkened corner of the chapel.

At least one Pennsylvania county known to the writer, Monroe, follows the practice of holding the personal property sale at the courthouse—probably not consistent with the rules of procedure and contrary to both historic practice and practicality, as well as detrimental to both plaintiff and defendant in judgment. How does one know how to bid on goods unseen? How does one easily remove the property from the defendant's premises after the sale? How would you expect this to affect the bidding?

Conducting a public sale includes announcement of the sale by the sheriff's public outcry. But it has been said that the sheriff has a duty to adjourn a sale where the execution creditor or the creditor's representative is the sole person attending the sale, there being no bystanders present. *Ricketts & Stewart v. Unangst*, 15 Pa. 90 (1850). On the other hand, an execution sale is not invalid only because one bid is offered from the several bystanders in the vicinity. *Swires v. Brotherline*, 41 Pa. 135 (1861); compare *Bornman v. Gordon*, 527 A.2d 109 (Pa.Super. 1987) (purpose of sale notice is to ensure the presence of bidders).

For various reasons, it behooves counsel to invite bidders to a sale that will otherwise likely go unattended. The sheriff usually requires cash. Bidders must be prepared to remove the goods immediately after sale (except perhaps in Monroe County). It is wise to prepare and advise bidders accordingly.

In sales of personal property, the "Philadelphia custom" is that the sheriff permits credit bidding by "the attorney on the writ" only if requested in advance, so as to enable the assigned deputy to see if he or she possesses other writs of execution that have priority in distribution. It behooves plaintiff's counsel to request permission to "credit bid" in whatever county a sheriff's sale is scheduled.

Some sheriffs do not observe the rule of *Ricketts & Stewart v. Unangst* and permit sale to the attorney on the writ even if no one else is present. Although the sheriff has the power to adjourn an execution sale likely to produce an unusual sacrifice, in Pennsylvania, "inadequacy of price is not alone sufficient to invalidate a public sale under process of law." *Plummer v. Wilson*, 185 A. 311 (Pa. 1936). In practice, however, some sheriffs, e.g., in Philadelphia and Delaware, are known to refuse to accept the best bid at personal property sales because it is, in their opinion, inadequate; compare *Scott v. Adal Corp.*, 509 A.2d 1279 (Pa.Super. 1986) (sheriff's sale procedures not unconstitutional for omitting standard requiring relationship between price bid at sale and fair market value in that government allows the market to operate and has no legitimate interest in setting the price for auctioned property). Others permit the goods to be sold for the costs. A sheriff's clerk in one county who accompanied the deputies to a sale opined to this writer that he would be making her job easier by bidding only costs and \$1.00, since no schedule of distribution would have to be prepared.

In sensitive circumstances, it may be prudent for the plaintiff to bring an appraiser to the sale, especially in counties where the "policy" of the sheriff is to require a "fair bid." Since there is a right to request that the court set aside a sheriff's sale of personal property due to gross inadequacy of the bid, *Greater Pittsburgh Bus. Dev. Corp. v. Braunstein*, above, why do some sheriffs require a "fair bid" on personal property as a prerequisite to completing the sale while not imposing the same requirement on real estate sales? See *Scott v. Adal Corp.*, above.

The attorney for the plaintiff may order the sale adjourned once for 30 days or less, to a date certain with no additional notice other than public announcement. Additional listings of the sale may be requested, but these require additional posting of handbills. Pa.R.C.P. 3128(c).

Securities listed on recognized exchanges or negotiable documents of title traded on recognized exchanges may be sold by the sheriff at a regular sheriff's sale or on the exchanges through any authorized broker. There are special provisions for disposing of these documents "over the counter." See Pa.R.C.P. 3130.

The writer recently sold all the shares of a beer distributor grocery store at sheriff's sale one afternoon, immediately conducted a shareholders' meeting, elected new directors and officers, notified the Pennsylvania Liquor Control Board of the changes, and reopened for business the following day. Critically, the corporation had a written lease for a term and this lease was not and could not be disturbed by the corporation's change of ownership and management.

The plaintiff or other lien creditors may bid at the sale. See section 1-14, above. It is wise for the plaintiff in execution to consult the sheriff concerning the application of Pa.R.C.P. 3133, Lien Creditor as Purchaser, to ascertain whether the sheriff will permit the execution creditor to give credit against the judgment in lieu of paying cash as would be required of every other bidder.

Significantly, Pa.R.C.P. 3125 does not discuss petitions and rules but simply provides that when perishable property is the subject of execution, the court may make appropriate orders relating to its preservation, sale, or distribution. Some sheriffs refuse to sell perishable foods without a court order.

