FRAUDULENT TRANSFERS: VOID AND VOIDABLE

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This Article explores the civil procedure attendant to private fraudulent transfer litigation (primarily outside the context of bankruptcy). In such litigation, courts ponder whether fraudulent transfers are void or voidable. In fact, they are both—simultaneously! According to the theory "at law," a fraudulent transfer is "void." That is, a creditor with a judgment could simply levy the property from a fraudulent grantee as if the grantee had no property rights. This Article questions the constitutional viability of this ancient attitude. Meanwhile, "equity" viewed the transfer as voidable. The grantee gets title, but the title might be set aside. The Article explores the ancient law-equity contradiction in the context in which the enforcing creditor already has a money judgment against the transferor and wishes to reach the property of the transferee. It also explores fraudulent transfer avoidance as a pre-judgment remedy and finds that the law-equity contradiction is equally alive in this context.

TABLE OF CONTENTS

Introduction 3
I. Substantive Fraudulent Transfer Law 8
II. Post-Judgment Litigation 9
A. Disregarding the Fraudulent Transfer and Proceeding as if the Debtor Still Owned the Property 10
1. Implications for real property 12
2. Bona fide purchasers 17
3. Statute of limitations 19
4. Priority 20
5. Implications for bankruptcy: transferee of a transferee 21
6. Exempt property 25
7. Unconstitutionality of the remedy 28
B. Set-Aside 30
1. The role of *Lis Pendens* 36
2. Exhaustion of remedies 39
C. Void-Voidable in the Uniform Commercial Code 40
III. No Judgment Yet 45
A. Effect on the Statute of Limitations 50
B. Joinder 53
C. D as a "Necessary and Indispensable Party" 55
D. Priority 59
E. The Failure of C's Claim Against D 62

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F. Attachment 63
G. Injunctions 71
H. Contingent Claims 76
Conclusion 81

INTRODUCTION

On December 23, 1938, Captain Hendrick Goosen netted a coelacanth and made worldwide headlines. The coelacanth was reckoned extinct since the end of the Cretaceous period. Yet it survived the massive destruction of the dinosaurs and can be found today swimming happily in the Indian Ocean, oblivious of the fact that time and fashion have passed it by.[1]

Fraudulent transfer law—a staple of creditors' rights—is a jurisprudential coelacanth. The antique skeleton of this legal creature adheres to the distinction of law and equity, long since thought extinct. Yet the contradictory creature lives on.

Fraudulent transfer law rears its two heads (one legal, one equitable) when debtors cannot or will not pay their unsecured creditors. Creditors facing such debtors must obtain a "money" judgment. Money judgment is the legal remedy for debt.[2] Given a money judgment, the law empowers a court officer to seize a debtor's property and sell it to raise cash to pay the judgment.[3] Or the law directs the officer to collect a debt due and owing to the debtor.[4] This power of sale (or power of collection) goes by the name of "judicial lien."[5] Judicial liens organize the discourse of debt collection, though often covertly.[6]

It is a happy day if a creditor has established a judicial lien on property of her debtor. If a lien has been established, fraudulent transfer law need not be consulted, and this article may be set aside as a superfluity.

Crafty debtors, however, have always known how to prevent judicial liens from latching onto their property. If they convey away their assets before any judicial lien can attach, the creditors are hindered, delayed, and defrauded.

Fraudulent transfer law responds to this strategy. The utility of fraudulent transfer law arises precisely when a creditor (whom I shall call *C*) can find no asset of the debtor (whom I shall call *D*) to which a judicial lien might attach. Fraudulent transfer law empowers *C* to get a judicial lien[7] on the property of a third party (here denoted as *X*) that historically once was *D*'s property.

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[1] *See* KEITH STEWART THOMSON, LIVING FOSSIL: THE STORY OF THE COELACANTH 29, 145 (1991).

[2] *See* Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., 873 F.3d 85, 137 n.52 (2d Cir. 2017).

[3] *See* David Gray Carlson, *Bankruptcy's Organizing Principle*, 26 FLA. ST. U. L. REV. 549, 554 (1999) [hereinafter Carlson, *Bankruptcy's Organizing Principle*].

[4] *See* 11 U.S.C. § 550(a) (2018).

[5] Sometimes they are called judgment liens, when entry of the judgment establishes the power of sale. Sometimes they are called execution liens, when the power of sale arises at some point in the life of a writ of execution. I shall use the generic phrase "judicial lien" to include any lien that arises in connection with enforcement of a money judgment.

[6] *See* Carlson, *Bankruptcy's Organizing Principle*, *supra* note 3, at 552 ("[B]ankruptcy's organizing principle is lien creation. . . ."); *see also* 2 EDWARDO COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 289(b) (London, Charles Butler ed., 19th ed. 1832) ("*Executio est fructus et finis legis*.").

[7] *See* Campbell v. Drozdowicz, 10 N.W.2d 158, 160 (Wis. 1943) ("[T]he fraudulent conveyance is not to be set aside to all intents and purposes. Instead, there is to be established in effect a lien against the property for the benefit of creditors, which will be prior and superior to the rights of the grantee; and the fraudulent conveyance to the latter is void only so far as to permit such lien of the creditors to be established as prior and superior to the rights of such grantee.").

The civil procedure surrounding the transubstantial moment of lien creation—when *D*'s property becomes *C*'s property—is itself conceptually challenging.[8] But when we add the fact that *C* looks to recover *D*'s debt from the property of *X*, complexity grows logarithmically.

At the heart of the procedure attendant to fraudulent transfers is a stubborn ambiguity. Hearkening back to the days when law and equity were the provinces of different courts, law courts and equity courts virulently disagreed on the nature of a fraudulent transfer.

"Law" (Esau to equity's Jacob) viewed fraudulent transfers as *void ab initio*. On this view, a fraudulent transfer is not a transfer at all, at least insofar as *C* is concerned. *C* could treat *X*'s thing as if it were still *D*'s thing. *C*'s judicial lien attached to *X*'s thing accordingly.

Equity, however, viewed fraudulent transfers as "voidable." On this view, when *D* fraudulently transfers a thing to *X*, *D*'s act of alienation is complete. *D* no longer has any title in the item transferred. Rather, *X* has title. *X*, however, holds the property in trust for the creditors of *C*. The conveyance being fraudulent, *C* is invited to have the conveyance set aside. What once was *D*'s property is *D*'s property again, and *C* is able to obtain the coveted judicial lien on *X*'s thing. The lien implies that *C* may liquidate *X*'s thing in order to satisfy *C*'s judgment against *D*.

Thus, to the law lords, a fraudulent transfer is no transfer. It is void. It never happened. To the chancellor, the transfer is absolutely effective until it is avoided or "set aside."

The Statute of Elizabeth (1571)[9] is the traditional lazy scholar's starting place for the Anglo-American history of fraudulent transfers.[10] The Statute mentions land and chattels transferred by *D* to hinder, delay, or defraud creditors.[11] The Statute passed

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[8] I cover the New York scene in David Gray Carlson, *Critique of Money Judgment Part One: Liens on N.Y. Real Property*, 82 ST. JOHN'S L. REV. 1291 (2008) [hereinafter Carlson, *Critique I*]; David Gray Carlson, *Critique of Money Judgment (Part Two: Liens on N.Y. Personal Property)*, 83 ST. JOHN'S L. REV. 43 (2009); and David Gray Carlson, *Critique of Money Judgment Part Three: Restraining Notices*, 77 ALB. L. REV. 1489 (2014).

[9] The Second Circuit pauses to consider whether 1570 or 1571 was the date of enactment. Eberhard v. Marcu, 530 F.3d 122, 129 n.4 (2d Cir. 2008). The matter is complicated by the fact that, until 1751, New Year's Day was considered in England to be March 25. 24 Geo. 2 c. 23 (1751) (Gr. Brit.); BASIL WILLIAMS, THE WHIG SUPREMACY 1714–1760, at xx (G. N. Clark ed., 1939).

[10] *See* 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 58 (rev. ed. 1940) ("Later, no one cared to go back further; and so our law of fraudulent conveyances may be ascribed to Coke."); FREDERICK S. WAIT, A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' BILLS §§ 18–19 (3d ed. 1897) (explaining the Statute of Elizabeth derived from Plantagenet and Tudor precedents); Louis E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 16 (1919) ("The Act of 13 Elizabeth, c. 7, complains that . . . fraudulent bankrupts had much increased, and it was necessary to make better provision for suppressing them. . . ." (footnote omitted)). *See generally* Max Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109 (1931).

[11] Not mentioned is so-called equitable property such as accounts receivables and choses in action. This was because the "law writs" associated with money judgment covered only land (writ of elegit) or chattels (writ of fieri facias). *See* 13 Eliz. c. 5 (Eng. & Wales).

into the common law of American states.[12] As we shall see, in the early case law fraudulent transfers were viewed as void on the law side and voidable on the equity side.

In 1918, the Uniform Law Commission issued the Uniform Fraudulent Conveyance Act (the "UFCA").[13] Its achievement included the introduction (or sanctification) of the constructive fraudulent conveyance[14] and the invitation to creditors without judgments to get a provisional remedy. The UFCA failed to choose between "voidable" and "void." In fact, it legislated both positions simultaneously. Fraudulent transfers could be avoided (the equitable solution),[15] but they also could be "disregarded" (the legal solution).[16] The sheriff, under a writ of execution, could simply take *X*'s thing as if it were *D*'s thing, even though *C* had no judgment against *X*.[17]

After 1918, Congress and state legislatures interacted tit-for-tat in dialectic fashion. The Chandler Act created the right of federal bankruptcy trustees to avoid *D*'s pre-petition fraudulent transfers.[18] It basically added the text of the UFCA to the Bankruptcy Act. About forty years later, Congress enacted the United States Bankruptcy Code (the "Bankruptcy Code"), a radical rewriting of the Bankruptcy Act. Congress took the occasion to refashion the trustee's power to avoid fraudulent

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[12] *See In re* Goldberg, 277 B.R. 251, 291 n.73 (Bankr. M.D. La. 2002) ("Almost every jurisdiction in the United States has either recognized the Statute of 13 Elizabeth as part of common law, or has enacted a statute in similar terms."); *see also* Montgomery v. City of Philadelphia, 253 F. 473, 475 (E.D. Pa. 1918).

[13] *See Prefatory Note* to UNIF. FRAUDULENT CONVEYANCE ACT 2 (UNIF. L. COMM'N 1918).

[14] Basically, a constructive fraudulent transfer is a "gift" by insolvent *D* to *X*. *See* UNIF. FRAUDULENT CONVEYANCE ACT § 4 ("Every conveyance made . . . by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made . . . without a fair consideration."). According to one court:

> When the Uniform Fraudulent Conveyance Act was drafted, the rebuttable presumption of fraud concept had a widespread following in the states. In drafting the Uniform Fraudulent Conveyance Act . . . the National Conference of Commissioners on Uniform State Laws sought to eliminate the confusion in existing laws which stemmed, in part, from judicial attempts to stretch the original English fraudulent conveyance statute, the Statute of Elizabeth . . . and its offspring (*see*, *e.g.*, New York's 1829 statute [2 Rev Stat of NY, Part II, ch VII. tit III (1st ed)]), which permitted relief only on a showing of actual intent to defraud, to apply to situations where no such actual intent could be proven.
>
> To eliminate the undesirable reasoning underlying the judicially created presumptions while at the same time recognizing that a remedy was often required when the creditor was wronged without judicially provable intent to defraud, the draftsmen of the uniform act eliminated the presumption as a basis for finding a conveyance fraudulent . . . [I] is apparent to us that the presumption has ceased to exist.

Marine Midland Bank v. Murkoff, 508 N.Y.S. 17, 21, 120 A.D.2d 122, 127–28 (1986), *aff'd*, 69 N.Y.2d 875, 507 N.E.2d 322 (1987) (most citations omitted).

[15] *See id.* § 9(a).

[16] *See id.* § 9(b).

[17] *See id.*

[18] *See* Act of June 22, 1938, ch. 575, 52 Stat. 840, 877–78 (enacting Bankruptcy Act section 67(d), which provides fraudulent transfers "shall be null and void against the trustee").

transfers. The language and the substance of fraudulent transfer was changed in some important respects, and fraudulent transfer *procedure* (as a federal matter) changed profoundly.[19] Bankruptcy procedure is not our current topic, however. We mostly concern ourselves with the civil procedure outside bankruptcy.

The Uniform Law Commission in 1984 decided to conform the uniform state law to the updated linguistics of the Bankruptcy Code. The result was the Uniform Fraudulent Transfer Act (the "UFTA").[20] In a majority of states, the UFTA lays down the law of fraudulent transfer. Like the UFCA, the UFTA perpetuates the contradiction that fraudulent transfers are void (law)[21] and are voidable (equity).[22]

In 2013, the Uniform Law Commission once again awoke from its Rip Van Winkle slumbers and updated the UFTA, renaming it the Uniform Voidable Transactions Act (the "UVTA").[23] Basically, this new act changes the name of a fraudulent transfer to a voidable transaction.[24] It also adds a choice of law provision.[25] It makes few substantive changes in the language and substance of the UFTA. The name change is based on correcting an age-old bad Latin translation.[26] (Out of an

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[19] Whereas the UFCA gave *X* a defense if *X* paid value to *somebody*, Bankruptcy Code section 548(c) defends *X* only if *X* conveys value *to the debtor*. 11 U.S.C. § 548(c) (2018). This change tremendously perverts the law of fraudulent transfers, as I document in David Gray Carlson, *Mere Conduit*, 93 AM. BANKR. L.J. 475 (2019) [hereinafter Carlson, *Mere Conduit*].

[20] *See Prefatory Note* to UNIF. FRAUDULENT TRANSFER ACT 4 (UNIF. L. COMM'N 1984); Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 UNIF. COM. CODE L.J. 195, 198 (1986).

[21] *See* UNIF. FRAUDULENT TRANSFER ACT § 7(b).

[22] *See id.* § 7(a)(1).

[23] *See Prefatory Note* to UNIF. VOIDABLE TRANSACTIONS ACT 5 (UNIF. L. COMM'N 2014).

[24] *See* Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, 70 BUS. LAW. 777, 780 (2015) ("[The UFCA] referred to such a transfer sometimes as 'voidable' and sometimes as 'fraudulent.' The [UVTA] amendments rectify that inconsistency by consistently using 'voidable.'").

[25] *See* UNIF. VOIDABLE TRANSACTIONS ACT § 10; *see also* Kettering, *supra* note 24, at 796 ("New section 10 sets forth a choice of law rule that is simple, reasonably predictable, and familiar.").

[26] According to Kenneth C. Kettering, the reporter for the new UVTA:

> The main purpose of the renaming is to replace the long-used but misleading word "fraudulent" with terminology that will not mislead. . . . The heart of the matter is that fraud, in the modern sense of the word, is not, and never has been, a necessary element of a claim for relief under the [UFCA]. . . . The confusion in terminology can be blamed on the fact that American lawyers, as a group, have never been fluent Latin scholars. The English common law of fraudulent conveyance, which long predated the Statute of 13 Elizabeth, drew on the well-developed Roman law on the subject. From that source the Latin expression *in fraudem creditorum* came to be familiar to the English legal community in Elizabethan times. Translated by the "if-it-were-English" method, that became the familiar phrase "in fraud of creditors." But the root word *fraus* did not really mean "fraud." Rather, it meant "prejudice" or "disadvantage." The key phrase "hinder, delay, or defraud any creditor" in the Statute of 13 Elizabeth, which remains the statement of the primordial rule in the UFTA and other modern statutes, was written by Elizabethan lawyers who were far better Latinists than today's, and the statutory phrase signals the correct understanding through its use of "hinder" and "delay" in addition to "defraud." But this point is too subtle to sink into the shorthand language used by lawyers in a hurry. A more correct shorthand for this doctrine than "fraudulent conveyance" or "fraudulent transfer" would be the more correct translation, "conduct to the prejudice of creditors."

ornery resentment of hurly-burly innovation, I shall continue to refer to the *D-X* transaction as a fraudulent transfer—bad Latin though it be.)

The procedural contradiction between law and equity, however, remains unchanged.[27] The study of the civil procedure of fraudulent transfer litigation ends up being an antiquarian affair. Many of the rules stem from 19th century cases that have not been repealed by the UFCA, UFTA, or UVTA.[28] One must reach back and view the procedural scene as it existed in the 19th century. Ancient cases still govern in non-bankruptcy litigation in the 21st century. By and large, the UFCA and its successors have legislated the law-equity split with which the 19th century was obsessed. This study must therefore encounter the law-equity divide, which was supposed to have been eliminated by the mid-20th century.[29]

Part I of this Article sets forth the criteria by which a transfer can be viewed as fraudulent. Thereafter, a natural division cries out for the analysis to be cleft in twain. Accordingly, Part II discusses the cases in which *C* has already obtained a money judgment against *D* and *D* has made a fraudulent transfer to *X*. In the post-judgment environment, *C* undertakes to subject *X*'s asset to a judicial lien with a view to satisfying *C*'s claim against *D*. In the 19th century, fraudulent transfer law was largely conceived to be a post-judgment question—enforcement of a lien (on the law side) and as an aid to execution (on the equity side) of a pre-existing money judgment.

Part III ponders cases in which *C* does not yet have a money judgment against *D*. *C*'s claim against *D* is "not matured," to use the UFCA term.[30] Yet, basically starting with the UFCA, the law invites *C* to grab *X*'s property in anticipation of *D*'s ultimate money judgment against *C*.

Pre-judgment procedure too has its law-equity split. On the law side, *C* is invited to obtain an attachment lien on *X*'s property on the theory that the *D-X* transfer was no transfer. Alternatively, equity invites *C* to avoid the *D-X* conveyance, so that what was once *D*'s property becomes *D*'s property once more—but locked down for eventual liquidation by *C*.

In the classic case of pre-judgment avoidance, *C* commences an action against *D*. Then, simultaneously and as an "ancillary" matter, *C* commences a fraudulent transfer action against *X*. The idea is to encumber *X*'s property, while a court, in magisterial leisure, ponders whether *C* is a creditor of *D* at all.

This is the paradigm. How far from the paradigm may *C* wander before judicial tolerance gives out? May *C* commence an action against *X* and *not* commence an action against *D*? In civil procedure terms, is *D* a necessary party to the action against *X*? May *C* attach *X*'s property by bringing a pre-judgment attachment proceeding

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Kettering, *supra* note 24, at 806–07 (footnotes omitted).

[27] *See* UNIF. VOIDABLE TRANSACTIONS ACT § 7(a)(1), (b).

[28] *See* Schline v. Kine, 152 A. 845, 846 (Pa. 1930) (complaining the UFCA "does not specify a particular course of procedure").

[29] *See* FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

[30] *See* UNIF. FRAUDULENT CONVEYANCE ACT § 10 (UNIF. L. COMM'N 1918) ("Rights of Creditors Whose Claims Have Not Matured.").

against *D* but not against *X* (that is, is *X* a necessary party if *X*'s property is to be encumbered by an attachment lien)? These and other questions are posed in Part III. Though the case law is sparse and not always cooperative, I conclude that the basic paradigm limits the ability of *C* to pursue *X*'s property before *C* has a money judgment against *D*. *C* must basically *join X* in her principal lawsuit against *D*. There can be no question of suing *X* without also simultaneously suing *D*, where *C* does not yet have a judgment against *D*.

I. SUBSTANTIVE FRAUDULENT TRANSFER LAW

So far, I have not said what makes a transfer fraudulent. Summarizing the situation at a towering altitude of generality, fraudulent transfers come in two flavors. First, there is what I shall call a bulk sale.[31] By bulk sale I mean a transfer to *X* out of the ordinary course of *D*'s business for a reasonably equivalent value with the design of making *D*'s property liquid and portable. The liquidity enables *D* to abscond.[32] A bulk sale requires *D*'s intent to hinder, delay, or defraud creditors.[33] If such an intent exists, we do not care whether *D* was insolvent[34] or whether *D* received a reasonably equivalent value.[35] In a bulk sale, *X* pays a reasonably equivalent value to *D*, but *X* knows that he is facilitating flight. That which is illiquid and "bulky" is rendered liquid and suitable for travel.[36] If, however, *X* does not know *D* intends to decamp, *X* is a good faith purchaser for value and has an immunity against the attachment of *C*'s judicial lien. Bulk sales are known as *actual* fraudulent transfers because *D actually* intends to hinder *C*.[37]

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[31] Bulk sales used to be governed by separate statutes, often imposing onerous burdens on the buyer to notify the seller's creditors. These statutes culminated in article 6 of the Uniform Commercial Code, which was later repealed as useless and redundant of fraudulent transfer law. A thorough review can be found in the symposium published by the *Alabama Law Review* in the spring of 1990. *See generally Symposium: Article 6 of the Uniform Commercial Code*, 41 ALA. L. REV. 549 (1990).

[32] *See* 50 Edw. 3 c. 6 (1376) (Eng.) ("[D]ivers people . . . do give their tenements and chattels to their friends, by collusion thereof to have the profits at their will, and after do flee to the franchise of *Westminster*, or *St. Martin's le Grand* of *London*, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant. . . .").

[33] *See* Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 F.2d 295, 297 (2d Cir. 1927).