Customarily, the deputy sheriff conducting the sale will remain on the premises to preserve order for a modest period while the goods sold at auction are removed. If it may take longer to remove the goods, it behooves counsel to attempt to make special arrangements with the sheriff or to anticipate filing an appropriate motion for supplementary relief in aid of execution before the sale.

How would one challenge a sheriff's sale of personal property at a grossly inadequate price? Pa.R.C.P. 3132 requires challenges of such sales to be made before delivery of the sheriff's deed to real estate and before "delivery of the personal property." In practice, personal property sold at sheriff sales conducted at the premises are delivered to the purchaser forthwith. In *First Federal Savings Bank v. CPM Energy Systems Corp.*, 619 A.2d 371 (Pa.Super. 1993), the Superior Court held that "delivery" of personal property meant actual delivery and not constructive delivery via bill of sale normally provided instantly after the sale, noting that if the right to challenge a sheriff's sale of personal property was cut off by the contemporaneous delivery of a bill of sale, due process of law would be violated for want of a reasonable opportunity to be heard. Compare *Bornman v. Gordon*, 527 A.2d 109 (Pa.Super. 1987). Apparently not realizing that personal property sold by the sheriff is almost always delivered forthwith as well (except, perhaps, in Monroe County), the court apparently assumed an extended time for actual delivery, which would ordinarily allow a reasonable time for a defense challenge of an inadequate price, and remanded the case for determination of whether the petition was timely filed. The writer suggests that Pa.R.C.P. 3132 is easily subject to constitutional challenge relative to personal property sales.

Attention must be given to the corporate character of a defendant in execution because of the superpriority of certain Commonwealth of Pennsylvania corporate obligations and the “bulk sales” impact of 72 P.S. §§ 1401–1402. Many sheriff’s offices properly inquire of these tax balances and receive certificates of the same prior to sale. If the sale does not produce sufficient distribution to discharge these superpriority liens, purchasers may take subject to them, and the plaintiff may realize nothing. However, these liens may often be substantially compromised.

#### 1-16 EXCEPTIONS TO DISTRIBUTION AND DISTRIBUTION OF PROCEEDS

The sheriff is required to prepare a proposed distribution schedule within 30 days after the sale of real estate and 5 days after the sale of personal property. This schedule is not always posted but is at least kept on file and available for inspection. No schedule is required when the property is sold to the plaintiff for costs only. Pa.R.C.P. 3136(a).

Exceptions must be made within 10 days after filing. Absent exceptions, the sheriff makes distribution. Pa.R.C.P. 3136(d).

It behooves a lien creditor anticipating distribution or challenging distribution to check with the sheriff intensively within the initial period when the proposed schedule is due. What if the sheriff’s office has a practice of filing its schedules months or years late? Must lien creditors check every day? Should not motions to allow exceptions to proposed distributions be liberally allowed *nunc pro tunc* in these circumstances?

Exceptions are filed with the sheriff, who transmits them to the prothonotary for disposition by the court. Pa.R.C.P. 3136(e). However, the sheriff of Philadelphia appears to ask excepting parties to refrain from filing with that office and instead cast exceptions as a motion to be filed directly with the court.

The case of *State Street Bank v. Petrey*, 819 A.2d 581 (Pa.Super. 2003), holds that notwithstanding the entry of judgment by default and assessment of damages by plaintiff against a silent defendant, on execution and sale a junior lien creditor may, via exceptions to the sheriff’s schedule of distribution, put the selling lien creditor and other senior lien creditors to the burden of proving the balances they claim.

#### 1-17 QUALITY OF TITLE PURCHASED AT JUDICIAL SALES—BUYER BEWARE

The common-law principle of *caveat emptor*, or “buyer beware,” applies with full force and effect to judicial sales, whether the successful bidder is either the attorney on the writ of execution representing the plaintiff, or a third-party bidder, *Taylor v. Bailey*, 185 A. 699, 702 (Pa. 1936); *CSS Corp. v. Sheriff of Chester County*, 507 A.2d 870, 872 (Pa.Super. 1986), app. denied, 522 A.2d 556 (Pa. 1987). All that a sheriff exposes to sale and conveys is the right, title, and interest, *if any*, of the defendant in judgment and execution.

Bidding at a sheriff’s sale is not for amateurs or the uninformed. Those who intend to make a purchase at a judicial sale, including the plaintiff, must carefully inform themselves of the quality of title of real estate and personal property that they intend to purchase, upon pain of purchasing nothing, purchasing subject to undischarged liens, etc. Absent suggestion of fraud on the part of the plaintiff, *First Nat’l Bank v. Mount*, 1 A.2d 547 (Pa.Super. 1938), the general rule is that bidder’s error is not an adequate basis to

move to set aside a judicial sale, pursuant to Pa.R.C.P. 3132. *National Penn Bank v. Shaffer*, 672 A.2d 326, 331 (Pa.Super. 1996); *First Fed'l Sav's & Loan Ass'n v. Swift*, 321 A.2d 895 (Pa. 1974).