[34] *See id.* (finding where defendant's intent to defraud, hinder, or delay exists, *D*'s insolvency is of no relevance); *see also* Fox v. Moyer, 54 N.Y. 125, 131 (1873).

[35] *See* Scholes v. Lehmann, 56 F.3d 750, 759 (7th Cir. 1995).

[36] A bulk sale need not be a "sale" in an absolute sense. The grant of a mortgage on illiquid assets in exchange for a loan (never to be paid back) suffices nicely, as with leveraged buyouts. *See generally* David Gray Carlson, *Leveraged Buyouts in Bankruptcy*, 20 GA. L. REV. 73 (1985).

[37] As to *X*'s intent, we do not usually care. *See In re* Dreier LLP, 452 B.R. 391, 430–33 (Bankr. S.D.N.Y. 2011). However, sometimes *X*'s state of mind matters. One such exception is where, under N.Y. Debtor & Creditor Law section 276-a, *C* wishes to dun *X* for *C*'s attorneys' fees. *See* Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir. 1991) ("[B]efore awarding attorneys' fees against a defendant . . . the court must make an explicit finding of [*X*'s] actual intent to defraud. . . ."). Another exception is where *X* asserts the defense of UFCA section 9(2), which provides: "A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment." UNIF. FRAUDULENT CONVEYANCE ACT § 9(2) (UNIF. L. COMM'N 1918). A third exception is

The second type of fraudulent transfer is a gift to *X* when *D* is insolvent.[38] The gift by insolvent *D* is commonly known as a constructive fraudulent transfer. The gift is *constructively* fraudulent because we do not know or care what insolvent *D*'s state of mind was when *D* made the gift. Be *D*'s intent wicked or charitable, bringing airs from heaven or blasts from hell, *D*'s intent to hinder *C* arises by operation of law and is conclusively presumed to exist.[39]

This is all the substance we shall need in order to undertake our procedural inquiry.

II. POST-JUDGMENT LITIGATION

Fraudulent transfer procedure, as it emerged from the 19th century, is derivative of the procedure for enforcing money judgments.

At least in the United States, land[40] and chattels could be sold under the legal remedy of execution.[41] But execution did not initially reach intangible personal property ("equitable assets").[42] As to the equitable assets, the legal remedy of execution by a sheriff was inadequate.[43]

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where *X* files for bankruptcy, *C* seeks a money judgment for fraudulent transfer, and *X* seeks a discharge. If *X* has a bad intent, then *X*'s obligation is not dischargeable if *X* has sufficiently bad intent. *See* Husky Int'l Elecs. v. Ritz, 136 S. Ct. 1581, 1588–89 (2016). On some puzzles concerning this case, see David Gray Carlson, *The Supreme Court, Dischargeability and Actual Fraud*, 28 AM. BANKR. INST. L. REV. 205 (2020).

[38] Proxies exist for insolvency. These include, where *D*:

> (i) was engaged or was about to engage in a business or transaction for which remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2) (UNIF. L. COMM'N 1984).

[39] *See* Nostalgia Network, Inc. v. Lockwood, 315 F.3d 717, 719 (7th Cir. 2002) ("The usual motive for such transfers *is* to hinder creditors, but that is difficult to prove and provided the transfer is indeed gratuitous creditors are hurt and the recipient, having paid nothing for what he received, has no very appealing claim to keep the money.").

[40] In England, *eligit* was not a power of sale. Rather, it permitted the sheriff to possess fifty percent of *D*'s land (basically to collect rent) to satisfy the judgment. In addition, the *Magna Carta* required execution against chattels precede a remedy against land. G.R.C. DAVIS, MAGNA CARTA 22–33 (1963). New Jersey still follows this rule. *See* N.J. STAT. ANN. § 2A:17-1 (West 2020).

[41] *See, e.g.*, DEL. CODE ANN. tit. 10, § 4901 (West 2020); N.J. STAT. ANN. § 2A:17-1.

[42] *See* Steelman v. All Continent Corp., 301 U.S. 278, 286 (1937) ("Choses in action and other equitable assets even though fraudulently transferred, are not subject at common law to seizure under execution at the instance of a creditor, but the transfer must be avoided by a decree in equity."); Geery v. Geery, 63 N.Y. 252, 256 (1875) ("The tangible property must first be taken, and then if there are equitable assets of the debtor which cannot be reached by execution a resort to equity may be had."); Fox v. Moyer, 54 N.Y. 125, 128–29 (1873). *See also* Daniel H. Distler & Milton J. Schubin, *Enforcement Priorities and Liens: The New York Judgment Creditor's Rights in Personal Property*, 60 COLUM. L. REV. 458, 462 n.30 (1960) (substituting the term "equitable assets" for "intangibles" and "intangible assets").

[43] *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 46–48 (1989).

Inadequacy of the legal remedy is like red rags to the raging bull of equity, and so, on producing the execution returned *nulla bona*[44] (supposedly signaling no leviable land or chattels),[45] the chancellor would entertain the "creditor's bill in equity."[46] This featured a grab bag of remedies, including discovery. *D* was obliged to say under oath where *D*'s assets were located. If equitable assets came to light, the court was prepared to issue an injunction ordering a third party (whom I shall call *AD*, for "account debtor")[47] to pay *C* whatever amount *AD* currently owed to *D*. An equity court might also appoint a receiver with express powers to realize on *D*'s "equitable" assets not reachable under an execution.

In modern times, the execution lien usually reaches intangible property.[48] Furthermore, the equitable remedies of turnover or receivership do not always require the ritual of an execution returned *nulla bona*.[49]

As we have said, fraudulent transfer law has its utility when *D* conveys a thing to *X* before *C* is able to fix a judicial lien upon it. Our topic is: What procedures are required for *C* to obtain a lien on *X*'s property, where *D* fraudulently transferred that property to *X*? Currently, we assume *C* has obtained a money judgment against *D*. In Part III, we relax that assumption.

A. Disregarding the Fraudulent Transfer and Proceeding as if the Debtor Still Owned the Property

An early answer held that, since a fraudulent transfer was *no* transfer (that is, the transfer was *void*), *C* should behave exactly as if *D* never made the conveyance. Indeed, the ink with which the Statute of Elizabeth was penned had scarcely dried before Queen's Bench established this principle in *Mannocke's Case*.[50] *Mannocke* was

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[44] *See* Feldstein v. Fusco, 238 N.Y. 58, 63, 143 N.E. 790, 791 (1924) ("If [the transfer] were made with intent to hinder, delay and defraud creditors, then it could be set aside in a judgment creditor's action. In such an action a judgment not only had to be recovered, but an execution issued and returned unsatisfied before the action could be maintained."). The execution had to be addressed to the sheriff of the county where *D* resided. *See Fox*, 54 N.Y. at 128–29.

[45] Professor Glenn emphasized how phony this requirement was, as attorneys know how to tell a sheriff that a search is useless. *Nulla bona* on such occasions was produced on the spot. *See* GLENN, *supra* note 10, § 87.

[46] *See* Case v. Beauregard, 101 U.S. 688, 690 (1879) (discussing the necessity of exhausting remedies at law before recourse in equity is possible).

[47] *See* U.C.C. § 9-102(a)(3) (AM. L. INST. & UNIF. L. COMM'N 2017) ("'Account debtor' means a person obligated on . . . [a] general intangible.").

[48] *See* N.Y. C.P.L.R. § 5201(b) (McKinney 2020) ("A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest. . . ."); *id.* § 5232(a) ("All property not capable of delivery . . . shall be subject to the levy.").

[49] *See* Foster v. Evans, 429 N.E.2d 995, 999 (Mass. 1981). New York dropped the requirement of an unsatisfied execution in 1935. 1935 N.Y. Laws 1265; *see also* Utils. Eng'g Inst. v. Mangan, 94 N.Y.S.2d 244, 245, 276 A.D. 922, 922 (1950); Distler & Schubin, *supra* note 42, at 494.

[50] Mannocke's Case (1571) 73 Eng. Rep. 661; 3 Dyer 295 a; *see also* H. Miles Foy III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 532 (1986) ("[I]f a debtor transferred property to a third person for the purpose of defrauding his creditors, the creditors, in the wake of the passage of the Statute of Elizabeth, could proceed directly against the property and recover it from the third person. This remedy was available under the Statute of Elizabeth even though the

based on the idea that a fraudulent transfer was no transfer at all. The thing still belonged to *D*. So *C* could obtain a judicial lien upon it.[51]

The UFCA preserved this possibility of ignoring the fact that *D* conveyed to *X*. According to UFCA section 9:

> (1) Where a conveyance . . . is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser. . . .
>
> (b) Disregard the conveyance and attach or levy execution upon the property conveyed.[52]

UFCA section 9 refers to "mature" claims. This is usually taken to mean that *C* has obtained a money judgment.[53] Only judgment creditors may "levy execution" against property.

The UFCA, then, preserves the option of disregarding the conveyance and levying execution. This has been called the "legal remedy," as opposed to avoidance, which is the "equitable remedy."[54]

UFTA section 7(b) makes a significant change in UFCA procedure: "If a creditor has obtained a judgment on a claim against the debtor, the creditor, *if the court so orders*, may levy execution on the asset transferred or its proceeds."[55] Today, a *court* must order a levy against *X*'s property. This requirement has been read to mean levies without express court permission are invalid.[56]

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statute expressly authorized only a penalty and forfeiture of the property, which the Crown and the aggrieved creditors were to divide equally." (footnotes omitted)).

[51] The "void" theory of fraudulent transfer can be found in 50 Edw. III c. 6 (1376) (Eng.) ("[I]f it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels, as if no such gift has been made.").

[52] UNIF. FRAUDULENT CONVEYANCE ACT, § 9 (UNIF. L. COMM'N 1918).

[53] *See* Baker v. Speaks, 295 P.3d 847, 857 (Wyo. 2013); Charles S. Ascher & James M. Wolf, Current Legislation, *The Uniform Fraudulent Conveyance Act*, 20 COLUM. L. REV. 339, 341 (1920). *But see* St. Johnland Nursing Home, Inc. v. Perlman, 514 N.Y.S.2d 171, 173, 134 Misc. 2d 1048, 1050 (Suffolk Cnty. Ct. 1987) (holding *C*'s claim was mature even though *C* had no judgment against *D* because *C* alleged *D*'s debt was due and owing); Zimmerman v. Merriman, 223 N.Y.S. 723, 724, 130 Misc. 163, 164 (Sup. Ct. 1927) (finding, where *C* held promissory notes past due but no judgment against *D*, *C* had a mature claim); Current Legislation, *The Uniform Fraudulent Conveyance Act and Its Effect on New York Law*, 25 COLUM. L. REV. 487, 490 (1925) ("The meaning of 'mature' is not definite. A creditor's claim may be mature though he is not a judgment creditor. . . .").

[54] *See* Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 144, 27 N.E.2d 814, 817 (1940). Since equity could not interfere with a legal remedy, injunctions against disregarding the transfer were not allowed. *See* Doland v. Burns Lumber Co., 194 N.W. 636, 637 (Minn. 1923); Sauber v. Nouskajian, 133 A. 642, 644–45 (Pa. 1926).

[55] UNIF. FRAUDULENT TRANSFER ACT § 7(b) (UNIF. L. COMM'N 1984) (emphasis added). The UVTA continues this language going forward. *See* UNIF. VOIDABLE TRANSACTIONS ACT § 7(b) (UNIF. L. COMM'N 2014).

[56] *See* Jazzville, Inc. v. C & L Asset Grp., Ltd., C8-00-1076, 2001 WL 242599, at *2 (Minn. App. Mar. 13, 2001).

1. Implications for real property

The phrase "may levy execution" appears in all three versions of the uniform acts.[57] When it comes to real property, "levying execution" often ill-describes what happens when a sheriff sells land to satisfy a judgment.[58] First, a creditor never "levies." This is something the sheriff, if anybody, does.[59] Second, the execution typically plays no role in calculating the amount of title that is for sale. The test is conducted as of when the judgment is docketed[60] or an abstract of the judgment is filed[61] locally where the real property is located.[62] Third, a levy is often not required at all. It is enough that a lien attach and that the sheriff has obtained the execution at a time when the lien is still alive.[63]

Putting aside these linguistic quibbles, the UFCA invites a sale of *X*'s property without the need for a prior avoidance action.[64] The transfer is *void*, and *C* can proceed as if *X*'s property were still *D*'s property.[65] No notice to *X* is required because it is not *X*'s land.

To illustrate, suppose, just before *C*'s judgment against *D* is entered, *D* fraudulently conveys Blackacre to *X,* and *X* records the deed. *X* was supposed to have legal title by virtue of the deed, but fraudulent transfer law makes clear that *C*'s judgment against *D* can encumber the land because the deed is void. Thus, when *C* achieves local docketing against *D*, *C* thereby obtains a judicial lien on *X*'s land.[66] We

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[57] UNIF. FRAUDULENT CONVEYANCE ACT § 9(b); UNIF. FRAUDULENT TRANSFER ACT § 7(b); UNIF. VOIDABLE TRANSACTIONS ACT § 7(b).

[58] New Jersey constitutes an exception. There, a docketed judgment is a lien, but, as between competing judgment creditors, the first to "levy execution" establishes priority over his fellows. *See In re* Silverman, 2 B.R. 326, 329–30 (Bankr. D.N.J.), *rev'd*, 6 B.R. 991 (D.N.J. 1980).

[59] That the sheriff sells, not the creditor, was described by Professor Glenn as "one of the finest flowers of English accidentalism." GLENN, *supra* note 10, § 19.

[60] *See* N.Y. C.P.L.R. § 5203(a) (McKinney 2020).

[61] *See* CAL. CIV. PROC. § 697.310(a) (West 2020).

[62] Or in cases of after-acquired property, the judicial lien attaches when *D* acquires the property. *See, e.g.*, Hulbert v. Hulbert, 216 N.Y. 430, 111 N.E. 70 (1916).

[63] *See* N.Y. C.P.L.R. § 5236(a).

[64] *See supra* text accompanying notes 52–54.

[65] *See* John C. Flood of MD, Inc. v. Brighthaupt, 122 A.3d 937, 942 (D.C. 2015) ("We see no reason that assets fraudulently conveyed, *and thus still owned by the debtor*, to a transferee should be exempt from post-judgment writs of [execution] on the ground that a court had not previously decided the ownership of the asset in question, given that ownership of the property could promptly be questioned in any case involving a third party." (emphasis added)).

[66] *See* Hillyer v. Le Roy, 179 N.Y. 369, 375–76, 72 N.E. 237, 238 (1904) ("The property of a debtor, which has been transferred by him in fraud of creditors, still remains, as to them, the debtor's property, and the lien of the creditor's judgment attaches to the real estate."); *see also* Bull v. Ford, 4 P. 1175, 1176 (Cal. 1884); Swift & Co. v. First Nat'l Bank, 168 A. 827, 830 (N.J. 1933); Note, *Priority Among Judgment Creditors in Property Fraudulently Conveyed*, 43 YALE L.J. 1178, 1178 (1933). *Hillyer* contains a refinement. In the case, *C* had a lien on *X*'s land from the time *C v. D* was docketed. But *C* had also obtained a money judgment against *X* for diverted rent from the time of the fraudulent transfer. This part of the case was reversed. *X* was privileged to collect rent after *C v. D* was docketed, but this privilege ended when *C v. X* was commenced. The rule in rent is that a lien creditor of the landlord has no right to rent until the lien creditor "dispossesses" the landlord. This is accomplished in New York by the appointment of a receiver. *See* Carlson, *Critique I*, *supra* note 8, at 1358–67. Thus, commencing *C v. X* in *Hillyer* was equated with dispossessing *X*.

shall say that *C*'s lien right "shines through" *D*'s fraudulent transfer and encumbers *X*'s land, even though *C* never docketed against *X*.

Suppose further that, armed with an execution from *C*, the sheriff advertises the sale of *X*'s land. An auction is held where *B* is the buyer. Because *C* has a "shine-through" lien on *X*'s land, the sheriff sells *X*'s land to *B*.[67]

If, after *B* receives her sheriff's deed, *X* was in possession, *B* must bring an action in ejectment against *X*. In this ejection action, *B* would have to prove that *D*'s conveyance to *X* was fraudulent. If *B* sustains this burden of proof, *X* is ejected.[68] On the other hand, if *B* goes into possession under color of title from the sheriff's deed, *X* could eject *B* based on *X*'s prior deed from *D*. *B*'s defense would be that *X*'s title was void for being fraudulent. If *B* carried this burden of proof, *B* would not be ejected.[69]

Basically, proceeding in this manner relieved *C* of any responsibility for litigating *X*'s title. The matter was left for *B* and *X* to hash out.[70] *C* could take her money from the sheriff and depart the scene.[71]

But what precisely is *B* buying? In California, the ancient answer (still valid) is that *B* buys *X*'s right of possession—if *X* fraudulently received her deed from *D*. *B* has a present right of possession and may even (presumably) use reasonable force to oust *X*.[72] If, however, *X*'s title was legitimate from the first, *B* bought nothing at all. Any seizure of the land by *B* would be trespassory.

In *Stewart v. Thompson*,[73] *D* fraudulently transferred California land to *X* in 1857. *C* obtained judgment against *D* in 1858. This triggered the start of a three-year statute

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[67] Courts disagree whether *X* may intervene to prevent the sale. *See* Doland v. Burns Lumber Co., 194 N.W. 636, 637 (Minn. 1923) (determining *X*, not made a party to execution sale, was not entitled to injunction to halt the sale); Conemaugh Iron Works Co. v. Delano Coal Co., 148 A. 94, 96 (Pa. 1929); Spellbrink v. Bramberg, 14 N.W.2d 38, 42 (Wis. 1944) (upholding the injunction to test *X*'s defenses).

[68] *See* S. Cent. Bldg. & Loan Ass'n v. Milani, 150 A. 586, 587–88 (Pa. 1930); *Conemaugh Iron Works Co.*, 148 A. at 95; Spokane Merchs.' Ass'n v. Chittick, 143 N.W. 915, 915–16 (Minn. 1913); Eckert v. Wendel, 40 S.W.2d 796, 797 (Tex. 1931); Smith v. Reid, 134 N.Y. 568, 568, 31 N.E. 1082, 1085 (1892); Bergen v. Carman, 79 N.Y. 146, 153 (1879) ("[I]t is well settled that where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution and the purchaser will have the right to impeach the conveyance in an action at law to recover the premises. . . .").

[69] *See* Shuck v. Quackenbush, 227 P. 1041 (Colo. 1924). *Shuck* refers to *X*'s title as being held in resulting trust for *D*. The court also refers to *D*'s intent to defraud creditors. The difference between a resulting trust and a fraudulent transfer is that in the former case nothing need be avoided. *C* can simply enforce his judgment against *D*'s equitable asset. In a fraudulent transfer, *X* has *both* legal and equitable title. For the relationship between fraudulent transfer and resulting trust, see David Gray Carlson, *Giving Back A Fraudulent Transfer: A Defense to Liability?*, 94 AM. BANKR. L.J. 629 (forthcoming 2020).

[70] *See* Amaker v. New, 11 S.E. 386, 387 (S.C. 1890) ("[H]e may disregard the conveyance as fraudulent and void, and proceed to sell the property under his execution, leaving the validity of the deed to be determined in an action by the purchaser at such sale to recover possession of the land. . . .").

[71] Typically, the sheriff writes a quitclaim deed and is not liable for a refund if title fails. *See* Reynolds v. Reynolds, 355 P.2d 481, 488 (Cal. 1960).

[72] *See* RESTATEMENT (SECOND) OF TORTS § 77 (AM. LAW INST. 1965) ("An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels. . . .").

[73] 32 Cal. 260 (1867).

of limitations.[74] *C* fomented an execution sale to *B* in 1859. In 1863, *B* sued *X* to quiet title. *X* claimed that the statute of limitations prevented *B* from raising the fraud attendant to *X*'s title. The California Supreme Court ruled that *B* was entitled to quiet title.[75] From this case, we may infer that *B* bought *X*'s right of possession in 1858. At that point, *B* was "the owner of the land."[76] *X* was a trespasser.

A contrary case is *Brasie v. Minneapolis Brewing Co*.[77] At an execution sale, *B* bought *X*'s land in 1893 and left *X* in possession. *B* waited until 1899 to bring an ejectment action against *X*. The court ruled that *X* had a valid defense of statute of limitations against avoidance and, therefore, *B* was not entitled to possession of the premises.[78]

What does *Brasie* imply about the effect of the execution sale? In Minnesota, it appears, *B* is not entitled to immediate possession. *B* would have trespassed if he entered on the land before obtaining a set-aside. All that *B* had bought was *C*'s set-aside action against *X*, as to which *B* must prevail as a condition precedent to her right of possession.[79]

Still, under the Minnesota rule, there is a difference between *C*'s action against *X* to set aside *D*'s fraudulent transfer and *B*'s action against *X*'s possession. If *C* had proceeded directly against *X* for a set-aside, *C*, if successful, would have established a lien on *X*'s property. *C* would then have to generate an execution sale, where *B* would buy a vested right to eject *X*. But, because *B* has bought in advance of the set-aside action, the consequence of *B* prevailing against *X* would be a right of possession, not a mere lien. Having made the high bid in *C*'s auction, *B* need not conduct a second auction.

One concludes that, at least in Minnesota, the legal remedy of disregarding the conveyance and levying execution was judicially abolished. The execution sale means only that *C*'s avoidance rights have been assigned to *B*. In short, one may not disregard a Minnesota conveyance at all. One must first set it aside. In this respect, it is tempting to suggest that the UFCA, later enacted in Minnesota,[80] overrules the

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[74] *See* Brown v. Campbell, 35 P. 433, 436 (Cal. 1893) (stating, in California, the statute of limitations for a claim against a debtor who fraudulently transfers property does not begin to run against the creditor, "until [the creditor] has obtained . . . a judgment against his debtor, because until then he has no right of action").

[75] *Stewart*, 32 Cal. at 263–64; *accord* Puccetti v. Girola, 146 P.2d 714, 715 (Cal. Dist. Ct. App. 1944); Wallin v. Scottsdale Plumbing Co., 557 P.2d 190, 195 (Ariz. Ct. App. 1976); Hutchinson Realty Co. v. Hutchinson, 239 P. 388, 391 (Wash. 1925); *Amaker*, 11 S.E. at 386.

[76] *See* Hager v. Shindler, 29 Cal. 47, 60 (1865) ("The plaintiff became the owner of the land . . . when he received the Sheriff's deed. . . ."); Scholle v. Finnell, 137 P. 241, 244 (Cal. 1913) ("[U]nder the sale [*B*] would acquire full legal and equitable title to the property."); Strangman v. Duke, 295 P.2d 12, 17–18 (Cal. Dist. Ct. App. 1956) ("As purchaser at his execution sale the judgment creditor acquires the legal title, not merely a right to set aside a voidable transfer.").

[77] 92 N.W. 340 (Minn. 1902).

[78] *Id.* at 343.

[79] *See Amaker*, 11 S.E. at 388 ("[This] view would render the conceded right of the creditor to disregard the fraudulent deed and sell the land under his execution absolutely nugatory . . . [and] amounts to saying that the *only* effectual mode of relief is by an action to set aside the deed for fraud, and that [disregarding the conveyance] is but a delusion." (emphasis added)).

[80] It has since enacted the UFTA. *See* Finn v. All. Bank, 838 N.W.2d 585, 592 (Minn. Ct. App. 2013) ("In 1921, Minnesota adopted the Uniform Fraudulent Conveyance Act. . . .").

Brasie holding and reinstates the legal remedy of disregarding *X*'s title. No recent court has said so, however.

Some of the older cases agree with *Brasie* that *C* has no lien on *X*'s property unless *C* obtains avoidance of *D*'s fraudulent transfer. For example, in *Miller v. Sherry*,[81] *D* fraudulently transferred land to *X*. C_1 docketed a judgment against *D*. C_2 subsequently docketed a judgment as well. C_2 then commenced a creditor's bill against *X*, as a result of which a "master in chancery" sold *X*'s land to *B*. C_1 claimed a lien against *B*'s land—a good claim under *Mannocke*. The Supreme Court, under pre-*Erie* federal common law, held that *B* bought free and clear of C_1.[82] Such a position denies the legal remedy of disregarding the conveyance. It assumes *D*'s transfer is real and effective. In such a case, *X* takes a *voidable* title.[83] To courts adopting this position, "void" is seen as an "egregious fallacy."[84]

The UFCA would seem to overrule such cases. Nevertheless, in *In re Previs*,[85] a bankruptcy court, reviewing ancient Washington law,[86] found the "voidable" solution—no "shine-through" lien. It denied that the UFCA reversed that position.[87] As a matter of legislative intent, this seems incorrect. Recall that UFCA section 9(b) invites *C* to "[d]isregard the conveyance and attach or levy execution upon the property conveyed."[88] In real estate cases, this implies that the shine-through lien is already there, before the *D-X* transfer is actually avoided.

In denying that the UFCA positively legislated the "void" theory, the *Previs* court observed that, by the express terms of the UFCA, *C* is required to "attach or levy."[89] Where *C* has not taken these actions, *C*'s docketing lien does not shine through. Yet, in many states, liens on land exist without attachment or levy. In Washington itself, the lien arises upon entry of a money judgment.[90] Thus, an inarticulate expression of the *Mannocke* rule became an excuse to deny that the UFCA legislates the "void" position. But then *In re Previs* implies a world in which proceeding against *D*'s land and proceeding against *X*'s land operate by different rules. If the UFCA implies different procedural rules for selling *X*'s land, why were these rules not set forth?

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[81] 69 U.S. 237 (1865).

[82] *See id.* at 251; *accord* Luhrs v. Hancock, 181 U.S. 567, 573 (1901); Union Nat'l Bank v. Lane, 52 N.E. 361, 362–63 (Ill. 1898); Casey Nat'l Bank v. Roan, 668 N.E.2d 608, 612 (Ill. App. Ct. 1996).

[83] *See* Doster v. Manistee Nat'l Bank, 55 S.W. 137, 138 (Ark. 1900) ("Ever since the passage of the 13 Eliz., after which our statute as to fraudulent conveyances was modeled, the word 'void,' as therein used, has generally been held to mean 'voidable.'").

[84] *Id.* at 139 ("All the authorities which hold that a judgment creditor has a judgment lien upon land which has been fraudulently conveyed by the debtor prior to the rendition of the judgment are grounded upon the egregious fallacy that a fraudulent conveyance is not voidable merely, but absolutely void.").

[85] 31 B.R. 208 (Bankr. W.D. Wash. 1983).

[86] *See* Preston-Parton Milling Co. v. Dexter Horton & Co., 60 P. 412 (Wash. 1900).

[87] *See In re* Previs, 31 B.R. at 211 ("The Uniform Fraudulent Conveyance Act, as enacted in Washington in 1945 . . . does not change the case law as applied under the facts of this case.").

[88] UNIF. FRAUDULENT CONVEYANCE ACT § 9(b) (UNIF. L. COMM'N 1918).

[89] *In re* Previs, 31 B.R. at 212.

[90] *See* WASH. REV. CODE § 4.56.200 (2010).

In re Harman[91] is the mirror image of *In re Previs*. Prior to enacting the UFTA, Texas followed the legal theory of voidness.[92] But in *Harman*, a Texas bankruptcy court read the UFTA as adopting the "voidable" theory and thus as eliminating the ancient Texas view that *C*'s judicial lien shines through to encumber *X*'s real property.[93] The argument was that, prior to the UFTA, fraudulent transfers were *void*.[94] Thus, filing an abstract of judgment against *D* created a lien on *X*'s land. But the UFTA makes the conveyance merely *voidable*. Ergo, *C* has no lien prior to the action to set aside the transfer. As the *Harman* court stated: "Now, in Texas, legal title does not remain with the debtor and the court cannot assume that the creditor obtains a lien as if the transfer had not been made. Fact, not fiction, now prevails. The transfer had been made."[95] The UFTA, however, invites *C*, if *C* has a judgment, to "levy execution."[96] This presupposes that *C*'s lien already exists. But the UFTA indicates that proceeding directly to the sale of *X*'s property is no longer countenanced *unless the court directly orders the sale*.[97] According to the *Harman* court: "Under current Texas law, procedurally, the judgment creditor may either bring an avoidance action, or request that the court order execution on an asset transferred or its proceeds. For either, the judgment creditor must obtain judicial relief."[98] Thus, *Harman* reads the new requirement for leave of court as auguring a switch from "void" to "voidable," reversing the *Mannocke* rule from 1571.

A Texas district court disagrees, though in a personal property context. In *California Pipe Recycling, Inc. v. Southwest Holdings, Inc.*,[99] *D* (never bankrupt) fraudulently transferred equipment to *X*. *X* sold the equipment to *AD* on credit. *X* then filed for bankruptcy. *AD* interpleaded the amount owed. This fund was proceeds of a fraudulent transfer. Both *C* and *X*'s bankruptcy trustee (T_X) claimed the fund. The court wrongly awarded the fund to *C* on the grounds that *D*'s conveyance to *X* was "void." *X* never had property rights in the equipment.[100] Because this was so, T_X had no interest in the proceeds paid by *AD*.

The case did not involve a shine-through judicial lien on the equipment. *C* had taken no action to levy on the equipment. Still, the "void" theory supports the notion that *if C* had a lien, it *would* have shined through.[101]

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[91] 243 B.R. 671 (Bankr. N.D. Tex. 1999).

[92] *See id.* at 674 (stating "Texas law now provides that fraudulent transfers are 'avoidable,' not 'void.'" (citing TEX. BUS. & COM. CODE §§ 24.005(a), .008(a)(1), .009(a) (West 1987))).

[93] *See id.* In *Harman*, the setting was different. *JC* attempted to petition *D* into involuntary bankruptcy. This requires *JC* to be an unsecured creditor. *D* claimed (unsuccessfully) *JC* was a *secured* creditor because *D* had fraudulently transferred real property to *X* before *JC* filed a local abstract of judgment. *See id.* at 673–74.

[94] *See* Eckert v. Wendel, 40 S.W.2d 796, 797 (Tex. 1931).

[95] *In re* Harman, 243 B.R. at 674.

[96] *See* UNIF. FRAUDULENT TRANSFER ACT § 7(b) (UNIF. L. COMM'N 1985).

[97] *See id.*

[98] *In re* Harman, 243 B.R. at 674–75 (citations omitted); *accord In re* Westpark One, LLC, No. 2:13-bk-02107-DPC, 2015 WL 5199368, at *4–5 (Bankr. D. Ariz. Sept. 4, 2015).

[99] No. H-09-2502, 2010 WL 56053 (S.D. Tex. Jan. 5, 2010).

[100] *See id.* at *5, *7.

[101] For a decision contrary to *California Pipe*, see *In re* Hirsch, 339 B.R. 18 (E.D.N.Y. 2006).

We have strayed from fraudulently transferred real property. Returning to that topic, the shine-through position, in which the transfer to *X* is void, not voidable, creates a nightmare for real estate title searchers. Suppose a title insurance company witnesses a chain of title like the following:

> (2014) *T* → *U* in a fraudulent transfer.
> (2015) *C*'s money judgment against *T* is docketed locally.
> (2016) *U* → *V*.
> (2017) *V* → *W*.
> (2018) *C* files a *lis pendens* against the property and commences an avoidance action.[102]
> (2019) *W* → *Y*.

Suppose, in 2020, *Z* wishes to buy from *Y* and asks a title insurance company for coverage. *Y*'s title is cloudy.[103] If *T*'s conveyance to *U* was a fraudulent transfer, then *C* has a lien against *Y*'s title after 2016.[104] Title searches are not likely to reveal this fact. The record shows that *T* conveyed away real property in 2014 and *C*'s judgment against *T* was in 2016. The record does not reveal the fact that *T*'s transfer to *U* was a fraudulent transfer.

The shine-through lien, if it exists, is important for four reasons: (1) it affects whether *V*-*Y* have bona fide purchaser defenses against *C*; (2) it affects the statute of limitations because the limitations period for fraudulent transfer tends to be shorter than the limitation on *C*'s judgment lien; (3) it determines priorities wherein multiple *C*s compete for the avails of a fraudulent transfer recovery; and (4) it is thought (wrongly) to affect the outcome of bankruptcy cases, where *C* has commenced (but has not concluded) an avoidance action against *X* prior to *D*'s bankruptcy petition.

2. Bona fide purchasers

When it comes to fraudulent transfers, it was usually said, where *V* (in 2016) was a bona fide purchaser for value, *V* bought the fraudulently transferred property free and clear of the creditors of *T*. But, ordinarily, *C*'s judgment lien is perfectly good against bona fide purchasers.[105] Therefore, an implication of *C*'s lien on *Y*'s property

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[102] A *lis pendens* (or notice of pendency) places the world on notice that litigation exists that affects the title to real property. After the notice of pendency is filed, there can be no bona fide purchasers. *See* N.Y. C.P.L.R. § 6501 (McKinney 2020).

[103] *See, e.g.*, Baldwin v. Burton, 850 P.2d 1188, 1198 n.48 (Utah 1993) (stating the title search would not report *C*'s lien). In *Marine Midland Bank v. Murkoff*, the trial court sensibly ordered that *D v. C* be docketed against *X*'s land, but this order was a remedy in *D v. X*. 508 N.Y.S.2d 17, 20, 120 A.D.2d 122, 125 (1986). This remedy was improvised and is nowhere expressly authorized by a New York statute. *See id.* at 25, 120 A.D.2d at 133.

[104] The New York scene is described in Carlson, *Critique I*, *supra* note 8, at 1369–83.

[105] *See, e.g.*, Fed. Deposit Ins. Corp. v. Jenson (*In re* Jenson), 980 F.2d 1254, 1259 (9th Cir. 1992); Doster v. Manistee Nat'l Bank, 55 S.W. 137, 138 (Ark. 1900).

is that *V-Y* are each denied the benefit of the good faith purchaser defense.[106] This observation becomes a policy reason to hold that *C*'s judicial lien on real property does not shine through.[107]

The UFCA confers a bona fide purchase defense upon subsequent takers like *U-Y*. Recall that UFCA section 9 provides that *C* may "[d]isregard the conveyance and attach or levy execution upon the property conveyed."[108] This is possible "as against any person *except* a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser."[109] The matter, however, is ambiguous. The reason why *C* can sell without a court-ordered set-aside is because *C* must have had a lien on *U*'s property in 2015. Liens typically are good against subsequent bona fide purchasers.[110] Only if *C*'s lien never attached to *U*'s property in 2015 do *U-Y* have a bona fide purchaser defense.

Alternatively, the position could be taken that, whereas judicial liens are good against bona fide purchasers, the UFCA intended a different rule for shine-through liens. That is, *C*'s lien at law is transformed by the UFCA into an equitable lien. If the lien is equitable, *U* could convey a good title free and clear of *C*'s lien to *V*, if *V* were a bona fide purchaser for value. I have found no cases that confirm or deny this interpretation of section 9.

The UFTA exacerbates the ambiguity. We have quoted UFTA section 7(b), which permits *C* to "levy execution on the asset transferred."[111] But *V-Y*'s bona fide purchaser defense is omitted. UFTA section 8(b) provides a defense in cases where *C* seeks a *money judgment* against a transferee for the value of Blackacre.[112] But, here, *C* is not interested in a *money judgment* against *U-Y*. Rather, *C* wishes to sell *Y*'s land straight out. If the UFTA is read literally, *Y*'s bona fides are no defense against the legal remedy of disregarding the *D-X* remedy.

The UVTA corrects this error. UVTA section 7(b) is identical,[113] but UVTA section 8(b)(2) adds this sentence: "Recovery pursuant to Section 7(a)(1) or (b) of or from the asset transferred . . . by levy . . . is available only against a person described in paragraph (1)(i) or (ii)."[114] *Y* is *not* described in section 8(b)(1)(ii). Subsection

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[106] For dictum that *JC* has a lien *and U-Y* have bona fide purchaser defenses against that lien, see *In re* Cass, 476 B.R. 602, 609 (Bankr. C.D. Cal. 2012), *aff'd*, BAP No. 12-1513-Kipata, 2013 WL 1459272 (B.A.P. 9th Cir. Apr. 11, 2013), *aff'd*, 606 F. App'x 318 (9th Cir. 2015). This is a contradiction. Liens are good against bona fide purchasers in California.

[107] *See Baldwin*, 850 P.2d at 1195 ("[*D*] held no interest in the property at the time [*C*] obtained their judgment against him; hence, a lien did not attach and [*C*] could not execute on the property. We therefore conclude . . . that it was necessary for [*C*] to bring a prior, separate action to set aside and declare void the allegedly fraudulent conveyance before foreclosing and executing. . . ." (footnotes omitted)).

[108] UNIF. FRAUDULENT CONVEYANCE ACT § 9(1)(b) (UNIF. L. COMM'N 1918).

[109] *Id.* § 9(1) (emphasis added).

[110] New York levies constitute an exception. *See* N.Y. C.P.L.R. § 5202(a)(2) (McKinney 2020) (stating good faith transferees of property not capable of delivery take free of a sheriff's levy).

[111] UNIF. FRAUDULENT TRANSFER ACT § 7(b) (UNIF. L. COMM'N 1984).

[112] *See id.* § 8(b).

[113] *See* UNIF. VOIDABLE TRANSACTIONS ACT § 7(b) (UNIF. L. COMM'N 2014).

[114] *Id.* § 8(b)(2).

(b)(1)(i) describes a first transferee or mediate transferee *other than* a good faith transferee for value.[115] Since *Y* is *not* described, *Y* has a good faith transferee defense.

Yet, a trap in the UVTA still lurks for *Y*. Suppose *C* filed a *lis pendens* in 2018. The significance of a *lis pendens* is to put the world on notice that *C* contests *W*'s title to the real property.[116] Under ordinary principles of "shelter,"[117] *V* took free and clear of *C*'s levying rights. The *lis pendens* makes *Y* a bad faith purchaser, but since *C*'s property right is utterly dead, we are not ordinarily concerned with the bona fides of *Y*. Under UVTA section 8(b)(2), *Y* is a person described by section 8(b)(1)(ii) and so is susceptible to *C*'s power to levy execution.[118] Per section 8(b)(1)(ii)(B), only *good* faith transferees of a good faith transferee are excluded from the description in paragraph (1)(ii).[119] So *Y* is described. *C* may sell *Y*'s land (via execution) to pay *C*'s judgment against *U*. If this is true, the UVTA does not follow the principle of shelter. *C* could not have levied execution against *V* or *W*, but *C*'s power revives against *Y*, the bad faith purchaser.

3. Statute of limitations

Reviewing our *T*-*Y* chain of title, if *C* has no judgment lien, *Y* can perhaps claim a statute of limitations defense against avoidance. UFTA section 9 invokes a four-year period.[120] On the other hand, UFTA section 9 does not apply if *C* already has a shine-through lien.[121] The statute of limitations for liens tends to be longer than it is for fraudulent transfers.[122]

This would appear to be the rule in California.[123] The Minnesota interpretation of *C*'s lien is that, if *C* instigates an execution sale where *B* is the buyer, *B* is not buying *X*'s right of possession. Rather, *B* is merely taking an assignment of *C*'s avoidance rights.[124] If that is so, *X* is fully able to assert the four-year statute of limitations as provided in the UFTA.[125] Thus, whether *C*'s judgment lien shines through to encumber *X*'s real property can be outcome-determinative for the statute of limitations defense.

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[115] *See id.* § 8(b)(1)(i).

[116] On the role of *lis pendens* in fraudulent transfer litigation, see *infra* text accompanying notes 241–65.

[117] On shelter rules, see Curtis Nyquist, *A Spectrum Theory of Negotiability*, 78 MARQ. L. REV. 897, 912–13 (1995).

[118] *See* UNIF. VOIDABLE TRANSACTIONS ACT § 8(b)(2).

[119] *See id.* § 8(b)(1)(ii)(B).

[120] *See* UNIF. FRAUDULENT TRANSFER ACT § 9 (UNIF. L. COMM'N 1984).

[121] *See* Tex. Sand Co. v. Shield, 381 S.W.2d 48, 53–55 (Tex. 1964) (pre-UFTA case).

[122] In New York, the lien lasts for ten years, more or less. N.Y. C.P.L.R. § 5203(a) (McKinney 2020). The lien can be renewed periodically. *See id.* § 5014.

[123] *See, e.g.*, CAL. CIV. PROC. CODE § 337.5 (West 2020) (providing a ten-year statute of limitations for "[a]n action upon a judgment or decree of any court of the United States or of any state within the United States").

[124] *See supra* text accompanying notes 79–80.

[125] *See* UNIF. FRAUDULENT TRANSFER ACT § 9.

4. Priority

Suppose multiple *C*s *seriatim* seek to avoid the same transfer to *X*. Whether a given *C*'s lien shines through determines the priority to the avails of an avoidance action against *X*.

Some cases let the shine-through lien determine priority. In *Jackson v. Holbrook*,[126] *D* conveyed Minnesota land to *X*. C_1's judgment was against *D*. C_2's judgment against *D* was subsequently docketed. C_2 opted to disregard the fraudulent transfer and levy execution. At an execution sale, B_1 was the buyer. B_1 sold to B_2 in a general warranty deed that promised B_2 marketable title. C_1, however, commenced enforcement proceedings against B_2, forcing B_2 to pay C_1 off.[127] B_2 was able to recover the payoff from B_1 as breach of a warranty. C_1's lien shined through and guaranteed to C_1 seniority over subsequent attempts to set aside *D*'s fraudulent transfer to *X*.[128]

In *Miller v. Sherry*,[129] the shine-through did not determine priority. *D* had fraudulently conveyed to *X*. Thereafter, C_1 docketed a judgment against *D*. Later, C_2 docketed a judgment as well. C_2 then filed a creditor's bill against *X*, and, as a result, a "master in chancery" sold *X*'s land to *B*. Thereafter, C_1 claimed a lien against *B*'s land—a good claim under *Mannocke*. The Supreme Court held that *B* bought free and clear of C_1.[130] Ergo, C_2 prevailed because commencement of the set-aside action brought the real property *in custodia legis* for the senior benefit of C_2. C_1's lien did not shine through.[131] C_2 commenced a set-aside action before C_1 did, so C_2 was senior.