A man who buys a worthless title at a sheriff's sale, and pays for it, or is allowed a credit on his lien, which is substantially the same thing, has no standing to repudiate the transaction subsequently.

It may be that enforcement of the rule which requires a bidder to make good his bid at sheriff's sale, will work hardship upon the defendants in this case. But if so, they have themselves to blame.

*Dickson v. McCartney*, 75 A. 735, 736 (Pa. 1910).

#### 1-18 EFFECT UPON LIENS AND EXECUTION OF ORDERS OPENING JUDGMENT, STRIKING JUDGMENT, STAYING EXECUTION, AND APPEAL

When judgment is opened, the lien of judgment upon real estate, and the lien of execution effected upon personal property is *not* divested, *Markofski v. Yanks*, 146 A. 569 (Pa. 1929). It is for this reason that an order opening judgment does not effect the dissolution of garnishment. Likewise an order staying execution does not dissolve attachment. *Fidelity Bank v. Commonwealth Marine & Gen. Assur. Co.*, 581 F.Supp. 999 (E.D. Pa. 1984).

There is even some authority that a judgment creditor bold enough (i.e., bolder than the writer) could proceed with execution even where a judgment has been opened, *In re FRG, Inc.*, 919 F.2d 850 (3d Cir. 1990); *Continental Bank v. Frank*, 495 A.2d 565 (Pa.Super. 1985). However, the foregoing dicta ought not to be relied upon, because it rests upon dicta of *Markofski v. Yanks*, above, that a court might *authorize* execution to proceed upon opening judgment, in appropriate circumstances. See 12 *Standard Pennsylvania Practice 2d*, § 72:17.

However, when judgment is stricken, the record of litigation is restored to where it stood before the entry of the same, *Higbee Estate*, 93 A.2d 467, 469 (Pa. 1953) ("when the judgment was taken off, the action stood as before judgment was entered"). This means that if the lien of judgment is excised, the execution dependent upon the same is vacated as well.

The pendency of an appeal without a stay does not operate to stay execution proceedings, Pa.R.A.P. 1701. However, the writer has experienced the discretionary inclination of common pleas judges and the templates of electronic case management systems to refuse to accept motions in aid or furtherance of execution due to pendency of an appeal. The remedy: persistence.

#### 1-19 FEDERAL PRACTICE

Pursuant to Fed.R.Civ.P. 69, the procedure for execution, discovery in aid of execution, and supplementary relief in aid of execution

shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Do the federal district courts in Pennsylvania use the *Finberg* forms in their executions as they are apparently required to do? Does the United States marshal adjudicate property claims? See *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980). Not only does the United

States District Court for the Eastern District of Pennsylvania fail to provide the *Finberg* forms in their Internet-published writ of execution, that form omits the 2007 Pennsylvania Rules of Civil Procedure updates found at Pa.R.C.P. 3111.1 and 3252. Moreover, the Eastern District publishes no forms for execution on judgments confessed in that court. See section 1-24.2, below.

Many practitioners find that the existing workload of the federal marshals substantially slows their service of execution process. For this reason, it is often preferable to transfer a federal judgment to a court of common pleas pursuant to 42 Pa.C.S. § 4305(b) and (c) and Pa.R.C.P. 3002, if the federal judgment was obtained in Pennsylvania, but otherwise pursuant to the Pennsylvania Uniform Enforcement of Foreign Judgments Act, 42 Pa.C.S. § 4306, and thereafter issue execution process directed to the appropriate sheriff. Moreover, by virtue of a longstanding directive from the Department of Justice, using federal marshals requires advance identification of the specific goods to be levied, which is nearly impossible. How could anyone provide specific descriptions, serial numbers, etc. without having first inspected the premises of the judgment debtor? Compare Pa.R.C.P. 4009.31.

Although a federal judgment is a lien against real estate of the defendant located in the county in which the United States district court is situated, it is necessary to transfer the judgment to impose a lien upon real estate situated in other counties within the same federal district. 42 Pa.C.S. § 4305(c). What about where the federal district court renders a judgment in Harrisburg, Williamsport, Allentown, or Reading? After all, the clerks and judgment indices are headquartered in Scranton and Philadelphia, respectively. See *In re Food Ctrs., Inc.*, 71 B.R. 16 (Bankr. E.D. Pa. 1986) (federal district court's judgment entered while sitting at Reading, Berks County, valid against Berks County real estate of debtors although never transferred to court of common pleas).

A federal judgment may not be enforced until 10 days after its entry. Fed.R.Civ.P. 62(a).

Sheriff sales of real estate are typically held at the county courthouse the same day of each month before a crowd that typically includes amateurs and regular attendees. A federal marshal's sale of real estate is typically held at the premises and likely to be less well attended. Differing tactical considerations will inspire the plaintiff's choice, if available.

## **1-20 COMMONWEALTH COURT**

Original jurisdiction matters, including execution, in appellate courts are governed by the common pleas rules. Pa.R.A.P. 106.

## **1-21 MUNICIPAL COURT OF PHILADELPHIA**

Phila.M.C.R.Civ.P. 126 conforms execution in that court to the rules of the courts of common pleas unless otherwise provided, at least as to money judgments. *Johnson v. Bullock-Freeman*, 61 A.3d 272, 278 (Pa.Super. 2013) (pursuant to March 28, 1996, order of the Supreme Court of Pennsylvania, the municipal court was obligated to conform its writ of possession practice to Pa.R.C.P.M.D.J. 518, which it had not). It is this writer's experience that the clerks who "approve" and process these forms electronically will demand to have their various questions answered and may give idiosyncratic directions before issuing the writ, e.g., (a) "Why are you naming Adam Black as a garnishee, what is your reasoning?" or (b) In the area [that the rules of procedure make optional] for description of

property to be garnished, you must describe tangible personal property to be levied. It is also the experience of this writer that the Municipal Court of Philadelphia improvidently truncates the revival process, Pa.R.C.P. 3025 et seq., and simply enters the writ as a judgment of revival upon issuance, without any further process.

#### **1-22 DEVELOPMENTS REGARDING THE NOTICE REQUIREMENTS FOR REAL ESTATE EXECUTION SALES AND THE FUTURE OF NOTICE FOR PERSONAL PROPERTY EXECUTION SALES**

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the Supreme Court of the United States, in a 6–3 decision, held that the procedure permitting a real estate tax sale to discharge a mortgage lien without actual notice via personal service or mail to the mortgagee violates the due process clause of the Fourteenth Amendment of the Constitution of the United States. With some expressions of reluctance, this decision was followed in *First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau*, 470 A.2d 938 (Pa. 1983). See also *In re Upset Sale, Tax Claim Bureau*, 479 A.2d 940 (Pa. 1984); *Tracy v. County of Chester, Tax Claim Bureau*, 489 A.2d 1334 (Pa. 1985). These cases recognize that when one pursues execution in real estate, the historic practice of notice by posting of handbills and publication is simply inadequate in our mobile, modern society. Accordingly, due process of law is believed to require greater efforts to notify not only mortgagees and other lien creditors whose interests could be affected by the sale, but also the defendants and owners of the real estate in question. To this end, an extended procedure has been erected under Pa.R.C.P. 3129.1–3129.3, culminating in a critical affidavit (see form 1-12). In essence, Rule 3129.2 requires certified mail notice of the sale and first class mail notice of the sale (with U.S. Postal form 3817 Certificate of Mailing) to all junior lien creditors and other parties having an interest in the subject real estate.

Without a similar system in place for personal property sales, there is a constitutional weakness that causes this writer to anticipate future litigation and parallel developments for personal property sales. *Query*: Why do sheriffs not presently send handbill copies to all execution creditors whose personal property writs they hold?

#### **1-23 SPECIAL RULES REGARDING EXECUTION IN PHILADELPHIA COUNTY**

Without consultation with or advance notice to the bar in general, the Philadelphia Court of Common Pleas adopted Phila.R.C.P. 3201.1, which intensively regulates personal property execution practice and adds new forms and procedures particular to Philadelphia. These rules were recommended to the court of common pleas by the Philadelphia city solicitor and Community Legal Services in an effort to settle the matter of *Montgomery v. Green*, Civ. No. 89-0764 (E.D. Pa. October 13, 1989) (Pollack, J.). Since these “nominal” adversaries were in agreement, the common pleas court approved the rules recommended by these parties with little hesitation, notwithstanding lack of input from other sources. Consider the dissent of Judge Aldisert in *Finberg v. Sullivan*, 634 F.2d 50 at 65 (3d Cir. 1980):

The status of the sheriff and prothonotary of Philadelphia County as “proper parties to this action” does not, as the majority suggest, rectify the absence of actual adversaries. There is a basic difference between the presence of proper parties to confer federal subject matter jurisdiction and the presence of parties with sufficient interest at stake to guarantee the minimum quantum of conflict to constitute a case or controversy. The appellees before us wear the

appropriate public costumes to furnish a modicum of state action, thereby becoming the vehicle by which an ordinary dispute between a debtor and creditor has been transmogrified into a federal case by virtue of 42 U.S.C. § 1983. But they are actually only actors in a Kabuki play, acting out artificial roles by gesture and speech, with everyone in the audience aware of the masquerade. Although they presented “a vigorous defense in this court,” maj. op. at 54, I am not prepared to say that they have any interest in the outcome that qualifies as legally adverse to Mrs. Finberg. They are merely official stakeholders, *giuridici castrati*, juridical neuters, required to defend the existing Pennsylvania Procedural Rules, whether this means protecting the interest of the debtor or the creditor. The state attorney general, who is vested with responsibility for enforcing and defending state statutes, did not participate and apparently was not notified, an extreme irony in a case touching precisely the rights to notice and hearing.