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[126] 32 N.W. 852 (Minn. 1887).

[127] To be more precise, C_1 had instigated an execution sale, where a buyer took title. B_2, who owned the equity behind C_1's lien, exercised a redemption right to buy off C_1's transferee. *See id.* at 856.

[128] *See id.* at 855–56; *accord* White's Bank of Buffalo v. Farthing, 101 N.Y. 344, 347–48, 4 N.E. 734, 734–35 (1886). The holding raises more questions as to what B_1 was buying at C_2's Minnesota execution sale in *Brasie*. *See supra* text accompanying notes 77–81. In *Jackson*, B_1's title consisted in those interest which disappeared when C_2 foreclosed: C_2's lien and any foreclosed junior liens, plus *X*'s possessory right, subject to the avoidance right by C_1. *See* 32 N.W. at 854–55; *see also* Fordyce v. Hicks, 40 N.W. 79, 80–81 (Iowa 1888) (finding *X*'s purchase of C_1's senior lien could be asserted against C_2's right to avoid the fraudulent transfer). In short, C_1 was not excused from proving the *D*-*X* conveyance was fraudulent; B_2 inherited any defense *X* may have had.

[129] 69 U.S. 237 (1864).

[130] *See id.*; *accord* Luhrs v. Hancock, 181 U.S. 567, 573–74 (1901); Bishop v. McPherson, 168 So. 675, 678 (Ala. 1936); Doster v. Manistee Nat'l Bank, 55 S.W. 137, 138 (Ark. 1900); Hallorn v. Trum, 17 N.E. 823, 825 (Ill. 1888); Boyle v. Maroney, 35 N.W. 145, 147 (Iowa 1887); Ely & Walker Dry Goods Co. v. Freedberg, 11 S.W.2d 964, 966 (Ky. 1928); Grenada Bank v. Waring, 99 So. 681, 684 (Miss. 1924).

[131] Care must be used, however, in applying the *Miller v. Sherry* rule. *See* 69 U.S. at 250–51. In *Shepler v. Whalen*, 119 P.3d 1084 (Colo. 2005) (en banc), *D* paid the mortgage of *X* by sending funds to *X*'s good faith lender. Properly analyzed, *D* bought the mortgage in subrogation. *D* then granted this mortgage to *X*. The mortgage merged with *X*'s equity to become a fee simple absolute. Thereafter, C_1, C_2, C_3, and C_4 docketed judgments against *D* in sequence. C_4 was the first to commence and therefore had priority. The liens of $C_{1\text{-}3}$ did not shine through. *See id.* at 1087–88. The matter would have been different if $C_{1\text{-}4}$ had docketed *before D* paid off the mortgage. Then $C_{1\text{-}4}$'s liens would have attached to the mortgage *D* bought in subrogation. C_4 would then not be entitled to priority over his fellows. This point seems to have been overlooked in *Clark v. Peters* (*In re* Bryan), 547 F. App'x 892 (10th Cir. 2013), where *C* docketed while *D* had an equitable interest in real property. The reasoning seems to assume judgment liens encumber *D*'s legal title in real property but not *D*'s equitable interests.

5. Implications for bankruptcy: transferee of a transferee

When *D* conveys real property to *X* and *C* dockets against *D*, does *C*'s judicial lien shine through to encumber *X*'s property? One might think that this question has important consequences for bankruptcy cases. If *C*'s lien shines through, it would appear at first blush that *C* would be a secured creditor in *D*'s bankruptcy. But this is not so.

Whether *C* is a secured creditor in *D*'s bankruptcy is entirely a federal question, and the answer is clear. Even in shine-through states, *C*'s lien on *X*'s property is voidable by *D*'s bankruptcy trustee, at least potentially. The issue turns on whether *C* knew that *D*'s transfer was fraudulent at the time *C*'s lien attached to *X*'s property.

I theorize the matter as follows.[132] Suppose insolvent *D* owns Blackacre, and *D* fraudulently transfers it to *X*. *C* then obtains a money judgment against *D*. *C*'s judgment is docketed or filed in the county where Blackacre is located. *C* now has a shine-through lien on *X*'s land. When *D* files for bankruptcy, *X* owns the land, as encumbered by *C*'s shine-through lien. But *D*'s unsecured creditors have the right to avoid *D*'s fraudulent transfer to *X*. Because *C*'s lien encumbers *X*'s land by "shining through," whatever lien an unsecured creditor gets is subordinated to *C*'s lien. Nevertheless, *X* owns an equity behind *C*'s lien, and this equity is held in trust by *X* for the benefit of *D*'s unsecured creditors. *X*'s equity may have had value in the marketplace before *C*'s shine-through lien came into existence. But now, where *C*'s secured claim exceeds the value of *X*'s land, there may be, in hindsight, zero value for any creditor other than *C*. But avoidance rights exist nevertheless.[133]

The trustee has direct avoidance rights under Bankruptcy Code section 548(a).[134] According to section 544(b)(1), the trustee is subrogated to the rights of *unsecured* creditors.[135] *C*, under state law, is a *secured* creditor by virtue of the shine-through lien.[136] In effect, *C* has already, quite automatically, avoided *D*'s fraudulent transfer to *X*. *D*'s bankruptcy trustee cannot subrogate herself to *C*'s lien. But *D*'s bankruptcy trustee can subrogate to the avoidance rights of *other* unsecured creditors of *D*, if they exist.

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[132] This theory depends on Bankruptcy Code section 550(a)(2), which did not exist under the Bankruptcy Act of 1898. *See* 11 U.S.C. § 550(a)(2) (2018). Therefore, prior to 1978, *C*'s lien on *X*'s real property survived *D*'s bankruptcy proceeding. *See* Hillyer v. Le Roy, 179 N.Y. 369, 375–76, 72 N.E. 237, 238–39 (1904); GLENN, *supra* note 10, § 97.

[133] *See In re* Claxton, 32 B.R. 215, 217–19 (Bankr. E.D. Va. 1983).

[134] 11 U.S.C. § 548(a).

[135] *See id.* § 544(b)(1) ("[T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an *unsecured* claim. . . ." (emphasis added)).

[136] *See* Giffin v. Edwards, 708 N.E.2d 876, 879 (Ind. Ct. App. 1999) (explaining that when *C* docketed his judgment in the county where the real estate was located, and brought the fraudulent conveyance action against *X* before *D* filed his bankruptcy petition, *C* had acquired an equitable lien which gave him a secured status).

Under either section 548(a) or section 544(b)(1), the trustee may avoid the fraudulent transfer by bringing an action against *X*.[137] This is the trustee's exclusive right; the trustee has expropriated state-law avoidance rights from the unsecured creditors.[138] *X* is the initial transferee under section 550(a)(1).[139] In addition—and here is the key to the theory—the trustee may avoid *C*'s shine-through judgment lien because *C* is a transferee of a transferee under section 550(a)(2).[140]

How is *C* a transferee of a transferee? First, *C* was an unsecured creditor of *D*. Second, *D* conveyed to *X*. *Any* unsecured creditor of *D* (not just *C*) has an avoidance right against *X*. Third, *X* involuntarily transferred the land to *C* when *C* docketed or filed against *D* and obtained a lien on *X*'s fraudulently received land. Creation of a judicial lien is a transfer.[141] Therefore, *C* is a transferee of a transferee.

As a transferee of a transferee, *C* is technically eligible for the defense in section 550(b):

> The trustee may not recover under section (a)(2) of this section from—
>
> > (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided. . . .[142]

The reference to section 550(a)(2) in section 550(b) indicates that the transferee of a transferee (but not initial transferees) may assert this defense.[143]

C can assert that *C* is a transferee for value because *C*'s judgment lien secures an antecedent debt. But *C* may have knowledge of the voidability of the transfer, especially where *C* has commenced set-aside litigation against *X* prior to *D*'s bankruptcy petition. If knowledge exists, *C* has no defense under section 550(b).

But suppose, at the time of docketing, *C* never knew of the fraudulent transfer to *X*. *C* could then plausibly claim that *C*'s automatic shine-through lien on *X*'s property attached at a time when *C* was without the requisite knowledge. If so, *C* is a good faith transferee for value entitled to the section 550(b)(1) defense.

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[137] 11 U.S.C. §§ 544(b)(1), 548(a).

[138] *See* Nat'l Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 708–09 (7th Cir. 1994) ("[T]he right to recoup a fraudulent conveyance, which outside of bankruptcy may be invoked by a creditor, is property of the estate that only a trustee or debtor in possession may pursue once a bankruptcy is under way."); Hatchett v. United States, 330 F.3d 875, 886 (6th Cir. 2003); *In re* Phillips, 573 B.R. 626, 639–40 (Bankr. E.D.N.C. 2017); *In re* Tessmer, 329 B.R. 776, 779 (Bankr. M.D. Ga. 2005). *But see In re* Hashim, 379 B.R. 912, 922 (B.A.P. 9th Cir. 2007) (holding *C* had standing to commence an adversary proceeding to recover a fraudulent transfer for the benefit of the estate).

[139] *See* 11 U.S.C. § 550(a)(1).

[140] *See id.* § 550(a)(2).

[141] *Id.* § 101(54)(A).

[142] *Id.* § 550(b).

[143] *See* Schafer v. Las Vegas Hilton Corp. (*In re* Video Depot, LTD), 127 F.3d 1195, 1198 (9th Cir. 1997) ("Subsequent transferees therefore have a defense unavailable to initial transferees.").

This theory is vindicated in *Cadle Co. v. Mims* (*In re Moore*),[144] where *C* had already commenced fraudulent transfer litigation against *X*. Commencing a fraudulent transfer action in Texas brought *X*'s property *in custodia legis*, so that, as of commencement, *C* had a lien on *X*'s property that trumped all the other creditors of *C*.[145] *D*, however, filed for bankruptcy. This meant, pursuant to Bankruptcy Code section 544(b)(1),[146] *T* expropriated unsecured creditor avoidance right against *X* for the benefit of *all* the creditors of *D*. Since *C*'s litigation against *X* was in a highly advanced state, *T* agreed to sell *T*'s section 544(b)(1) right back to *C* for cash. The court upheld the sale.[147] The sale, however, assumes that *C* was an unsecured creditor of *D*. *C*'s lien had disappeared! The court does not account for this disappearance. The avoidance of *C*'s lien under section 550(a)(2) explains it. The case implicitly depends on the disencumbrance of *X*'s property of *C*'s *in custodia legis* lien.

This theory finds oblique support in case law. *C*'s lien was actually avoided in *In re Previs*[148] but as a consequence of section 551, not section 550(a)(2). According to section 551, "[a]ny transfer avoided under section . . . 544 . . . is preserved for the benefit of the estate but only with respect to property of the estate."[149] This section does not seem to say anything about whether what is avoided is senior to *C*'s senior shine-through lien. Nevertheless, the correct result was achieved. The shine-through lien was avoided.

Some courts have avoided the shine-through lien as a voidable preference. In *Cullen Center Bank & Trust v. Hensley* (*In re Criswell*),[150] *D* fraudulently transferred real property to *X*. *C* docketed in Texas and obtained a shine-through lien. *D* filed for bankruptcy within ninety days. This was held to be a voidable preference.[151]

The voidable preference solution was also suggested in *Federal Deposit Insurance Corp. v. Davis*.[152] In *Davis*, *D* conveyed real property to *X*. *C* docketed a judgment against *D*, creating a shine-through lien on *X*'s property. A month later, *D* filed for bankruptcy. The trustee neglected to challenge either *X*'s fraudulently received title or *C*'s lien upon it.[153] The court suggested that, had the trustee bothered,

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[144] 608 F.3d 253 (5th Cir. 2010).

[145] *See* Cassaday v. Anderson, 53 Tex. 527, 537 (1880) ("As between two creditors, if one has already obtained his judgment and instituted proceedings to set aside the fraudulent conveyance, this will give him priority of right to first have his debt satisfied out of the property. . . .").

[146] 11 U.S.C. § 544(b)(1).

[147] *In re* Moore, 608 F.3d at 262.

[148] *In re* Previs, 31 B.R. 208, 212 (Bankr. W.D. Wash. 1983).

[149] 11 U.S.C. § 551.

[150] 102 F.3d 1411 (5th Cir. 1997).

[151] *See id.* at 1418.

[152] 733 F.2d 1083, 1084 (4th Cir. 1984) ("Preferences under [section] 547 . . . are voidable, not void.").

[153] Where a trustee does not seek avoidance against *X* or *C*, *C*'s lien on *X*'s property survives *D*'s bankruptcy and can be asserted against *X*. *See In re* Johnson, 466 B.R. 67, 70 (Bankr. E.D. Va. 2012) ("Marking [a] judgment 'discharged in bankruptcy' does not release any lien that attached to the property conveyed prior to the filing of the [bankruptcy] petition. . . . [A] creditor 'having unavoided liens on fraudulently conveyed property can pursue [its] state law remedies' as to the fraudulently conveyed property." (fourth alteration in original) (citations omitted)).

he could have avoided *C*'s lien—as a voidable preference.[154] That is, *C* was seen as receiving a judicial lien on *D*'s property within ninety days of bankruptcy. The court took it for granted that *X*'s property was still *D*'s property. In short, the transfer was *void*—not *voidable*.

The voidable preference theory, however, is untenable. Assuming, *ex hypothesi*, that *C*'s lien was avoided, the trustee *still* would have been required to avoid *D*'s fraudulent transfer to *X*.[155] *X* was the initial transferee of the fraudulent transfer. Yet, the avoidance theory in *Cullen* and *Davis* presupposes that *X* is *not a transferee at all*! At one moment, *X* is not a transferee. *D* is the owner; *C*'s lien attaches to *D*'s property within ninety days of bankruptcy. At another moment, *X is* a transferee. The trustee must recover the fraudulently transferred land from *X*. This logic, it seems to me, is contradictory. If *X* had title and *C* has a lien on *X*'s property, *C* has received no *debtor* property within ninety days of bankruptcy as section 547(b) requires.[156]

Other courts proclaim themselves mystified by the relevance of section 551 and uphold *C*'s shine-through lien. In so doing, they overlook *C*'s status under section 550(a)(2).[157] In *Daff v. Wallace* (*In re Cass*),[158] *D* had fraudulently transferred a remainder interest in real property to *X*, retaining a life estate. Thereafter, *C* obtained judgment against *D*. *C* commenced a set-aside action against *X* prior to the bankruptcy. *D* filed for bankruptcy more than two years later. Properly, *D*'s bankruptcy trustee could avoid the *D*-*X* conveyance under Bankruptcy Code section 544(b).[159] The trustee could recover *X*'s "equity" behind *C*'s lien because *X* was the initial transferee of a fraudulent transfer.[160] Then, the trustee could avoid *C*'s lien, as *C* was a transferee of a transferee under section 550(a)(2).[161] *C* could not claim to be a bona fide transferee under section 550(b)(1) because *C* obviously knew that the *D*-*X* transaction was a fraudulent transfer.[162] Thus, unambiguously, the trustee prevails over *X* and *C*.

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[154] *Davis*, 733 F.2d at 1084 (stating the trustee must take affirmative steps to set aside a preferential transfer because preferences under section 547 are voidable, rather than void).

[155] *See In re* Claxton, 32 B.R. 215, 219 (Bankr. E.D. Va. 1983). In *Claxton*, *C* had a shine-through lien on *X*'s property. *D* then filed for bankruptcy. The trustee first avoided *X*'s fraudulently received title and then subsequently avoided *C*'s lien under Bankruptcy Act section 67a(1), which provided, "[e]very lien against the property of a person obtained by . . . judgment within four months before the filing of a petition . . . shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent. . . ." Bankruptcy Act of 1938, Pub. L. No. 75-696, § 67a(1), 52 Stat. 840, 875–76; *accord* Guaranty Nat'l Bank v. State Motor Sales, Inc., 147 S.E.2d 495, 499, 501 (W. Va. 1966). This theory had similar defects to the voidable preference theory suggested in *Davis*. Once the trustee recovered from *X*, the property was property of the bankruptcy estate, not of the "person" who filed for bankruptcy, as section 60a required. Bankruptcy Act of 1938 § 60a.

[156] *See* 11 U.S.C. § 547(b)(4)(A) (2018).

[157] *See id.* § 550(a)(2) (providing an avoided transfer may be recovered by the trustee from any immediate or mediate transferee of the initial transferee).

[158] 476 B.R. 602 (Bankr. C.D. Cal. 2012), *aff'd*, No. 12-1513-Kipata, 2013 WL 1459272 (B.A.P. 9th Cir. Apr. 11, 2013), *aff'd*, 606 F. App'x 318 (9th Cir. 2015).

[159] *See* 11 U.S.C. § 544(b).

[160] *See id.* § 550(a)(1).

[161] *See id.* § 550(a)(2).

[162] *See id.* § 550(b)(1).

The bankruptcy court missed this point, however. It held that *C* was a secured creditor of *X* as soon as *C* filed an abstract of judgment against *D* and that *C*'s lien was valid in *D*'s bankruptcy.[163] Therefore, the bankruptcy court assumed that, in California, judicial liens unavoidably shine through[164] to encumber *X*'s property.[165] Properly, the shine-through lien was avoidable.

6. Exempt property

These questions have arisen in a recent case involving exempt property. In *Patrusky v. Jungle Treats, Inc.* (*In re Patrusky*),[166] the court was confronted with the following chronology:

> (2013): *D* owns her home, which was monetarily exempt for $150,000. *D* fraudulently transfers her home to *X*.
> (2015): *C* dockets a judgment against *D*.
> (March 2016): *C* commences fraudulent transfer litigation against *X* to set aside the *D*-*X* deed.[167]

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[163] *See In re* Cass, 476 B.R. at 618; *accord In re* Faraldi, 286 B.R. 498, 501 (Bankr. E.D.N.Y. 2002); *In re* Mathiason, 129 B.R. 173, 177 (Bankr. D. Minn. 1991).

[164] The B.A.P., in an unpublished opinion, affirmed on a different, sensible ground. *See In re* Cass, No. 12-1513-Kipata, 2013 WL 1459272, at *1 (B.A.P. 9th Cir. Apr. 11, 2013). The case did not involve a fraudulent transfer after all! It appears when *D* deeded a remainder to *X*, *X* promised to convey it back to *D* upon demand. This was a real estate contract. Its significance is that it triggers the doctrine of equitable conversion. Under that doctrine, a buyer holds equitable title in the underlying real property and the seller holds the legal title. *See* David Gray Carlson, *Constructive Trusts and Fraudulent Transfers: When Worlds Collide*, 103 MARQ. L. REV. 365, 383–85 (2020) [hereinafter Carlson, *When Worlds Collide*]. In light of equitable conversion, *D* held a life estate and an equitable interest in the remainder. *X* held legal title to the remainder. *C*'s judgment lien therefore attached to *D*'s life estate and also to *D*'s equitable remainder. Thus, *C* was not a transferee of a transferee of a fraudulent transfer, but rather, an initial transferee of a nonvoidable judicial lien. Incidentally, *D* died after filing for bankruptcy. *X*'s remainder had become property of the bankruptcy estate because *D* had fraudulently transferred the remainder to *X*. *D*'s retained life estate was also property of the estate. When *D* died, the trustee's life *pur autre vie* became a fee simple absolute, but still, it was held in trust for *C*'s shine-through lien.

[165] For shine-through cases that also miss the section 550(a)(2) point, see *In re* Laines, 352 B.R. 420 (Bankr. E.D. Va. 2006); *In re* Bell, 55 B.R. 246 (Bankr. M.D. Tenn. 1985). For a case where *C* had a lien by commencing an avoidance action against *X* and where the court missed the section 550(a)(2) point, see *In re* Satterfield, 110 B.R. 553 (Bankr. N.D. Ala. 1989). In *Laines*, the court had second thoughts when the trustee made a claim for reimbursement of administrative costs. *In re* Laines, No. 04-10020-RGM, 2007 WL 2287905, at *15–18 (Bankr. E.D. Va. Aug. 6, 2007). The court thought that *C*'s shine-through lien was no good against a subsequent bona fide purchaser (which is questionable). Therefore, the trustee took free and clear of *C* pursuant to Bankruptcy Code section 544(a)(3). This thought must be rejected. Once *D* had conveyed to *X* and once *X* recorded the deed, *D* had no power to convey free and clear of *X*. Therefore, the trustee could not take free of either *C* or *D*.

[166] 797 F. App'x 653 (2d Cir. 2020), *aff'g* 599 B.R. 202 (E.D.N.Y. 2019).

[167] Was this a fraudulent transfer? In most states, conveying away exempt property is not a fraud on creditors (the "no harm, no foul" rule). *See* Nino v. Moyer, 437 B.R. 230, 235 (W.D. Mich. 2009). In New York, apparently, creditors can recover fraudulently transferred exempt property. *See In re* Panepinto, 487 B.R. 370, 374–75 (Bankr. W.D.N.Y. 2013). *But see* James v. Powell, 19 N.Y.2d 249, 257, 225 N.E.2d 741, 745 (1967) (suggesting if Puerto Rican land was exempt, then "manifestly" its transfer cannot be fraudulent). In any case, the numbers provided in the *Pastrusky* opinion indicate that *X* promised to pay fair consideration for *D*'s equity

> (May 2016): *X* deeds the home back to *D*.
> (November 2016): *D* files for bankruptcy and claims the home as exempt.