A copy of the resulting rules is included as Appendix 1-A, and the forms are included as form 1-14. The ostensible general purpose of these local rules is to ensure that potential third-party property claimants of property subject to levy (and potential non-judgment-debtor co-owners of attached property) have notice of the means by which they may present their claims for prompt adjudication. The vice in the system created is the needlessly repetitive manner by which this notice is disseminated: delivery, mail, and posting. When does overabundant notice become the antithesis of notice? See *Finberg v. Sullivan*, above, 634 F.2d at 93 (Weis, J., dissenting).

## **1-24 THE CONSTITUTIONALITY OF THE PENNSYLVANIA PRACTICE OF ISSUING EXECUTION ON JUDGMENTS BY CONFESSION**

### **1-24.1 Federal Court Review of Execution on Confessed Judgments**

On March 31, 1994, a panel of the United States Court of Appeals for the Third Circuit (including one former justice of the Pennsylvania Supreme Court and one former common pleas judge) decided the three appeals arising from *Jordan v. Berman*, 758 F.Supp. 269 (E.D. Pa. 1991) (Waldman, J.), and *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 792 F.Supp. 393 (E.D. Pa. 1992) (Waldman, J.). Deciding these cases under the caption of *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), this circuit panel held, among other things, that although Pennsylvania practice and procedure for confession of judgment was constitutional (following *In re FRG, Inc.*, 919 F.2d 850 (3d Cir. 1990) (overruling *In re Souders*, 75 B.R. 427 (Bankr. E.D. Pa. 1987) (Scholl, J.), which had held that Pennsylvania confession of judgment procedure was facially unconstitutional), the Pennsylvania procedures for enforcing judgments by confession, sometimes employed contemporaneously with entering judgment, denied due process of law.

We think the district court’s general exposition of the procedural protections that due process requires, absent waiver, before garnishment or attachment can constitutionally take place is correct. It said:

First, to obtain a writ of garnishment or attachment the creditor must present a sworn document setting forth in non-conclusory terms the basis for his claim. Second, the issuance of the writ should be conditioned on a review and an approval by an official invested with the req-

quisite discretion. . . . Finally, there must be an opportunity for a prompt post-seizure hearing at which the creditor must demonstrate at least the probable validity of his claim.

*Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d at 1270–1271 (footnote omitted). Compare *Jonnet v. Dollar Sav's Bank*, 530 F.2d 1123, 1129–1130 (3d Cir. 1976). According to the circuit and district courts, the weaknesses in the Pennsylvania procedure that resulted in the constitutional infirmity was the failure to satisfy the last two prongs of the triad required for due process: approval of execution by a judicial officer vested with discretion in reviewing the process (as opposed to a ministerial prothonotary) and the opportunity for the defendant in execution to invoke a prompt postseizure hearing. *Finberg v. Sullivan*, above. New rules of civil procedure effective July 1, 1996, purport to respond to the constitutional concerns.

Counsel should carefully study the trilogy of *Jonnet*, *Finberg*, and *Berman* to have a complete view of the constitutional issues involved in executing on confessed judgments (not to mention drafting confession clauses). Prior to the Supreme Court of Pennsylvania's adopting new rules for executing on confessed judgments, counsel and clients were in a quandary as to how to enforce confessed judgments without risking exposure to civil rights actions pursuant to 42 U.S.C. § 1983. One method was for counsel to perform due diligence in ascertaining that the confession of judgment clause, the instrument, and circumstances surrounding its signing demonstrated a voluntary, knowing, and intelligent waiver of constitutional rights to notice, hearing, etc. before judgment and execution. This writer had recommended consideration of suing out on the confessed judgment pursuant to Pa.R.C.P. 1019(e), limiting defendant's defenses and resulting in a judgment free of due process concerns and other questions unless successfully pressed by the defense. Compare Pa.R.C.P. 2981 et seq. (the action prerequisite to the issuance of execution against certain real estate or confessed judgments, 41 P.S. § 101 et seq.). Other counsel were filing motions for leave to execute on confessed judgments.