At all levels, the courts assumed that *C*'s New York lien did *not* shine through, in spite of New York authority to the contrary.[168] Under these authorities, *C*'s judicial lien shined through and encumbered *X*'s land in 2013. This lien did not disappear when *X* conveyed the home back to *C*. *C* was a transferee of a transferee, and so *C*'s lien was probably voidable by *D*'s bankruptcy trustee under section 550(a)(2)[169] and preserved for the benefit of the bankruptcy estate under section 551.[170] This point was overlooked, however.

In *In re Patrusky*, *D* listed the home on her schedule of exempt assets. *D* had a problem, however. *D* could not homestead against *C*'s lien on *X*'s property. Homesteads require that *D* first own land and then *C*'s judgment is docketed. Where *D* acquires *X*'s land already encumbered by *C*'s judicial lien, *D* cannot disencumber *C*'s pre-existing lien.[171] But section 522(f) potentially comes to *D*'s rescue.

D moved to avoid *C*'s lien under Bankruptcy Code section 522(f) to the extent the lien impaired *D*'s exemption.[172] According to section 522(f)(1):

> [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) . . . if such lien is—
>
> (A) a judicial lien. . . .[173]

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in the home, even if we put aside the $165,000 exemption point. *See In re* Patrusky, 599 B.R. at 204. Nevertheless, the court treated the *D-X* conveyance as fraudulent and so shall we.

[168] *See In re* Faraldi, 286 B.R. at 503; Lawson v. Liberty Nat'l Bank & Trust Co., 18 B.R. 384, 386–87 (W.D.N.Y. 1982). *Contra In re* Paolini, 11 B.R. 317, 319–20 (Bankr. W.D.N.Y. 1981). Both *In re Faraldi* and *Lawson* are discussed in Carlson, *Critique I*, *supra* note 8, at 1369–83.

[169] *See* 11 U.S.C. § 550(a)(2) (2018). If *C* did not know of the *D-X* fraudulent transfer when *C*'s judgment was docketed, *C* could assert the good faith transferee defense in Bankruptcy Code section 550(b)(1).

[170] *See id.* § 551.

[171] *See* Hartell v. Tulsa Rig, Reel & Mfg. Co., 64 S.W.2d 804, 806 (Tex. Civ. App. 1933) ("[A] pre-existing lien is not affected by the subsequent acquisition of a homestead right in the property.").

[172] By way of background, section 522(f)(1) was added to the Bankruptcy Code because the Bankruptcy Code also added optional federal exemptions into the bankruptcy mix. *See* 11 U.S.C. § 522(b)(2), (d). As is well known, section 522(b)(2) invites state legislatures to "opt out" of the federal exemption. Since these federal exemptions might be non-exempt under state law, the danger arose that federally exempt property would arrive in bankruptcy already encumbered by a judicial lien. In such a case, a choice of the federal exemption would seem to be defeated. Section 522(f)(1) allows the pre-petition lien to be removed, thereby vindicating the federal exemption. But section 522(f) potentially applies to state exemptions as well. For example, in some states, a debtor must file notice of a homestead in the local real estate records. Section 522(f)(1) permits a homestead to be exempted if a creditor has obtained a lien before any such declaration could be filed by the debtor. *See* Farrey v. Sanderfoot, 500 U.S. 291, 298–99 (1991).

[173] 11 U.S.C. § 522(f)(1). Yet, section 551 states: "Any transfer avoided under section 522 . . . of this title . . . is preserved for the benefit of the estate *but only with respect to property of the estate*." *Id.* § 551 (emphasis added). Does section 551 take away from the debtor what section 522(f)(1) gives? If so, section 522(f)(1) is a dead letter. Clearly this is not the case. The lien avoided under section 522(f) encumbers exempt property—

"Impairment" is defined in section 522(f)(2):

> (A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens.[174]

Under this definition, *D* could entirely avoid *C*'s lien.[175] At first impression, section 522(f) is the enemy of shine-through liens on exempt homesteads.

C objected, however, that *C*'s lien could not be avoided under the Supreme Court's weird opinion in *Farrey v. Sanderfoot*.[176] Under this opinion, *D* could avoid *C*'s lien if *first D* owned the home and *then C*'s lien attached to the home. But if *D* obtained the land *at the same time as or after C*'s lien attached, *D* could *not* avoid *C*'s lien.[177]

C's analysis was that *C*'s lien on the home arose when *X* conveyed back to *D* (2016). Since *C*'s lien (2016) was coeval with *D*'s acquisition (2016), *Farrey* applied, and there could be no avoidance. In other words, *C* denied the shine-through nature of its lien.

D, however, confessed that her transfer to *X* was fraudulent.[178] As such, the transfer to *X* was a nullity. *D* owned the home since 2004 and never gave it up. Since

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property that is *not* in the bankruptcy estate. The italicized portion of section 551, *supra*, prevents the trustee from arguing that the trustee inherits the avoided lien from an individual creditor.

[174] *Id.* § 522(f)(2)(A).

[175] The amounts corresponding to section 522(f)'s subparagraphs (A)(i)–(iii) were:

> (i) $480,364.80 (*C*'s lien);
> (ii) $662,561.08 (two senior mortgages);
> (iii) $165,500.00 (the exemption).

The sum of these amounts is $1,308,425.88. The value of the unencumbered home was alleged to be $810,000. Therefore, *D* thought herself able to avoid $498,425.88 worth of *C*'s lien. Patrusky v. Jungle Treats, Inc. (*In re* Patrusky), 797 F. App'x 653, 655–56 (2d Cir. 2020), *aff'g* 599 B.R. 202 (E.D.N.Y. 2019).

[176] *See* 500 U.S. at 301.

[177] *See* Marine Midland Bank v. Scarpino (*In re* Scarpino), 113 F.3d 338, 341 (2d Cir. 1997) ("[T]he critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it was fixed." (quoting *Farrey*, 500 U.S. at 299)). Scholarly criticism of *Farrey* has been scathing. *See* Laura B. Bartell, *Extinguishment and Creation of Property Interests Encumbered by Liens—The Strange Legacy of* Farrey v. Sanderfoot, 87 AM. BANKR. L.J. 375 (2013); C. Robert Morris, *Bankrupt Fantasy: The Site of Missing Words and the Order of Illusory Events*, 45 ARK. L. REV. 265 (1992); *see also* Carlson, *Critique I*, *supra* note 8, at 1389 (describing the Supreme Court's opinion as "highly cubist").

[178] This confession violates the rule that *D* has no standing to avoid her own fraudulent transfer; only creditors may do this. *See In re* Patrusky, 599 B.R. at 206–07 ("The Court is unmoved by [*D*'s] attempt to use her admittedly deceptive actions to avoid the Lien.").

D owned in 2004 and *C*'s shine-through lien attached in 2013, *Farrey* did not apply. *D* could therefore obliterate *C*'s lien.

The Second Circuit read New York law as prohibiting the shine-through.[179] As a result, *D* acquired the home (2016) at the same time *C*'s docketing lien attached to *X*'s home. Because *D*'s ownership did not predate *C*'s lien, *Farrey did* apply,[180] and so (based on no shine-through) *D* had no avoidance rights against *C*'s judgment lien.[181]

In truth, *D*'s bankruptcy trustee had avoidance rights because *C* was a transferee of a transferee of *D*'s fraudulent transfer. The trustee deserved to stand in the shoes of *C*, but this opportunity was overlooked.

7. Unconstitutionality of the remedy

In the case of chattels, *C* is invited to "levy execution" without ever seeking in advance to set aside the transfer as fraudulent.[182] A sheriff typically levies a chattel by taking custody of it prior to the sale.[183] Classically, if *D* fraudulently transfers a chattel to *X* just prior to *C*'s obtainment of judgment, and if *C* subsequently obtains a judgment, *C* may serve an execution on the sheriff. The sheriff is authorized to seize *X*'s chattel and sell it to some buyer, *B*.[184]

After the fact, *X* may seek replevin of the levied chattel from *B* or from the sheriff if it turns out *D*'s transfer of the brick was not a fraudulent transfer.[185] Or, alternatively, *X* can sue *C* and the sheriff in conversion, if indeed no fraudulent transfer actually existed.[186]

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[179] The court decided the matter by citing stray comments from New York authorities that fraudulent transfers are voidable, not void. *In re* Patrusky, 797 F. App'x at 655–57 (citing Eberhard v. Marcu, 530 F.3d 122, 129 (2d Cir. 2008); *In re* Hirsch, 339 B.R. 18, 29 (E.D.N.Y. 2006)). But all the court meant by "not void" is *D* could not avoid his own fraudulent transfer to *X*; only *C* could. The court cites *Adelphia Recovery Trust v. HSBC Bank USA* (*In re Adelphia Recovery Trust*), 634 F.3d 678, 691 (2d Cir. 2011), but the stray remark goes to whether a creditor can *ratify D*'s fraudulent transfer (yes, because a transfer is voidable and therefore not necessarily void). The *Patrusky* court failed to see that fraudulent transfers are *both* void (law) *and* voidable (equity).

[180] *Farrey*, 500 U.S. at 298–99 ("If the fixing [of the lien] took place before the debtor acquired that interest, the 'fixing' by definition was not on the debtor's interest.").

[181] For a case holding that the shine-through lien is good against a bankruptcy trustee, see Giffin v. Edwards, 708 N.E.2d 876 (Ind. Ct. App. 1999).

[182] *See* UNIF. FRAUDULENT CONVEYANCE ACT § 9(1)(b) (UNIF. L. COMM'N 1918); UNIF. FRAUDULENT TRANSFER ACT § 7(b) (UNIF. L. COMM'N 1984); UNIF. VOIDABLE TRANSACTIONS ACT § 7(b) (UNIF. L. COMM'N 2014).

[183] *See* N.Y. C.P.L.R. § 5232(b) (McKinney 2020).

[184] *See* Schwartz v. A.J. Armstrong Co., 179 F.2d 766, 767–68 (2d Cir. 1950) (holding, however, *C*'s lien was void in *X*'s subsequent bankruptcy); Comput. Scis. Corp. v. Sci-Tek, Inc., 367 A.2d 658, 659–60 (Del. Super. Ct. 1976) (upholding levy pending an investigation into whether *X*'s property was fraudulently transferred); Hess v. Hess, 117 N.Y. 306, 308, 22 N.E. 956, 956 (1889); Van Etten v. Hurst, 6 Hill 311, 312–13 (N.Y. Sup. Ct. 1844).

[185] *See* Baxter v. Myers, 52 N.W. 234, 234–35 (Iowa 1892).

[186] The sheriff could insist on an indemnity against such liability. *See* Am. Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 5–6, 166 N.E. 783, 784 (1929).

Under the Fourteenth Amendment to the Constitution, *X* is entitled to due process of law[187]—notice and a hearing[188]—as to whether *X*'s fraudulently received chattel is liable for *C*'s money judgment against *D*. Under Supreme Court precedent pertaining to replevin and attachment, it is clear that levying *X*'s chattel without according *X* notice and a hearing is unconstitutional.[189] A quick review of due process doctrine will support this conclusion.

The first principle established is that, once *C* has a judgment against *D*, *D* has all the due process he deserves, at least with regard to *D*'s non-exempt property.[190]

As for the pre-judgment remedies of replevin and attachment, *D* deserves no pre-seizure due process. The Supreme Court has declared that a statutory regime need not alert *D* in advance that *D*'s chattels will be seized.[191] That would enable *D* to hide or convey away the property.[192] The Constitution, however, requires a statutory regime to require from *C* a bond to protect against damage from wrongful seizure.[193] *C* must appear *ex parte* before a "judge"—a clerk will not do—and make a *prima facie* case that seizure is lawful.[194] The regime must provide *D* with a prompt post-seizure hearing on the merits.[195]

The levy against *X* fails to meet these standards. First, *C*'s judgment against *D* is not a judgment against *X*. Ergo, for due process purposes, *X* is analogous to *D* in a pre-judgment mode. Executions typically do not require issuance by a judge;[196] *C* need not appear before a judge and show the predicates of a fraudulent transfer by *D* to *X*. There is no requirement for *C* to post a bond.[197] There is no prompt post-seizure hearing mechanism to protect *X*. It follows, then, that the ancient remedy of levy "as

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[187] U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .").

[188] *See* Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 (1963) ("Due process . . . implies notice and a hearing." (citation omitted)).

[189] *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 96 (1972) ("We hold that [the states'] prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.").

[190] *See* Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285, 288–89 (1924). Since then, courts have made due process rules for post-judgment execution to protect a judgment debtor's right to possess exempt property. *See* Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1186–89 (S.D.N.Y. 1982); Diana Gribbon Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligors*, 45 MD. L. REV. 61 (1986).

[191] *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 607 (1974).

[192] *See id.* at 608–09 ("[T]here is a real risk that the buyer, with possession . . . will conceal or transfer the merchandise to the damage of the seller.").

[193] *See* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606–07 (1975).

[194] *See id.*; *Mitchell*, 416 U.S. at 616; *Fuentes*, 407 U.S. at 83–84.

[195] *See Mitchell*, 416 U.S. at 618–20.

[196] *See* N.Y. C.P.L.R. § 5230(b) (McKinney 2020) ("[A]n execution may be issued . . . by the clerk of the court or the attorney for the judgment creditor as officer of the court. . . .").

[197] *See* John C. Flood of MD, Inc. v. Brighthaupt, 122 A.3d 937, 940, 943–44 (D.C. 2015) (holding that *X* waived the due process violation by not raising the issue at trial). The court in *Flood* writes, "the penalty provision for unlawfully attaching assets should sufficiently deter a judgment creditor from attaching the assets of innocent third parties." *Id.* at 943. Maybe so, but the Supreme Court requires a *bond* to secure *C*'s obligation to pay damages.

if" no conveyance was ever made is unconstitutional, as a small number of courts have held.[198]

Returning for a moment to real property, the Supreme Court in *Connecticut v. Doehr*[199] struck down a pre-judgment attachment regime for real property where the governing statute requires no pre-attachment contested hearing or, in the absence of such a hearing, a requirement of some exigent circumstance excusing a contested hearing.[200] Attachment of real property does not deprive the owner of use and enjoyment.[201] Nevertheless, a regime that does not require exigent circumstances cannot issue an attachment of real property in the absence of a pre-attachment hearing.[202] If this is so for attachments of *D*'s real property, it is surely also the case for *C*'s shine-through lien on *X*'s real property. Note that attachment against *D*'s real property does not result in a present sale, but only a freeze on *D*'s power to alienate the property. In contrast, *C*'s shine-through lien on *X*'s property does indeed implicate a present right of sale. Constitutionally, the UFTA is *worse* than the Connecticut statute challenged in *Doehr*.[203]

Accordingly, one may fairly regard the shine-through lien as unconstitutional as to both real property and chattels. If so, *Mannocke's Case* did not survive enactment of the Constitution's due process clauses.

B. Set-Aside

We have argued that disregarding the conveyance to *X* and levying as if *X* had no property rights is unconstitutional. Only a few courts have said as much.[204] Perhaps this is because the *C*s of the world suspect this is true and, accordingly, they do not press the advantage against *X*. Modern resort to the legal remedy of "disregarding" is exceedingly rare.[205]

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[198] *See* Tanaka v. Nagata, 868 P.2d 450, 455 (Haw. 1994); Nat'l Stabilization Agreement of Sheet Metal Indus. Tr. Fund v. Evans, 71 F. Supp. 2d 427, 430 (M.D. Pa. 1999); Gulf Mortg. & Realty Inv. v. Alten, 428 A.2d 978, 981 (Pa. Super. Ct. 1981).

[199] 501 U.S. 1 (1991).

[200] *See id.* at 12–13, 18. Where attachment is awarded in a contested hearing, the requirement of exigent circumstances falls away. *See* Cendant Corp. v. Shelton, 473 F. Supp. 2d 307, 319 (D. Conn. 2007).

[201] *Doehr*, 501 U.S. at 27 (Rehnquist, C.J., concurring).

[202] *But see* Clearwater v. Skyline Constr. Co., 835 P.2d 257, 262–64. (Wash. Ct. App. 1992) (declaring attachment of *X*'s real property in the absence of exigent circumstances but not discussing the *Doehr* case).

[203] In *Lauer v. Rose*, 131 Cal. Rptr. 697 (Cal. Ct. App. 1976), *D* fraudulently transferred real property to *X*. *C* obtained judgment against *D* and served an execution to the sheriff who prepared to sell *X*'s property. *X* was never made a party to any action. *D* (on behalf of *X*) moved to stay the sale until the question of *X*'s interest in the land could be judicially determined. Invoking the Due Process Clause of the Constitution, the court stayed the sale. *Lauer*, 131 Cal. Rptr. at 701.

[204] *See, e.g.*, N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975) (finding pre-judgment garnishment statute violated due process because it did not contain provisions for prior notice or hearing); Fuentes v. Shevin, 407 U.S. 67, 86–87 (1972) (finding replevin statute violated due process because it failed to provide *D* with prior notice and opportunity to dispute *C*'s claim of default).

[205] *See* Foster v. Evans, 429 N.E.2d 995, 999 (Mass. 1981) (finding that, where levy of *X*'s property failed, *C* was not later precluded from seeking equitable relief from *X*).

Much more common than seizing and selling *X*'s property without due process of law is *C*'s action against *X* in advance of sale to avoid or set aside the transfer. *C* often prefers to proceed this way because otherwise the sheriff, on *C*'s behalf, is simply selling a lawsuit against *X*. The prospect of a risky lawsuit discourages the ardor of many a *B* at an execution sale.[206] As an alternative, *C* could bring an action to avoid the conveyance, clearing title in advance of the execution sale.

Avoidance[207] is the equitable remedy for fraudulent transfer. It presupposes that, after *D* fraudulently transfers to *X*, *X* does have title, which must affirmatively be avoided. In contrast, the legal remedy of execution assumes *X* had *no* (that is, a void) title. The equitable remedy of avoidance is in the nature of declaratory relief. It declares in advance that what *D* formerly owned, but conveyed away, is now *D*'s property again, so that *C*'s right to a lien on *D*'s property can be vindicated.[208] To be emphasized, however, is that avoidance is never absolute. *C* may only obtain "avoidance of the transfer . . . to the extent necessary to satisfy [*C*'s] claim."[209] This limitation explains why *X* (not *D*) owns the surplus where *C*'s claim against *X*'s property is less than the value of that property.[210]

In the 19th century, many courts thought that, prior to a set-aside action, *C* had to generate an execution, so that the court was seen as removing a cloud from the title to be offered at an execution sale.[211] A return *nulla bona*, however, was not required

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[206] *See* Note, *Creditors' Rights in Equity*, 29 MICH. L. REV. 1057, 1058–59 (1931) ("The purpose of the intervention of equity . . . is to place the creditor in as good position as if the fraudulent conveyance had never been made. That is, although the property might be sold on execution notwithstanding the fraudulent conveyance, yet equity will not require the creditor to sell a doubtful and obstructed title.").

[207] For the claim that "avoidance" is a misleading metaphor misdescribing what is really going on, see David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 161–62 (2003) [hereinafter Carlson, *Logical Structure*].

[208] *See* Glassman v. Glassman, 309 N.Y. 436, 445, 131 N.E.2d 721, 726 (1956) ("The actual effect of this suit is to set aside the fraudulent conveyance, thereby returning the ownership of the funds to [*D*], and [*C*'s] recovery will, for all intents and purposes, be against him.").

[209] UNIF. FRAUDULENT TRANSFER ACT § 7(a)(1) (UNIF. L. COMM'N 1984).

[210] *See* Doster v. Manistee Nat'l Bank, 55 S.W. 137, 142 (Ark. 1900); GLENN, *supra* note 10, § 127a ("[C]reditor's suit to set aside such a transfer will not result in any gain to the debtor. To the extent that the property is applied to the creditor's claim the debtor gets nothing, for if there is a surplus, it must be turned back to the grantee."). As the Massachusetts Supreme Court put it:

> The final decree declared the assignment void and the mortgage cancelled and discharged. A fraudulent conveyance, though voidable, is not a void conveyance. Where creditors seek directly to reach and apply property fraudulently conveyed the conveyance may be set aside only to the extent necessary to satisfy the debts of creditors. Where, as here, a creditor plaintiff seeks merely the freedom to collect his debt through the methods provided in a court of law, the relief to which he is entitled is the opportunity to proceed unhampered by the obstacles of the mortgage and the assignment. The decree should not have declared the assignment void. A decree is to be entered providing in substance that the mortgage and the assignment do not constitute a lien on the premises as against [*C*] and that [*X*] and all persons claiming under or through him are perpetually enjoined from setting up or claiming any right under the mortgage or the assignment. . . .

Serv. Mortg. Corp. v. Welson, 200 N.E. 278, 280 (1936) (citations omitted).