#### **1-24.2 Rules for Execution on Confessed Judgments**

Nearly two years after *Jordan*, the Supreme Court of Pennsylvania promulgated responsive amendments to the rules for confession of judgment and execution thereon. The substantive highlight of these provisions, effective July 1, 1996, was prospective abolition of confession of judgment in consumer credit transactions, i.e., those involving the grant of credit to a natural person "primarily for personal, family or household purposes." Pa.R.C.P. 2950, 2951(a)(2)(ii), 2961(a). For a body of law defining this expression in the context of a consumer transaction, see 15 U.S.C. § 1692a(5), the Fair Debt Collection Practices Act, and cases cited thereunder.

The procedural highlight of these rules was the erection of a system of optional notices, delays, or stays of execution, procedures, and mandatory time periods to challenge confessed judgments, and drastic limitation of the opportunity to attack confessed judgments after these time frames. The praecipe for a writ of execution on a confessed judgment must now certify that one of the three notices has been or will be served on the defendant or is not necessary due to prior filing of a petition for relief from judgment by confession. Pa.R.C.P. 2957(b).

Pursuant to Pa.R.C.P. 2958.1(a) and 2964, the plaintiff may choose to give pre-execution notice of the opportunity to challenge the confessed judgment and the consequences of failing to do so.

A judgment in the amount of \$\_\_\_ has been entered against you ... without any prior notice or hearing based on a confession of judgment contained in a written agreement or other paper allegedly signed by you. The sheriff may take your money or other property to pay the judgment at any time after thirty (30) days after the date on which this notice is served on you.

You may have legal rights to defeat the judgment or to prevent your money or property from being taken. YOU MUST FILE A PETITION SEEKING RELIEF FROM THE JUDGMENT AND PRESENT IT TO A JUDGE WITHIN THIRTY (30) DAYS AFTER THE DATE ON WHICH THIS NOTICE IS SERVED ON YOU OR YOU MAY LOSE YOUR RIGHTS.

If this pre-execution notice is duly served on the defendant via certified mail, the sheriff, or a competent adult, or pursuant to special court order, Pa.R.C.P. 2958.1(b), a defendant has 30 days to petition for relief from judgment, which will thereafter be denied absent demonstration of “compelling reasons for the delay.” Pa.R.C.P. 2959(a)(3). The Superior Court has applied this rule severely, precluding a motion to strike a confessed judgment, obviously void on its face, *M & P Management, LP, v. Williams*, 900 A.2d 871 (Pa.Super. 2006), rev’d, rem’d, 937 A.2d 398 (Pa. 2007) (plurality) (distinguishing between void and voidable judgments). Moreover, giving pre-execution notice precludes raising as a ground for relief from judgment “[t]he ground that the waiver of the due process rights of notice and hearing was not voluntary, intelligent and knowing.” Pa.R.C.P. 2959(a)(2). The explanatory comment to Pa.R.C.P. 2959(a)(2) explains starkly that:

The intent of these rules is to limit the necessity for hearings on issues of due process and waiver by providing the defendant with a pre-deprivation notice and opportunity for hearing on the merits. However, new Rule 2959(a)(2) specifies three instances when the issue of the voluntary, intelligent and knowing waiver of due process rights may be raised. The first is in support of a request for a stay when the court has already denied a prior request for a stay despite timely filing of that request and “the presentation of prima facie evidence of a defense.” The second is when personal property has been levied upon or attached without prior notice and hearing under new Rule 2958.2. The third is when a defendant in possession of leased residential real property has been evicted without prior notice and hearing under new Rule 2973.3. In all other instances, the issues upon a petition for relief from the judgment will be the merits and not the waiver of due process rights.

Does notice of an opportunity for a pre-execution hearing “on the merits” of a petition to open or strike judgment by confession cure or offset a claim that a waiver of the rights to notice and hearing prior to judgment was not knowing, intelligent, and voluntary? Does the incentive for creditors to give pre-execution notice—no due process challenge to confessed judgment after 30 days notice—counsel employment of this option as a superior tool to that of the option of giving notice with the execution? Does the availability of the optional procedure for pre-execution notice and its ramifications dramatically change the playing field by improving initial notice of rights to defendants subject to confessed judgment and by subsequently reducing the opportunity for defendants to claim those rights?

Pursuant to Pa.R.C.P. 2958.2(a) and 2965, a plaintiff has the option of providing a substantially similar notice of the pre-execution opportunity to challenge a judgment if the property subject to execution is real estate or real estate and personal property to be sold with the real estate pursuant to 13 Pa.C.S. § 9501(d). This notice also includes the date of sale. If the plaintiff elects this form of notice, it must be served 30 days prior to sale, in the same manner as the written notice of the sale of real estate. Pa.R.C.P. 3129.2(c).

Finally, the plaintiff may choose to give notice only of the post-execution opportunity to challenge a judgment by confession pursuant to Pa.R.C.P. 2958.3(a), 2966, and 2967. Thus, the plaintiff may still confess judgment and simultaneously issue execution—even attach bank accounts—before a defendant can effectively attack the judgment’s validity. However, the plaintiff’s election of this option affords the defendant superior notice and a formidable array of procedural advantages for seeking to void the confessed judgment.

The notice invites the constitutional claim:

If your money or property has been taken, you have the right to get the money or property back if you did not voluntarily, intelligently and knowingly give up your constitutional right to notice and hearing prior to the entry of judgment or if you have defenses or other valid objections to the judgment.

You have a right to a prompt court hearing if you claim that you did not voluntarily, intelligently and knowingly give up your rights to notice and hearing prior to the entry of the judgment. If you wish to exercise this right, you must immediately fill out and sign the petition to strike the judgment which accompanies the writ of execution and deliver it to the Sheriff.

Pa.R.C.P. 2966.

This writ of execution contains a preprinted petition to strike judgment on the ground of lack of effective waiver of rights; the defendant need only sign the petition to stay the proceedings and secure a hearing in three business days. Pa.R.C.P. 2958.3(b), (c), and (d); Pa.R.C.P. 2967.

At the hearing, the *plaintiff* must show effective waiver of rights to notice and hearing prior to judgment, by a preponderance of the evidence. If the plaintiff does not prevail, judgment is not opened but rather stricken and the writ vacated. Pa.R.C.P. 2958.3(c)(2). Is it possible that the trial court might have a bias in favor of granting relief so as to assure that the defendant has his or her day in court? Absent a well-drafted, plain-language, specially initialed confession clause, debtor’s representation by counsel when the confession clause was negotiated, or some other indication of probable cause to believe that the defendant knew that he or she was waiving rights to prejudgment notice and hearing, only a brave or desperate plaintiff would rush into giving notice of a post-execution hearing contemporaneously with service of the writ, a minefield for abuse of process claims where wise creditors fear to tread. Faced with litigating this issue, but lacking such a well-drafted confession clause, plaintiff’s counsel is urged to gather evidence of other confession of judgment clauses approved by the judgment debtor either as a creditor or a debtor.

Finally, one should remember that the Supreme Court of Pennsylvania has held that the “timeliness clock” for moving for relief from confessed judgment does not begin with the notice of judgment under Pa.R.C.P. 236, but rather with service of one of the notices of

the opportunity to petition for relief from judgment. *Thomas Assocs. Investigative & Consulting Servs. v. GPI Ltd.*, 711 A.2d 506 (Pa.Super. 1998), cited with approval in *Magee v. J.G. Wentworth & Co.*, 761 A.2d 159 (Pa.Super. 2000).

## **1-25 SHERIFF'S POUNDAGE**

Poundage is the commission that the sheriff receives in connection with executions. Throughout Pennsylvania, "The sheriff shall receive as an official fee a commission, based upon the total bid for the property, whether paid to the sheriff or credited to the purchaser, of 2% of the first \$100,000 and .05% of the remaining amount." 42 P.S. § 21106(b). By virtue of the ordinance of city council, the Philadelphia Code § 10-1002 has a poundage structure of 8 percent of the first \$5,000 and 2 percent thereafter.

### **1-25.1 Personal Property**

Most Pennsylvania county sheriffs do not charge an advance fee for personal property executions. (Allegheny and Philadelphia are exceptions and do charge set fees.) Instead, most sheriffs request a deposit: \$150, \$200, \$400, even \$500 in one county in Pennsylvania's northeasternmost corner. The major purpose of the deposit is to have a fund for the sheriff's recovery of poundage. Lancaster County formerly required a specific deposit for poundage in advance. Stated otherwise, if you were executing against personal property a \$100,000 judgment in Lancaster County, you formerly had to pay a deposit of \$400.00 for fees, plus a deposit of \$2,000 for poundage.

Pursuant to 42 P.S. § 21107, sheriffs are entitled to poundage even if the execution settles:

For the settlement or staying by the plaintiff of a writ relating to property, execution not being concluded, the sheriff shall receive the same fees for receiving, docketing and returning, levying, advertising and performing other functions enumerated in this act, including commission as would be chargeable if the sale had been made upon the writ, on the amount paid to settle or stay the writ, whether the sum is paid to the sheriff or to the plaintiff or a compromise is made between plaintiff and defendant for the future payment to satisfy the writ.

Accordingly, most sheriffs request that counsel advise them, often in affidavit form, of the amount of the settlement on recovery.