[211] *See, e.g.*, Jackson v. Holbrook, 32 N.W. 852, 853 (Minn. 1887).

because the court was acting in aid of a sale that could, in any case, proceed in spite of the cloudy title.[212] Thus, one sees in the 19th century much fallow chatter as to when an execution alone was required and when an execution returned *nulla bona* was required.[213] "If the property involved was tangible, the creditor must show that the writ had been issued and was at least outstanding; if the property was intangible, he must go further, and show that the sheriff had returned the writ unsatisfied."[214]

The UFCA term for an action against *X* is "[h]ave the conveyance set aside . . . to the extent necessary to satisfy his claim."[215] The UFTA and UVTA refer to this as "avoidance of the transfer . . . to the extent necessary to satisfy the creditor's claim."[216] So "avoid" is just another term for "set aside." Both phrases are based on the conceit that, upon an affirmative judgment of avoidance, *X*'s property is once again made into *D*'s property. That is to say, *D*'s conveyance is valid, but it could be undone. *X* has title, but it is voidable.

In *Emarine v. Haley*,[217] the court remarked: "The primary remedy in an action for fraudulent conveyance is to return the property fraudulently conveyed to its prior status of ownership, thereby bringing it within reach of the judgment creditor of the fraudulent transferor."[218] The facts in *Emarine* belie the aphorism, however. *D* had conveyed cash to *X,* and *X* conveyed the cash to a vendor in exchange for real

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[212] *See* Geery v. Geery, 63 N.Y. 252, 256 (1875); Fox v. Moyer, 54 N.Y. 125, 128 (1873). In *Geery*, *C* had a judgment but it was not docketed with the county clerk. Ergo, *C* had no lien on *X*'s land (which would arise by docketing against *D*) and no docketing meant that issuance of execution could not occur. Accordingly, the court dismissed *C*'s set aside action. *Geery*, 63 N.Y. at 256–57. *C* would have to docket the judgment, get the execution issued, and start again. In *Fox*, an execution had been issued and returned *nulla bona*. No new execution had been issued, and the court felt free to declare that *C*'s judicial lien attached to *X*'s property. *Fox*, 54 N.Y. at 130–31. This indicates that the issuance of the execution was neither here nor there. What was really required was a suitably local docketing of the judgment. The court could then de-cloud title in anticipation of a new execution.

[213] *See* Wadsworth v. Schisselbaur, 19 N.W. 390, 390–91 (Minn. 1884) ("[T]he better rule is that [*C*] need only proceed at law far enough to acquire a *lien* upon the property sought to be reached before filing his bill to set aside a fraudulent conveyance."); WAIT, *supra* note 10, § 86 (illustrating cases where courts held *C* must secure return of an execution unsatisfied in order to reach personal property); Garrard Glenn, *The Uniform Fraudulent Conveyance Act; Rights of Creditor Without Judgment*, 30 COLUM. L. REV. 202, 204 (1930) [hereinafter Glenn, *Without Judgment*]. In *Wadsworth*, the court thought the presence of a shine-through lien justified equitable intervention to set aside the "cloud" over the lien. *See Wadsworth*, 19 N.W. at 391.

[214] Glenn, *Without Judgment*, *supra* note 213, at 204. Professor McLaughlin thought that the UFCA repealed the requirement of the execution *nulla bona*. *See* James Angell McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 439–40 (1933). But this was not so. The requirement of an execution or execution *nulla bona* came from the equity courts and was equally applicable to a creditor's bill for a receivership or turnover order. The UFCA (or the UFTA, for that matter) has nothing to say about the entry ticket to actions in equity. These restrictions have fallen in civil procedure reform, not because the UFCA requires a specific procedure in equity.

[215] UNIF. FRAUDULENT CONVEYANCE ACT § 9(1)(a) (UNIF. L. COMM'N 1918).

[216] UNIF. FRAUDULENT TRANSFER ACT § 7(a)(1) (UNIF. L. COMM'N 1984); UNIF. VOIDABLE TRANSACTIONS ACT § 7(a)(1) (UNIF. L. COMM'N 2014).

[217] 892 P.2d 343 (Colo. App. 1994); *see also infra* notes 259–64 and accompanying text.

[218] *Emarine*, 892 P.2d at 346. For a case where *C* protested against a reconveyance back, see Bakwin v. Mardirosian, 6 N.E.3d 1078, 1084–86 (Mass. 2014). In *Bakwin*, *D* and his spouse (*W*) fraudulently transferred a tenancy by the entirety to *X*. The court ordered *X* to convey it back in the tenancy by the entirety form, which meant the property would be exempt from sale at *C*'s behest. *Bakwin*, 6 N.E.3d at 1086. *C* wanted *X* to keep the house and be liable for its value in a money judgment, but to no avail.

property. C_1 sought to "set aside" the conveyance of the real property. Taken literally, the "set aside" would make the vendor the owner of the real property again, which would not aid the creditors of *D*.[219] UFTA section 7(b) directly authorizes seizure of proceeds of fraudulent transfers, however.[220] Proceeds prove that the metaphor of avoidance or set-aside inadequately theorizes fraudulent transfer law. Long ago the Illinois Supreme Court spoke more sensibly and in a Hohfeldian manner: "The property did not thereby again become that of [*D*] but was merely made subject to be applied to the payment of [*C*'s] judgment to the same extent as it might have been had it remained the property of [*D*]."[221] Even more clearly stated are these Wisconsin words:

> [T]he fraudulent conveyance is not to be set aside to all intents and purposes. Instead, there is to be established in effect a lien against the property for the benefit of creditors, which will be prior and superior to the rights of the grantee, and the fraudulent conveyance to the latter is void only so far as to permit such lien of the creditors to be established as prior and superior to the rights of such grantee.[222]

Meanwhile, a right to proceeds signals that *X* holds fraudulently received property in trust for *C*; when *X* sells for value, *X* is deemed to take the proceeds for *C*'s benefit.[223]

"Set aside" and "avoid" became the metaphysical peg on which to hang the hat of complete *D* alienation. The conveyance is "voidable." In contrast, "disregard the conveyance" is the peg for the proposition that *X* takes nothing in a fraudulent transfer. The conveyance never happened! Thus, the UFCA and, arguably, the UFTA and UVTA hold simultaneously that fraudulent transfers are voidable and void.[224]

According to the metaphysics of avoidance, once the transfer to *X* is set aside, *C*'s rights against *D* are also rights against *X*. Suppose *C* has a locally docketed judgment lien. Set-aside adds nothing if *C*'s lien has already shined through to encumber *X*'s property. But we have shown this shine-through effect of *C*'s judgment against *X* is certainly unwise and probably unconstitutional.[225] If so, "set aside" implies that *C* has a lien against *X* for the first time.

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[219] *See* Goll v. Stefanski, 108 A. 189, 190 (N.J. 1919) ("The conveyance should not, therefore, be set aside, for that would vest the legal title in the former owner who was no party to the fraud and is not a party to these proceedings. The decree should declare a trust in favor of the trustee in bankruptcy. . . .").

[220] UNIF. FRAUDULENT TRANSFER ACT § 7(b).

[221] De Martini v. De Martini, 52 N.E.2d 138, 141 (Ill. 1943). *See also* Carlson, *Logical Structure*, *supra* note 207, at 161–62 (arguing that avoidance is a misnomer). *But see* GLENN, *supra* note 10, § 1 (refusing "to adopt that Esperanto of the gymnasia which is called Hohfeldian terminology").

[222] Campbell v. Drozdowicz, 10 N.W.2d 158, 160 (Wis. 1943).

[223] *See* GLENN, *supra* note 10, § 239.

[224] The reason for hesitation with regard to the UFTA and UVTA is that levying execution requires advance court permission. *See* UNIF. FRAUDULENT TRANSFER ACT § 7(b); UNIF. VOIDABLE TRANSACTIONS ACT § 7(b) (UNIF. L. COMM'N 2014).

[225] *See supra* text accompanying notes 187–203.

In the case of personal property, set-aside or avoidance suggests that *C* may now take action against *X*'s property "as if" it were still *D*'s property. Thus, not only does a court "set aside" or "avoid" the transfer, but the court must also order its sale.[226] This might be done by issuing an execution to the sheriff, ordering the sheriff to sell *X*'s property.[227] Alternatively, the court might appoint a receiver with power of sale.[228] Following through on the metaphorical confusion in the uniform legislation, some courts think that the proper remedy is to direct *X* to convey the property back to *D*.[229] Then, apparently, it is up to *C* to generate a sale by obtaining a writ of execution.[230]

Properly, commencing the set-aside action against *X* should result in a lien for *C* as to the property fraudulently received by *X*. At this moment, the property is *in custodia legis*. This was recognized by the Supreme Court in *Metcalf Brothers & Co. v. Barker*,[231] applying New York law.

Unhappily, New York has arguably reversed this rule statutorily, at least in personal property cases. In New York, fraudulent transfers are recovered under N.Y. C.P.L.R. section 5225(b), which provides:

> Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, . . . or that *the judgment creditor's rights to the property are superior to those of the transferee*, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as

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[226] *See* Miller v. Kaiser, 433 P.2d 772, 774 (Colo. 1967); GLENN, *supra* note 10, § 90.

[227] *See* Young v. Heermans, 66 N.Y. 374, 384–85 (1876).

[228] *See* Lamb v. Cramer, 285 U.S. 217, 218 (1932); *see also* WAIT, *supra* note 10, § 72. For cases in which a receiver was appointed to prevent further dispositions by *X*, see *In re* Teknek, LLC, 343 B.R. 850 (Bankr. N.D. Ill. 2006); Matthews v. Schusheim, 235 N.Y.S.2d 973, 36 Misc. 2d 918 (Sup. Ct. 1962).

[229] *See* HBE Leasing Corp. v. Frank, 48 F.3d 623, 635 (2d Cir. 1995); Klein v. Weidner, 729 F.3d 280, 282, 296 (3d Cir. 2013) (affirming the court's order requiring *X* to transfer the property back to *D*).

[230] According to Professor Glenn:

> [I]f the bill finds the grantee with the property on hand, then the frame of the decree must express the idea that informs the suit. The decree . . . recognizes the title as in the debtor, removes the fraudulent cloud from it for the benefit of the creditor, and declares his judgment a lien upon the property "as if no conveyance had been made by the judgment debtor." It then goes on to a realization of this right in the creditor's behalf by an "equitable execution or a sale by a receiver."

Glenn, *Without Judgment, supra* note 213, at 209.

[231] 187 U.S. 165, 172, 175 (1902) ("The general rule is that the filing of a judgment creditors' bill and service of process creates a lien in equity on the judgment debtor's equitable assets. . . . The state courts had jurisdiction over the parties and the subject matter, and possession of the property. And it is well settled that where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control."); *accord Lamb*, 285 U.S. at 219.

> is of sufficient value to satisfy the judgment, to a designated sheriff.[232]

The emphasized language describes *X*'s interest in fraudulently received property. Meanwhile, according to N.Y. C.P.L.R. section 5202(b):

> Where a judgment creditor has secured an order for delivery of, payment of, or appointment of a receiver of, a debt owed to the judgment debtor or an interest of the judgment debtor in personal property, the judgment creditor's rights in the debt or property are superior to the rights of any transferee of the debt or property, except a transferee who acquired the debt or property for fair consideration and without notice of such order.[233]

This statute says, rather inarticulately, *C* only has a lien when *C* "secures" on order for delivery of personal property. Only then is the right of a third party potentially subordinated to the right of a subsequent transferee (and even then, the subsequent transferee's right is superior if the transferee acquired rights for value and in good faith).

One possible argument might preserve the wise rule invoked in *Metcalf*.[234] In 2019, New York adopted the UVTA.[235] According to UVTA section 7(a), a creditor has the choice of avoiding the transfer or, under section 7(b), executing on the assets transferred.[236] *Metcalf* supplies the rule for choice (a); N.Y. C.P.L.R. section 5202(b) provides the rule for choice (b). If this reasoning is accepted, commencement of the set-aside action would give *C* an equitable lien, which remains completely immune from N.Y. C.P.L.R. governance. Such a distinction would enhance judicial power over *X* when *X* has fraudulently received property from *D*.

In vague support for this proposition is *Clarkson Co. v. Shaheen*,[237] where C_1 had a judgment against *D*. Thereafter, *D* conveyed certificated securities to *X*. C_1 moved for a turnover proceeding and obtained a preliminary order requiring *X* to turn over the shares to a court officer. Pending a decision, the court ordered *X* to surrender the shares to a court officer, and *X* did so.[238] C_2 then purported to levy the shares in the officer's possession.[239] The court held that, irrespective of the N.Y. C.P.L.R., C_1 had

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[232] N.Y. C.P.L.R. § 5225(b) (McKinney 2020) (emphasis added).

[233] *Id.* § 5202(b).

[234] *See* 187 U.S. at 172 ("[G]eneral rule is that the filing of a judgment creditors' bill and service of process creates a lien in equity on the judgment debtor's equitable assets.").

[235] *See* 2019 N.Y. Laws 1545 (codified as amended at N.Y. DEBT. & CRED. LAW §§ 270–80a (McKinney 2020)).

[236] UNIF. VOIDABLE TRANSACTIONS ACT § 7(a)–(b) (UNIF. L. COMM'N 2014); *see also* N.Y. DEBT. & CRED. LAW § 276.

[237] 716 F.2d 126 (2d Cir. 1983).

[238] *Id.* at 128.

[239] The *Clarkson* court was grievously confused about what the N.Y. C.P.L.R. required. It assumed that C_2 had achieved a levy even though the sheriff had not taken possession of the shares. *See id.* at 218–29. *But see*

achieved seniority under *in custodia legis*.[240] The opinion, however, never says that C_1's lien arose when C_1 commenced the C_1 *v.* X action. But at least the opinion affirms *in custodia legis* is a source of lien creation independent of the N.Y. C.P.L.R.

If this analysis is wrong, then C_1's commencement of a set-aside action in New York means nothing,[241] and C_2 can snatch X's chattel by levy or by prior turnover order, while C_1's judge leisurely ponders whether X fraudulently received a transfer from D. Why should C_1 suffer because the decision process is dilatory?

1. The role of *Lis Pendens*

Classically, commencement of a fraudulent transfer action against X brought the fraudulently received property *in custodia legis*, meaning that C had a judicial lien on X's property. If, after commencement of C *v.* X, X were to sell the asset to B, a bona fide purchaser for value (known as a *pendente lite* purchaser),[242] B bought subject to C's lien. Thus, the eventual decree setting aside the conveyance is binding on B.[243] As stated in *Bridgman & Co. v. McKissick & Bone*,[244] "the commencement of such a suit operates as a *lis pendens* notice, and stops all successful alienation of the property in question, and keeps it within the control and jurisdiction of the Court."[245]

In olden days, commencement of the equity proceeding *was* a *lis pendens*—without any filing.[246] In modern times, at least with respect to real estate, statutes invite D to file a notice of pendency in the records notifying the world that X's title is being disputed in litigation.[247] I shall reserve the phrase "*lis pendens*" to refer to the

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N.Y. C.P.L.R. § 5232(b) (stating the sheriff must take possession of property capable of delivery). Rather, it appears that neither C_1 nor C_2 had achieved liens on the shares, in that neither had obtained a turnover order as required by N.Y C.P.L.R. § 5202(b).

[240] *Clarkson*, 716 F.2d at 129–30.

[241] *See* Colombo v. Caiati, 493 N.Y.S.2d 244, 246–47, 129 Misc. 2d 338, 340 (Sup. Ct. 1985) ("The mere pendency of an action to establish a lien upon land does not of itself . . . create a lien on the land.").

[242] *See* Weston Builders & Devs., Inc. v. McBerry, LLC, 891 A.2d 430, 438 (Md. App. 2006).

[243] *See* O'Connor v. O'Connor, 32 S.E. 276, 278 (W. Va. 1897) ("Ordinarily the decree of the court binds only the parties and privies in representation or estate, but he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title." (quoting Zane v. Fink, 18 W. Va. 693 (Syl. point 1))); Jackson v. Andrews, 7 Wend. 152, 156 (N.Y. Sup. Ct. 1831).

[244] 15 Iowa 260 (1863).

[245] *Id.* at 265.

[246] *See generally* 1 ABRAHAM CLARK FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 519 (Edward W. Turtle ed., 5th ed. 1925).

[247] *See* Kirkeby v. Superior Court, 93 P.3d 395, 398 (Cal. 2004). The *Kirkeby* court cites with approval a case holding one may not file a *lis pendens* with regard to a constructive trust claim. *Id.* at 400 (citing Lewis v. Superior Court, 37 Cal. Rptr. 2d 63 (Ct. App. 1994)). This is tantamount to denying that constructive trust doctrine exists at all in California. *See generally* Carlson, *When Worlds Collide*, *supra* note 164. When the existence of constructive trust is denied, the constructive trust theory devolves into a fraudulent transfer theory, conferring standing on bankruptcy trustees to recover that which would otherwise belong exclusively to victims of fraud. *See* Darr v. Dos Santos (*In re* TelexFree, LLC), 941 F.3d 576, 579 (1st Cir. 2019); *see also* David Gray Carlson, *Ponzi Liquidations and Constructive Trust Theory: The First Circuit Misspeaks*, 40 BANKR. L. LETTER, no. 1, Jan. 2020. For a case denying that a *lis pendens* can be filed in a fraudulent transfer case, see County of Hawaii v. Unidev, LLC, 289 P.3d 1014 (Haw. Ct. App. 2012). According to *Unidev*:

modern *filing* of a notice, in contradistinction to commencing a set-aside action that brings real property *in custodia legis*.

It seems to me that the role of the *lis pendens* filing is misinterpreted. First, if *C* has a shine-through lien on *X*'s property, that lien is good against bona fide purchasers, and the *lis pendens* is useless. We have, however, hazarded an argument that the UFCA and its successors have made the legal remedy of "disregard" subject to the equitable defense of bona fide purchase. We left the matter as uncertain.[248]

Second, there may be no shine-through lien. For example, *C* may have a judgment in federal court, which does not by itself generate a lien on *D*'s land[249] and so there's no lien on *X*'s land. In such a case, commencement of the set-aside against *X* brings the property *in custodia legis*. This creates a lien on *X*'s property.

Article 9 scholars are wont to distinguish lien *creation* (that is, attachment)[250] and lien *perfection*—basically, the act of publicity needed to make the lien good against subsequent lien creditors.[251] This is precisely the way we should think of *in custodia legis* (lien creation) and filing a *lis pendens* (lien perfection). It is tempting to conclude that a lien arising on commencement of an action ought to be viewed as good against subsequent purchasers of *X*, even if no notice of pendency has been filed.[252] True, prior to commencing the action, *X* has the power to give good title to a bona fide purchaser for value. That is because *X* holds the land in trust for the creditors of *D*. "In trust" implies a power to convey free of equitable interests to a bona fide purchaser for value.[253] But this power *ends* when *C* actually obtains a *lien*. And *C* obtains a lien when *C* commences a set-aside action.

But countering this thought is the notion that the enactment of any notice of pendency statute constitutes legislative recognition that, in the absence of the filing, *in custodia legis* constitutes an inequity insofar as bona fide purchasers for value are

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> [*C*] does *not* seek to directly obtain title to, or possession of, the Property. Rather, [*C*] seeks to avoid the transfer . . . for the purpose of securing payment of money which might potentially be owed if [*C*] succeeds on its counterclaims. This is not a direct claim for the Property, and further, because a fair reading of [C's] counterclaim establishes that its primary purpose is to obtain money damages, the HUFTA claim is asserted for a purpose which [must be rejected].

Id. at 1028. For a contrary Hawaii case, see Sports Shinko Co. v. QK Hotel, LLC, 457 F. Supp. 2d 1121, 1123, 1129–30 (D. Haw. 2006) (holding the fraudulent transfer claims under the HUFTA, seeking to avoid the transfer of real property to satisfy *C*'s claims, "[was] an appropriate subject of a *lis pendens*").

[248] *See supra* text accompanying notes 105–19.

[249] *See* 28 U.S.C. § 1962 (2018).

[250] *See* U.C.C. § 9-203(a) (AM. L. INST. & UNIF. L. COMM'N 2017).

[251] *See id.* § 9-308(a) ("[A] security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 9-310 through 9-316 have been satisfied.").

[252] *See* Distler & Schubin, *supra* note 42, at 516. *But see id.* at 482–84, 493 (explaining *lis pendens* was thought not to protect C_1 when C_2 emerged to get a lien on the property involved in C_1's set-aside action).

[253] *See* RESTATEMENT (SECOND) OF TRUSTS § 284 (AM. L. INST. 1959).

concerned.[254] If so, the notice of pendency legislation is intended to reduce *in custodia legis* to a mere equitable lien.

We may never have the opportunity to find out the answer whether bona fide purchasers are subordinate to *in custodia legis*, in that *C* seems well trained to file a notice of pendency before or contemporaneously with commencing a set-aside action in a real property case.

There are some questionable interpretations of *lis pendens* arising from Colorado. In *Shuck v. Quackenbush*,[255] *D* paid for land and arranged the vendor to deed title to X_1. *D*'s purpose was to defraud creditors. X_1 conveyed to good faith X_2 for value, but X_2 did not record the deed. *C* then commenced an action to impose a lien on X_2's land. The court held that commencement, coupled with filing a *lis pendens*, created the lien on X_2's land.[256] The case should be understood as holding that X_2's unrecorded deed was not valid against judicial lien creditors. The lien should have been deemed to arise, however, when the property was *in custodia legis* by commencement of the action.[257] The court seemed to hold that the *lis pendens* filing (not commencement of the suit) was the moment of lien creation.[258] In fact, the filing stood for lien *perfection* rather than lien *creation*.

In *Emarine v. Haley*,[259] *D* defrauded C_1 of cash. *D* gave the cash to *X*, and *X* bought real property with it. C_1 initially sued *X* for unjust enrichment and (inconsistently) for conversion.[260] Upon learning that *X*'s cash yielded real property, C_1 amended her complaint to impose a constructive trust on the real property or, in the alternative, to "set aside" a fraudulent transfer. In connection with the motion to amend, C_1 filed a *lis pendens*. The court dismissed the unjust enrichment action and granted summary judgment on the conversion action.[261] That left C_1 with a fraudulent transfer theory.[262] Properly, *D* fraudulently transferred cash. The land was proceeds of the cash, and *X* held this land in trust for the creditors of *D*. *D* and C_1 then signed a "stipulation of judgment," which was duly entered. At the end of the day, C_1 probably had an equitable lien on *X*'s real property.

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[254] *See* White v. Wensauer, 702 P.2d 15, 18 (Okla. 1985) ("If the operation of lis pendens should prove harsh or arbitrary in some particular instance, equity can and should refuse to give it effect."); *see also* Benton v. Shafer, 24 N.E. 197, 200 (Ohio 1890); Abadie v. Lobero, 36 Cal. 390, 400 (1868).

[255] 227 P. 1041 (Colo. 1924).

[256] *Id.* at 1047.

[257] *See* COLO. R. CIV. P. § 105(f)(1) (West 2020); COLO. REV. STAT. ANN. § 38-35-110 (West 2014) (providing *lis pendens* may be recorded only "[a]fter filing any pleading . . . wherein the relief is claimed affecting the title to real property").

[258] *See Shuck*, 227 P. at 1045. *See also* Mira Overseas Consulting Ltd. v. Muse Family Enterps., Ltd., 187 Cal. Rptr. 3d 858, 864 (Cal. Ct. App. 2015); Roth v. Porush, 722 N.Y.S.2d 566, 568, 281 A.D.2d 612, 614 (2001).

[259] 892 P.2d 343 (Colo. App. 1994).

[260] Conversion is based on equitable title being in *X*. *See* Pierpoint v. Hoyt, 260 N.Y. 26, 29, 182 N.E. 235, 236 (1932). Constructive trust presumes equitable title remaining with C_1. *See* Carlson, *When Worlds Collide*, *supra* note 164, at 383.

[261] *See Emarine*, 892 P.2d at 345–46.

[262] That is, conversion theory retroactively makes rightful *D*'s conveyance of cash to *X*. *X* thus had title to the cash in exchange for *C*'s conversion judgment against *D*. But still *X* received equitable title to the cash for no fair consideration. *X* had therefore received a fraudulent transfer of the cash.

A few days after C_1 filed the *lis pendens*, C_2 recorded a transcript of a judgment. The effect of this recordation was to create a lien on *D*'s real property (if any) and a shine-through lien on *X*'s fraudulently received real property. Since C_1 had brought the property *in custodia legis*, C_1's resultant lien was prior to C_2's lien.

C_2, however, claimed priority. C_2 claimed that C_1 had no cause of action against *X* for fraudulent transfer because, at the time of C_2's lien, C_1 had no judgment against *D*. The court held that C_1 could obtain a lien on *X*'s property before C_1 had a judgment against *D*.[263] Thus, properly, *Emarine* belongs in the second half of the article, which studies *C v. X* when *C v. D* is not yet resolved.[264]

Properly, commencement of the set-aside action creates the lien, not the filing of a *lis pendens* notice. In *De Martini v. De Martini*,[265] *C* had a lien even though no *lis pendens* seems to have been filed. The facts much simplified were these: *D* conveyed to X_1 before *C* recorded a judgment. Illinois recognizes no shine-through lien. *C* commenced a set-aside action against X_1. Thereafter, X_1 quitclaimed to X_2, a bad faith purchaser. After obtaining the set-aside from the court, *C* fomented an execution sale where *C* was the buyer. *C* bought X_2's real property, proving *C* had a lien without filing a *lis pendens*.[266]

2. Exhaustion of remedies

In former times, set-asides were accomplished by creditors' bills, and these required an execution returned *nulla bona*. The *nulla bona* requirement was supposed to imply that the sheriff had been unable to find any land or chattels held by *D*. Did this mean that *X* had a defense if *X* could show that *D* had assets that could be reached by legal or equitable process?[267]

Apparently, it did not. There was no requirement that *C* do anything by way of liquidating *D*'s assets before liquidating *X*'s assets.[268] Nor could *X* claim that a sheriff

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[263] *Id.* at 346–47.

[264] In addition, C_2 pointed out that a *lis pendens* is only effective forty-five days from entry of C_1's judgment. The court found that C_1's judgment against *X* had been filed in the forty-five-day period, and, after entry, the judgment was good against the world. *Id.* at 348.

[265] 52 N.E.2d 138 (Ill. 1943).

[266] *Accord* Brown v. Cohn, 69 N.W. 71, 72 (Wis. 1896); Wood v. Price 81 A. 983, 986–87 (N.J. 1911).

[267] Professor Glenn reminds us that the execution *nulla bona* by no means proves that *D* is without land or chattels on which a sheriff might sell. Attorneys have always known how to tell a sheriff that a search is useless, so that *nulla bona* could be produced on the spot. GLENN, *supra* note 10, § 87. For a rare case to the contrary, see Jackson v. Sayler, 63 N.E. 881 (Ind. App. 1902), where *X*'s demurrer asserted *C* had failed to allege that *D* had no leviable assets. "If this statement was borne out by the record, the cause would have to be reversed for this reason." *Id.* at 882. A close reading of the complaint showed that "no leviable assets" had in fact been alleged. It is estimated that *Jackson* had been overruled by the enactment in Indiana of the UFTA. *See* Bruce A. Markell, Report, *The Indiana Uniform Fraudulent Transfer Act Introduction*, 28 IND. L. REV. 1195, 1203–04 (1995).

[268] *See* Roth v. Porush, 722 N.Y.S.2d 566, 568, 281 A.D.2d 612, 614 (2001); Brown v. Kimmel, 414 N.Y.S.2d 226, 226, 68 A.D.2d 896, 897 (1979); Payne v. Sheldon, 63 Barb. 169, 174 (N.Y. Gen. Term 1872) (finding no execution *nulla bona* needed where *C* had a shine-through lien on *X*'s property); Botsford v. Beers, 11 Conn. 369, 375 (1836) ("But upon what principle it is, that these facts can be set up, by a fraudulent grantee, to protect a conveyance admitted to be fraudulent, we are at a loss to discover.").

did not try hard enough to levy *D*'s assets, such that the return *nulla bona* should be invalidated.[269]

That *C* need not exhaust remedies against *D* was the implication of *Pierce v. United States*.[270] *C* was the federal government seeking to collect a fine from *D Corp*. In the case, *D Corp*. was indicted for receiving illegal rebates for goods purchased. Thereafter, *D Corp*. sold its assets to *S Corp*. for cash and a promise to assume all debts that *D Corp*. owed to its creditors. *D Corp*. then made fraudulent distributions to its shareholders. Thereafter, the government obtained a judgment imposing a criminal fine on *D Corp*. The government brought what was essentially a fraudulent transfer claim against the shareholders.[271]

The shareholders complained that the government was obliged to pursue *S Corp*. under its assumption agreement with *D Corp*. The Supreme Court ruled, however, that "[t]he existence of that possible remedy did not bar the government from following by a creditor's bill the assets of [*D Corp*.] into the stockholder's hands."[272] This case supports the view that *C* can generally proceed against *X* even if other remedies are open to *C*. Still, in ancient times and often in modern times, the execution *nulla bona* is a prerequisite to the commencement of a creditor's bill.[273] At some level, this reflects a norm that *C* should liquidate *D*'s assets before bothering *X*.

C. Void-Voidable in the Uniform Commercial Code

Unconstitutional though it may be, the legal notion of "void" is the underlying presumption of article 9 of the Uniform Commercial Code ("UCC").[274] To see why, we require a quick history of article 9 and its relation to fraudulent transfer remedies.

According to a too-simple view, the Star Chamber in 1601 proclaimed hypothecations to be fraudulent transfers.[275] As such, they were void, and the sheriff could levy *X*'s collateral still in *D*'s possession, disregarding *X*'s security interest.

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[269] *See* Jones v. Green, 68 U.S. 330, 332 (1863) ("The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy.").

[270] 255 U.S. 398, 404–05 (1921) (highlighting the existence of another possible remedy did not block *C* from pursuing the bill in equity in the present case).

[271] A later case assumes that, in *Pierce*, *D Corp*. dissolved: "However, [*Pierce*] concern[s] the liability of shareholders of a corporation no longer in existence. In that circumstance, the stockholders of a corporation may become liable for claims against the corporation to the extent of the property distributed to them upon liquidation." United States v. Dean Van Lines, Inc., 531 F.2d 289, 292–93 (5th Cir. 1976). The court also assumed that *Pierce* is sounded in unjust enrichment, but it certainly could have sounded in fraudulent transfer, where *D Corp*. dissolved after distributing assets to shareholders. *Id.*; *see also* Phillips-Jones Corp. v. Parmley, 302 U.S. 233, 236–37 (1937) (assuming *Pierce* involved the "trust fund doctrine"). On the affinity of the trust fund doctrine to fraudulent transfer law, see *infra* text accompanying notes 383–90.

[272] *Pierce*, 255 U.S. at 405.

[273] *See* Painters Dist. Council No. 2 v. Sustainable Constr., Grp., LLC, No. 4:12-CV-00492 ERW, 2016 WL 4124110, at *2 (E.D. Mo. Aug. 3, 2016) ("A creditor must exhaust her legal remedies before proceeding in equity to pierce the corporate veil. A return of nulla bona upon execution, is evidence of the exhaustion of remedies." (citation omitted)).

[274] *See generally* U.C.C. art. 9 (AM. L. INST. & UNIF. L. COMM'N 2017).

[275] *See* Twyne's Case, 76 Eng. Rep. 809 (1601). For qualifications and complications, see George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, 29 N.M. L. REV. 363 (1999).

With the advent of the railroads, the taste for hypothecations vastly increased. Accordingly, states began to pass chattel mortgage statutes. Under these statutes, a public filing purged the hypothecation of its vicious fraudulent nature. Where filing did not occur, however, *C* was invited to pursue the fraudulent transfer remedy: *C* was invited to ignore *X*'s unperfected security interest and establish a judicial lien on the collateral because *X*'s unperfected lien was void.[276]

To make this more concrete, suppose *D* owned something valuable, say a gold brick. *C* had a money judgment against *D*. Before *C* could serve an execution on the sheriff, *D* granted an unperfected security interest to *X*. Suppose further that *X* succeeded, after a time, in perfecting her lien on the brick. In spite of *X*'s perfection, *C* could obtain a levy of the brick as if *X*'s security interest did not exist. *C* was a creditor in the unperfected gap, and, as to *C,* the unperfected security interest was fraudulent and void.

This circumstance led to the infamous case of *Moore v. Bay*.[277] That case involved the following scenario: Suppose, in addition to the above-stated facts, *D* were to file for bankruptcy before *C* got around to the sheriff's levy of the brick. According to *Moore*, the trustee, under section 70(e) of the Bankruptcy Act, could subrogate to the avoidance right of *C* and avoid the entire security interest.[278] Suppose *C*'s claim was for $5, the brick was worth $20,000, and *X*'s secured claim exceeded the value of the brick. *X* lost everything and was reduced to the status of an unsecured creditor. Furthermore, *C* did not receive $5 from her subrogee. *C* also was reduced to an unsecured creditor with a mere pro rata share of the brick. Thus, the trustee expropriated *C*'s state law avoidance right and reduced *C* to an unsecured creditor. The chief winners were the post-filing creditors as to whom the chattel mortgage was not fraudulent.[279]

One of the main goals of article 9 was to defang the ponderous and marble jaws of *Moore v. Bay*.[280] This was done by depriving unsecured *C* of any rights against unperfected *S*. Under UCC section 9-317(a)(2), only persons who become lien

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[276] According to the California Civil Code:

> [A chattel mortgage] is conclusively presumed . . . to be fraudulent, and therefore, void against those who are his creditors . . . unless at least seven days before the consummation of such . . . mortgage, the . . . mortgagor . . . shall record in the office of the county recorder . . . a notice of said intended . . . mortgage. . . .

CAL CIV. CODE § 3440 (repealed 1951).

[277] 284 U.S. 4 (1931).

[278] *See id.* at 5.

[279] *See generally* John C. McCoid, II, Moore v. Bay*: An Exercise in Choice of Law*, 1990 Ann. Surv. Bankr. L. 4; Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 753 (1984) ("[Article 9] provid[es] that, at the moment of bankruptcy, *all* unsecured creditors could potentially defeat an unperfected security interest and conversely, that any security interest perfected before bankruptcy would defeat an unsecured creditor, whether earlier, gap, or subsequent.").

[280] *See* William D. Hawkland, *The Impact of the Commercial Code on the Doctrine of* Moore v. Bay, 67 COM. L.J. 359, 363 (1962).

creditors have rights against unperfected *X*.[281] Under article 9, unsecured *C* is deprived of her fraudulent transfer remedy.[282] Under Bankruptcy Code section 544(b)(1) and its predecessor, a trustee subrogates to the avoidance rights of an *unsecured* creditor.[283] Under article 9, only *secured* creditors have avoidance rights.[284] On the theory that what is without remedy should be without regard, we must concede that unperfected security interests cannot properly be considered fraudulent transfers.

But putting aside these metaphysics, when *C* becomes a lien creditor before *X* perfects, *X*'s lien is not merely voidable. It is *void*. The way section 9-317(a) puts it, *X*'s security interest is "subordinate to the rights of . . . a person who becomes a lien creditor."[285] Article 9, usually fastidious about formal definitions, disdains to define "subordinate," but we may view "subordinate" to mean that the security interest *has already been avoided*.[286] This privileges the legal view (void) over the equitable view (voidable).

An objection to this thesis may be posed: When *C* becomes a lien creditor before *X* perfects, *X*'s lien is not void. *X*'s junior security interest continues to exist. But when the sheriff sells to *B*, *X*'s security interest disappears at that time, even though *B* is fully knowledgeable about *X*'s security interest. Thus, the security interest is voidable when *C* becomes a lien creditor and is void only later, when the sheriff conducts a "free-and-clear" sale to *B*.[287] I think this is wrong. *C* was senior to *X* the moment she became a lien creditor. *X* was dead from that moment. True, *X* continued to exist as the walking dead. *X* was, as it were, Bruce Willis in *The Sixth Sense*[288]—dead without knowing it! Accordingly, *X*'s unperfected security interest was *void* the minute *C* became senior.

What would the world look like if unperfected security interests were *voidable* and not *void*? In such a world, when the sheriff levies collateral encumbered by an

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[281] U.C.C. § 9-317(a)(2) (AM. L. INST. & UNIF. L. COMM'N 2017).

[282] *See id.*

[283] 11 U.S.C. § 544(b)(1) (2018) ("[T]he trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim. . . .").

[284] *See* U.C.C. § 9-317(a)(2) (AM. L. INST. & UNIF. L. COMM'N 2017).

[285] *Id.*

[286] *See* David Gray Carlson, *The Res Judicata Worth of Illegal Bankruptcy Reorganization Plans*, 82 TEMPLE L. REV. 351, 382 (2009) [hereinafter Carlson, *Res Judicata*].

[287] In *Aircraft Trading & Services, Inc. v. Braniff, Inc.*, the court denied that "subordinated" means subject to a free-and-clear sale. 819 F.2d 1227, 1233–34 (2d Cir. 1987). *D* had granted an unperfected security interest in a jet engine to *X*. *D* sold to B_1, a good faith purchaser for value. Properly *X*'s security interest on the engine had gone out of existence, though an unperfected security interest in proceeds of the engine arose. Subsequently, *X* "perfected" by a suitable filing. But *X* had nothing to perfect as to the engine. B_1 then sold to B_2. *X* sued B_2 in conversion. *X*'s claim survived a summary judgment motion by B_2 because B_2 bought after *X* perfected. "Subordination," it appears, did not mean *D* sold to B_1 free and clear. *See id.* The 2000 amendments to article 9 revised section 9-317(b) to emphasize B_1 bought "free" of *X*'s unperfected security interest. *See* Edwin E. Smith, *Overview of Revised Article 9*, 73 AM. BANKR. L.J. 1, 27 (1999). Section 9-317(a)(2), pertaining to priority of lien creditors, still uses the word "subordinate." Nevertheless, the Permanent Editorial Board of the UCC specifically denounces *Braniff* making clear that "subordinate" means a "free-and-clear" sale. PERMANENT ED. BD. FOR THE UNIF. COM. CODE, PEB Commentary No. 6: Section 9-301(1), at 1167–68 (Mar. 10, 1990). *See generally* David Gray Carlson, *Death and Subordination Under Article 9 of the Uniform Commercial Code: Senior Buyers and Senior Lien Creditors*, 5 CARDOZO L. REV. 547 (1984).

[288] THE SIXTH SENSE (Hollywood Pictures 1999).

unperfected security interest, the judicial lien that empowers the sheriff is not yet senior. A prompt sale to *B* would not eliminate *X*. *X* would have the right to repossess from *B*. To end this right, *B* would have to bring a set-aside action against *X*. Yet UCC section 9-317(a)(2) refers to *C* having already become a lien creditor prior to the commencement of a set-aside action.[289] From this moment *C* became empowered to sponsor a free-and-clear sale to *B*. This free-and-clear power signals *void*, not *voidable*.

An adequate test case for this proposition is this: *D* grants an unperfected security interest in a gold brick to *X*. *C* obtains a money judgment and serves an execution on the sheriff and thereby "becomes" a lien creditor. Without notifying *X*, the sheriff sells the brick to *B*. *X* then seeks to replevy the brick from *B* because *X* claims to have a surviving security interest in *B*'s brick. The court denies replevin because the sheriff sold the brick free and clear of the unperfected security interest.[290] This is precisely what happens when, in a standard fraudulent transfer case, *C* "disregards" a fraudulent transfer to *X* and sells via a judicial lien to *B*.

Earlier, we suggested that the void theory of disregarding *X*'s rights was unconstitutional.[291] Must we now admit UCC section 9-317(a)(2) is unconstitutional? It would strike one and all as absurd to say so. But explaining why is not so easy. One instinct is to point out that it is in the nature of the property rights of a secured party that unperfection implies subordination to a lien creditor: "Perhaps the most obvious way to resolve the constitutional issue is to recognize that secured creditors willingly subject themselves to the vagaries of Article 9 with a presumptive understanding of the risks involved."[292] But this proves too much. The legislature could then generally define "property" to mean that which can be taken without due process of law. Due process rights could then be legislated out of existence.

Why does *X* deserve due process in a standard fraudulent transfer but not in an article 9 case? The answer probably lies in the intimacy of *X*'s *possessory* right to property fraudulently transferred by *D*.[293] But where *X* is an article 9 secured party, no intimacy of possession is involved. *X* may litigate the perfection and seniority of her security interest in a replevin action against *B*, and that is likely adequate due process for secured parties under article 9.[294] I leave the fine points to the constitutional law scholars.

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[289] *See* U.C.C. § 9-317(a)(2) (AM. L. INST. & UNIF. L. COMM'N 2017).

[290] *See* Md. Nat'l Bank v. Porter-Way Harvester Mfg. Co., 300 A.2d 8, 11 (Del. 1972) (finding the buyer at an execution sale bought "free and clear" of even senior liens). *Cf.* David Frisch, *The Implicit "Takings" Jurisprudence of Article 9 of the Uniform Commercial Code*, 64 FORDHAM L. REV. 11, 25 (1995).

[291] *See supra* text accompanying notes 182–203.

[292] Frisch, *supra* note 290, at 26 n.69.

[293] *See* N. Ga. Finishing, Inc. v. Di-Chem, Inc, 419 U.S. 601, 606–08 (1975) (assessing the constitutionality of the deprivation of *X*'s beneficial use of a deposit account); Fuentes v. Shevin, 407 U.S. 67, 89 (1972) (protecting household goods from replevin); Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 340 (1969) (finding that wages are "a specialized type of property," and their prehearing taking imposes "tremendous hardship"); Mitchell v. W.T. Grant Co., 416 U.S. 600, 618–20 (1974) (holding household goods could be seized without prior notice given adequate post-seizure procedure).