To raise money for their county treasuries and, in turn, their own offices, many elected sheriffs have aggressively pursued the recovery of poundage. Many Pennsylvania sheriffs attempt to recover poundage on attachment execution even though such process does not involve an "amount bid for the property," 42 P.S. § 21106(b), or (if the writ settles) a sum "as would be chargeable if the sale had been made upon the writ, on the amount paid to settle or stay the writ." 42 P.S. § 21107. No reported cases deal with this issue, but the writer submits that the statutes involved reference levy, bidding, and sales—execution activities that are foreign to the attachment process. Accordingly, if your attachment-only writ is paid or settled, there would appear to be no poundage due under the statute.

The sheriff of Philadelphia does not collect poundage for personal property sales unless there is an actual sale.

## 1-25.2 Real Estate

The cases of *Ashbridge Oil Co. v. Irons*, 554 A.2d 629 (Pa.Cmwlth. 1989), and *York Federal Savings & Loan Ass'n v. Anderson*, 630 A.2d 59 (Pa.Cmwlth. 1993), app. denied sub nom. *York Federal Savings & Loan Ass'n v. Geiger*, 639 A.2d 36 (Pa. 1994), created substantial issues relative to poundage in efforts to enforce judgments against real estate. *Ashbridge Oil* applied 42 P.S. § 21107 to real estate sales, rejecting the contention that it applied to personal property sales only, enabling the sheriff to collect poundage when real estate sales settle.

In *York Federal Savings & Loan Ass'n*, the real estate was sold to the attorney on the writ for costs and \$1.00. The sheriff of Pike County charged poundage on the full amount of the debt owing on the judgment. The plaintiff in execution excepted and argued that the 2 percent commission should be charged only on the sums tendered to the sheriff—just over \$300. The Commonwealth Court held that poundage was to be charged “based upon the total amount bid for the property whether paid to the sheriff or credited to the purchaser.” 42 P.S. § 21104(b) (emphasis added). The court apparently assumed that the full amount of the judgment was, in fact, credited to the purchaser and upheld the sheriff's claim, producing a great windfall to the county. Were there no proceedings under the Deficiency Judgment Act in that case? What if the property had been sold to the attorney on the writ for costs and \$500? Costs and \$2,000?

Because of the dramatic implications that the poundage charge would have had in significant judgments against real estate, *York Federal Savings & Loan Ass'n* was swiftly reconsidered and overruled in *Jersey Shore State Bank v. Brewer*, 668 A.2d 626 (Pa.Cmwlth. 1995), app. denied, 675 A.2d 1253 (Pa. 1996). The final word of the Commonwealth Court is that poundage is charged not on the total debt, but strictly on the amount bid or otherwise credited to the defendant. How does the sheriff determine the latter?

Was either *York Federal Savings & Loan Ass'n* or *Jersey Shore State Bank* correctly decided? It is notable that the Supreme Court of Pennsylvania denied allocatur each time the Commonwealth Court reached opposite views on this critical issue. What, if any, implication is there in the foregoing for the collection of poundage in personal property executions?

## 1-26 PREJUDGMENT RELIEF

Due to critical tensions with due process of law as guaranteed by the constitutions of Pennsylvania and the United States of America, as identified in *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3d Cir. 1976), and *Schreiber v. Republic Intermodal Corp.*, 375 A.2d 1285 (Pa. 1977), in 1989, the Supreme Court of Pennsylvania finally eliminated the only remaining forms of prejudgment execution in this Commonwealth: foreign attachment, Pa.R.C.P. 1251–1279, and fraudulent debtors attachment, Pa.R.C.P. 1285–1292. See, generally, 17 *Standard Pennsylvania Practice 2d*, § 95:1.

However, under circumstances otherwise appropriate for the grant of a preliminary injunction, Pennsylvania jurisprudence recognizes that the grant of a preliminary injunction, with appropriate bonding, may lie to preserve the asset status quo against debtor dissipation, via supervision of liquidation, distribution of assets, etc. These cases incorporate the well-known test for the grant of a preliminary injunction: (1) necessity to prevent immediate, irreparable harm; (2) greater injury in refusing injunction compared

with granting the same; (3) restoring or maintaining the status quo; (4) alleged wrong manifest and injunction reasonably suited to abate it; and (5) clear right to relief. *Ambrogio v. Reber*, 932 A.2d 969 (Pa.Super. 2007); *Citizens Bank of Pennsylvania v. Myers*, 872 A.2d 827 (Pa.Super. 2005); *Walter v. Stacy*, 837 A.2d 1205, 1210 (Pa.Super. 2003); *American Express Travel Related Servs. Co. v. Laughlin*, 623 A.2d 854, 856–57 (Pa.Super. 1993), app. denied, 633 A.2d 149 (Pa. 1993); *East Hills TV & Sporting v. Dibert*, 531 A.2d 507, 509 (Pa.Super. 1987).