[294] According to the balancing test of *Mathews v. Eldridge*:

An intriguing question is whether a bankruptcy trustee inherits the "void" position from lien creditors under state law. Under section 544(a)(1), a bankruptcy trustee has "the rights and powers of, or may avoid any transfer of property of the debtor . . . that is voidable by—(1) [a judicial lien creditor]."[295] This provision directly refers to the legal remedy of voidness and the equity remedy of avoidance. May a trustee simply "strong arm" an unperfected secured party and treat the security interest as already avoided? Or must an adversary proceeding be commenced, wherein a court is invited to proclaim the security interest avoided?[296] It is usually thought that, if *D* fraudulently transfers to *X* and then files for bankruptcy, the trustee must commence an adversary proceeding against *X* in order to avoid the transfer.[297]

Arguably, "rights and powers" implies a trustee can skip the adversary proceeding and proceed to sell free and clear of the unperfected security interest, just like a judicial lien creditor could under state law. If so, the trustee can sell by motion pursuant to Bankruptcy Code section 363(b).[298] *X* can intervene to protest. But *X* could not then complain that an adversary proceeding is necessary to extinguish *X*'s title. No case, however, has considered this possibility. But the existence of a shine-through lien implies that *X*'s claim is *instantly avoided* by *D*'s very bankruptcy petition. True, the Federal Rules of Bankruptcy Procedure require an adversary proceeding,[299] but Federal Rules are not permitted to override congressional enactments.[300]

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 334–35 (1976).

[295] 11 U.S.C. § 544(a)(1) (2018).

[296] *See* FED. R. BANKR. P. 7001 ("The following are adversary proceedings: . . . a proceeding to determine the validity, priority, or extent of a lien. . . .").

[297] *See* Bank of Am., N.A. v. Veluchamy (*In re* Veluchamy), 879 F.3d 808, 816 (7th Cir. 2018) (stating fraudulent transfers must be avoided in an adversary proceeding and may not be recovered in a turnover proceeding). Ironically, the court in *In re Veluchamy* upheld a turnover order, where *D* transferred funds to subsidiary corporation *X* allegedly on an antecedent debt. The court disbelieved in the debt, which suggested that *X* had title to the funds. The court, however, decided that *D* did not part with title to the funds, "rather, they simply moved the funds to an overseas account they controlled." *Id.* at 817. That is, either *D* was the beneficiary of a trust, *see* Nordberg v. Sanchez (*In re* Chase & Sanborn Corp.), 813 F.2d 1177, 1178–79 (11th Cir. 1987) (concluding the subsidiary was a "mere conduit"), or the court pierced the corporate veil, so that *X*'s property was *D*'s property.

[298] 11 U.S.C. § 363(b).

[299] *See* FED. R. BANKR. P. 7001.

[300] For a case striking down a Bankruptcy Rule for violating the express terms of the Bankruptcy Code, see *In re* Hausladen, 146 B.R. 557 (Bankr. D. Minn. 1992).

I have covered this issue elsewhere.[301] For the moment, I observe that the contradiction between void and voidable is a very basic issue for the whole of commercial law, separate and apart from private fraudulent transfer litigation.

III. NO JUDGMENT YET

Previously, we assumed that *C* has procured a money judgment against *D* and subsequently wishes to obtain a judicial lien on *X*'s fraudulently received property. Now we assume that *C* has not yet obtained judgment against *D*. To what extent may *C* encumber *X*'s property with a lien, keeping in mind *C* may *never* succeed in obtaining a judgment against *D*?

In this environment, the Cretaceous contradiction between law and equity unfolds again. As supplemented by statute, "law" gives pre-judgment creditors a right to an attachment lien, especially in an environment where fraud had occurred or was suspected.[302] Since fraudulent transfers are "void," according to "the law," attachment liens encumber *X*'s property.[303] I save this story for later.[304]

For its own part, equity had no pre-judgment procedure. Equity expected a writ of execution returned *nulla bona* as evidence that the legal remedy was inadequate. Executions do not issue until a judgment is entered.[305] Accordingly, in the 19th century, the equity chancellors insisted that fraudulent transfers were ancillary to money judgments.[306] That is to say, the absence of a money judgment implied that no fraudulent transfer could be set aside.[307]

Exceptions existed. Suppose *D* had died, so that it was impossible for *C* to obtain judgment against *D*. Under these circumstances, *C* was accorded the right to bring an avoidance action against *X*, provided *C* had exhausted her remedy against the estate

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[301] *See* Carlson, *Res Judicata*, *supra* note 286, at 381–87.

[302] *E.g.*, N.Y. C.P.L.R. § 6201(3) (McKinney 2020) (stating grounds for attachment include potential fraudulent transfers by the defendant in an attempt to defraud his creditors).

[303] *See* Whitney v. Davis, 148 N.Y. 256, 260, 42 N.E. 661, 662 (1896) ("[A] plaintiff who had attached personal property, fraudulently transferred, was entitled to have his attachment lien preserved until he could merge his claim in a judgment, and issue final process for its collection."); Am. Tr. Co. v. Kaufman, 119 A. 749, 751–52 (Pa. 1923) (upholding attachment lien even though *X* was never made a party to the underlying action); Ahern v. Purnell, 25 A. 393, 393–94 (Conn. 1892) (finding the writ of attachment defective for failing to describe the goods seized).

[304] *See infra* text accompanying notes 422–75.

[305] *E.g.*, N.Y. C.P.L.R. § 5230(a).

[306] *See* Briggs v. Austin, 129 N.Y. 208, 210, 29 N.E. 4, 4 (1891) ("[I]t is well settled that a general creditor having no judgment cannot maintain an action to set aside a conveyance by his debtor in fraud of the rights of creditors."); Van Huesen & Charles v. Radcliff, 17 N.Y. 580, 584 (1858) ("When a conveyance is said to be void against creditors, the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collections of debts."); Wiggins v. Armstrong, 2 Johns. Ch. 144, 146 (N.Y. Ch. 1816) ("[U]nless [*C*] has a certain claim upon the debtor, he has no concern with his frauds.").

[307] *See Whitney*, 148 N.Y. at 260–62, 42 N.E at 662–63; WAIT, *supra* note 10, § 73 ("A rule of procedure which allowed any prowling creditor, before his claim was definitely and finally established by formal judgment, and without reference to the character of his demand, to file a bill to discover equitable assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, it is asserted would, manifestly, be susceptible of the grossest abuse.").

of *D*.[308] Or suppose *D* could not be sued in the state, but *X* fraudulently received property there. *C* could sue *X* without a judgment against *D*. In some of these cases, *C* commenced an action and even had judgment against *D* in some other jurisdiction.[309] But at least one court permitted *C* to pursue *X*'s personal property without having commenced an action in the other jurisdiction to which *D* had re-located (where *D* was insolvent).[310] In either case, if *C* is to have judgment against *X*'s property, *C* must prove *C* is actually a creditor of *D*; the out-of-state judgment is *evidence* of the proposition, but it is not binding on *X*.[311] Indeed, we may say more broadly that, where *X* is not joined in the *C v. D* action, the *C v. D* result is never *res judicata* in the *C v. X* action.[312] Unless joined to *C v. D*, *X* is free to prove *C* was no creditor of *D*. But *C* "proves" *C* is a creditor by producing a judgment or pre-judgment proceeding in *C v. D*.[313]

In *Hall v. Stryker*,[314] *C* obtained an order of attachment against *D*. Under it the sheriff seized some wagons at *D*'s residence. It seems that, just before the levy, *D* conveyed the wagons to *X* in satisfaction of *X*'s unsecured claim against *D*. The trial court allowed *X* to contest that *C* was a creditor of *D*. The court of appeals reversed. *X* was not permitted to impeach *C*'s *ex parte* showing against *D* that *C* was really *D*'s creditor.[315]

For this, the court could cite *Candee v. Lord*.[316] In *Candee*, C_1 allegedly obtained a fraudulently confessed judgment and subsequent execution sale. C_2 thereafter obtained a judgment against *D* based on breach of an indorser's warranty. C_1 was not alleging C_2's bad faith, and so C_2's judgment could not be impeached.[317] C_2 could impeach C_1, however, if C_1's judgment was a fraudulent transfer. The *Candee* court stated in passing that in *C v. X*, *X* "would not be permitted to allege, in bar of the

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[308] *See* Nat'l Tradesmen's Bank v. Wetmore, 124 N.Y. 241, 249–251 26 N.E. 548, 550–51 (1891) (describing that *C* and *D*'s administrator had settled *C*'s claim, leaving *C* with a shortfall); Garrard Glenn, *A Study in the Development of Creditors' Rights II*, 14 COLUM. L. REV. 369, 370–71 (1914) (referencing the intricacies associated with bringing an avoidance action when original debtor is deceased). *But see* Laidley v. Heigho, 326 F.2d 592, 593–94 (9th Cir. 1963) (holding that, since *D* had died, *C*'s claim against *D* was discharged; thus, *C* was no longer a creditor and could not sue *X*).

[309] *See* Shuck v. Quackenbush, 227 P. 1041, 1043 (Colo. 1924); Trotter v. Lisman, 209 N.Y. 174, 179–81, 102 N.E. 575, 577 (1913).

[310] Williams v. Adler-Goldman Comm'n Co., 227 F. 374, 376 (8th Cir. 1915) ("[W]here it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference."); *see* Note, *Creditor's Rights in Equity*, *supra* note 206, at 1059.

[311] *See Shuck*, 227 P. at 1046.

[312] *See* Botsford v. Beers, 11 Conn. 369, 373 (1836).

[313] *See* Grace v. Bank Leumi Tr. Co. of N.Y., 443 F.3d 180, 188–89 (2d Cir. 2006). In *Grace*, *D* fraudulently transferred assets to *X*. *C* obtained a default judgment against *D*. *X* was allowed to intervene and have the judgment withdrawn, since the *C v. D* judgment seemed highly defective and perhaps fraudulent. But the court went too far in dismissing the fraudulent transfer action against *X*. Lifting the default simply meant *C v. D* had to be tried, and joinder by *X* was still authorized by Federal Rule of Civil Procedure 19(b).

[314] 27 N.Y. 596 (1863).

[315] *Id.* at 608.

[316] 2 N.Y. 269 (1848).

[317] *Id.* at 270–71; *see also* Nicholas v. Lord, 193 N.Y. 388, 397, 85 N.E. 1083, 1086 (1908).

action against him, that the parties seeking relief were not creditors prior to, or at the time of the conveyance."[318]

Putting these thoughts together, *C* must present evidence of the *C v. D* debt in *C v. X*. This is accomplished by showing a judgment or order of attachment in *C v. D*. *X* may not show the court in *C v. D* was in error,[319] but *X* is permitted to prove that the lien or obligation arising in *C v. D* is itself a fraud on *X*.

In ancient times, insolvency excused the requirement of a money judgment in *C v. D*.[320] In *Case v. Beauregard*,[321] *C* had no judgment against *D* (a partnership),[322] yet nevertheless sought to set aside a transfer of real property to *X*. Justice William Strong acknowledged that equity likes to see a judgment and execution returned *nulla bona* before setting aside a fraudulent transfer, but these were not necessary conditions:

> But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, "*Bona, sed impossibilia non cogit lex*." It has been decided that where it appears by [the creditor's bill in equity] that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference.[323]

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[318] *Candee*, 2 N.Y. at 276. Professor Glenn asked whether *X* could question the validity of *C*'s judgment. "This question should be answered in the negative," he wrote. GLENN, *supra* note 10, § 228.

[319] WAIT, *supra* note 10, § 74 ("A general creditor cannot attack another creditor's judgment.").

[320] *Hall v. Stryker* contains some dicta suggesting *C* could always obtain pre-judgment attachment against *X*'s fraudulently received property. Said the court:

> One of the cases in which [attachment] may be taken is where the debtor has assigned any of his property with intent to defraud his creditors. Suppose [*D*] has assigned . . . the whole of his goods, it cannot be doubted that the creditor would be entitled to the attachment on establishing the fraud. It is one of the cases expressly provided for in the statute. It might be the baldest cover, a mere gift executed by delivery with a declared purpose to cheat his creditors, yet the title would pass as between the parties, and the remedy which the law has provided would be utterly ineffectual if the property could not be seized on the attachment.

Hall, 27 N.Y. at 601. Perhaps the court was articulating the insolvency exception to pre-judgment fraudulent transfer rights.

[321] 101 U.S. 688 (1879).

[322] *C* had judgments against some of the partners individually, but these judgments did not serve to create liens on partnership property.

[323] *Id.* at 690. Nevertheless, the creditor's bill was denied. It seems that *C* had previously filed a creditor's bill, which had been (wrongfully) dismissed. The first dismissal precluded the second bill, and so *C* was out of court. *Id.* at 692 ("And this must be so, whether the reasons for dismissal were sound or not.").

In *People ex rel. Cauffman v. Van Buren*,[324] fraudulent transfer theory became a means for reversing fraudulent use of judicial process, where *C* did not yet have a judgment against *D*. *D* and *X* had conspired that *X* would raise false claims. *D* confessed judgment, and the sheriff levied tangible personal property of *D*. The idea was to generate an execution sale that would put funds in *X*'s pocket, thereby hindering *C*.

Having discovered this conspiracy, *C* could not simply get an order of attachment against the levied property. A levy under such an order would necessarily be junior to *X*'s levy. Indeed, *C*'s order of attachment would be delivered to the same sheriff who had levied under the execution. Under the circumstances, the sheriff who liquidated the levied property would be obliged to distribute to the execution creditor (*X*) before honoring *C*'s order of attachment.[325]

Instead, *C* commenced a set-aside action "upon the equity side of the court,"[326] to which *X* and the sheriff were made parties. Equity was capable of aiding an attachment lien,[327] even if equity would not aid the cause of an unsecured creditor without judgment or lien.[328] In the equity action, *C* alleged that *X*'s execution lien was a transfer from *D* to *X* for no fair consideration. If so, that would mean that *C* would have an attachment lien on *X*'s execution lien—a lien on a lien.[329] The sheriff could sell the levied goods to *B*, but now the proceeds would be encumbered by *C*'s senior attachment lien. These the sheriff would hold for the benefit of *C,* pending *C* actually obtaining judgment against *D*.

In connection with the set-aside action, the *Cauffman* court granted a preliminary injunction prohibiting the sheriff or *X* from selling the levied goods.[330] Meanwhile, the sheriff, in violation of the preliminary injunction, had sold the levied goods to *B*.[331] The exact issue before the court was whether *B* and the sheriff were in contempt of court. The trial court found *B* and the sheriff in contempt; the fine was the amount

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[324] 136 N.Y. 252, 32 N.E. 775 (1892).

[325] The modern version of the rule for this can be found at N.Y. C.P.L.R. § 5234(b) (McKinney 2020).

[326] *Cauffman*, 126 N.Y. at 257, 32 N.E. at 775.

[327] *See* Glenn, *Without Judgment*, *supra* note 213, at 208, 213.

[328] *See* Cates v. Allen, 149 U.S. 451, 458 (1893) ("The mere fact that a party is a creditor is not enough. He must be a creditor with a specific right or equity in the property, and this is the foundation of the jurisdiction in chancery, because jurisdiction on account of the alleged fraud of the debtor does not attach as against the immediate parties to the impugned transfer, except in aid of the legal right.").

[329] *See Cauffman*, 136 N.Y. at 257, 32 N.E. at 775 ("[T]he plaintiffs demand, as part of the relief to which they claim to be entitled, that the [execution] lien of the fraudulent judgment creditors . . . shall be postponed to the lien which the plaintiff has acquired by virtue of his attachment.").

[330] The trial court issued the injunction, and *then* the order of attachment was served on the sheriff. This was found to be an error. The injunction was strictly in aid of the attachment lien, and the attachment lien did not exist until the order of attachment was delivered. Nevertheless, the injunction was valid. The remedy of *B* and the sheriff was to seek relief from the court that issued the injunction. *B* and the sheriff could not merely assume that the injunction was void. *Id.* at 262, 35 N.E. at 777. A dissenting opinion protests that the injunction was facially invalid. *See id.* at 268, 35 N.E. at 779 (Earl, C.J., dissenting).

[331] *B* was Frank Hopkins, lawyer to Sheriff Van Buren.

of *C*'s claim against *D*[332] (presumably capped at the value of the goods sold by the sheriff).[333] These findings were upheld on appeal.

The *Cauffman* court severely limited its holding, stating: "The mere existence of a fraudulent transfer would not be sufficient to authorize a court of equity to entertain an action at the suit of an attaching creditor to set it aside."[334] The exception was based on the fact that *X* had abused court process in order to achieve *D*'s surrender of wealth and *X*'s gain of it.[335]

Cauffman could be viewed as an instance where equity came to the rescue of an attachment lien, a judicial lien on the law side, under circumstances in which *C*'s legal remedy was inadequate to protect *C*.

Fraudulent conveyance litigation before *C v. D* was decided might come about by accident in attachment cases. In *Hall v. Stryker*,[336] *C* obtained an order of attachment on an *ex parte* basis and served it on the sheriff late on November 30, 1857. The sheriff levied wagons on December 1, 1857 (thinking they were *D*'s property). *X* emerged with a bill of sale dated (a little too conveniently) November 30. *X* sued the sheriff for trespass to chattels. The sheriff was allowed to defend himself by showing that the transfer from *D* to *X* was a fraudulent transfer.[337]

In addition to such rare case-law exceptions, an occasional 19th century statute provided a fraudulent transfer remedy to creditors who had not received judgments against *D*.[338] Picking up on that innovation, the UFCA intervened with a section entitled "Rights of Creditors Whose Claims Have Not Matured."[339] As we have seen,

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[332] The fine was for $1,470.32. The opinion nowhere states what happened to the funds *B* paid to the sheriff in order to gain title to the levied goods. Presumably, these funds ended up in the pockets of *X*. Properly, the sheriff should have retained these funds for the benefit of *C*'s eventual judgment.

[333] It appears that *C*'s claim against *D* was less than the value of goods bought by *B*. *See id.* at 263, 35 N.E. at 777–78 (majority opinion).

[334] *Id.* at 260, 35 N.E. at 777.

[335] *See id.* at 260–61, 35 N.E. at 777 (stating, confusingly, "[b]ut when [a set aside] is sought [by *X*] to make use of such a transfer for the purpose of removing the attached property from the jurisdiction of the officer who has it in his custody it is evident that nothing but the equitable arm of the court can prevent the consummation of the wrong").

[336] 27 N.Y. 596 (1863).

[337] *See id.* at 608; *accord* Hart v. A.L. Clarke & Co., 194 N.Y. 403, 408–09, 87 N.E. 808, 810 (1909) ("It is settled in this state that an attachment is a good defense in an action brought by a fraudulent vendee against a sheriff for seizing the property so attached."). In *Hart*, *C* obtained an order of attachment. The sheriff levied *D*'s cases of whiskey. *D* supposedly conveyed the whiskey to *X* for no consideration. *C* sought to avoid *X*'s title. The court said *C*'s remedy was unnecessary because *X* could not dispossess the sheriff even if *X* possession's title was absolute and not voidable, as the whiskey had been levied from *D* before the sale to *X*. *Hart*, 194 N.Y. at 409, 87 N.E. at 810. The court *also* added, before judgment against *D*, *C* had no avoidance rights against *X*. *Id.* at 408, 87 N.E. at 810.

[338] *See, e.g.*, Scott v. Neely, 140 U.S. 106, 111–12 (1891) (citing Mississippi statute); Dewey v. W. Fairmont Gas Coal Co., 123 U.S. 329, 332 (1887) (quoting West Virginia statute); Lipskey v. Voloshen, 141 A. 402, 404–05 (Md. 1928) (quoting Maryland statute); Wallace's Adm'r. v. Treakle, 68 Va. 479, 485–86 (1876) (citing Virginia statute). The Supreme Court, however, would rule such state statutes could not affect federal equity powers. Federal equity insisted that *C* exhaust his legal remedy of money judgment before obtaining the aid of equity. *See* Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 379 (1893) ("The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation.").

[339] UNIF. FRAUDULENT CONVEYANCE ACT § 9 (UNIF. L. COMM'N 1918); *see also* Am. Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 7, 166 N.E. 783, 785 (1929) ("We think the effect of these provisions is to abrogate the

a mature claim was one for which a money judgment existed.[340] An immature claim included not only claims due and owing (but for which no judgment existed) but also *contingent* claims: A creditor was defined as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."[341] The upshot was that a claim of fraudulent transfer could be entertained even in the absence of a money judgment.[342]

A. Effect on the Statute of Limitations

The UFCA's procedural innovation has had a profound effect on the statute of limitations for fraudulent transfer. In the primitive days prior to the UFCA, ere statute purged the commonweal, the *C v. D* money judgment was thought to be an element of *C*'s cause of action. Accordingly, the statute of limitations for the action against *X* commenced when *C* had judgment against *D*[343] or had procured the execution *nulla bona*.[344] After the UFCA, however, the judgment was *not* an element of the cause of action.[345] *C*'s cause of action accrued earlier, when the fraudulent transfer was actually made. The statutory period grew considerably shorter.[346]

An early UFCA case denied this implication of a shorter statute of limitations. In *Lind v. O.N. Johnson Co*.,[347] the court noted that, under pre-Code Minnesota law, *C* had to get a post-judgment execution returned *nulla bona,* and the statutory period only commenced at that point. Admittedly, the UFCA permitted immature creditors to bring suit *sans* judgment against *D*. If this were to imply a short statute of limitations that commenced with the transfer itself, *C*, the court thought, would be

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ancient rule whereby a judgment and a lien were essential preliminaries to equitable relief against a fraudulent conveyance.").

[340] *See supra* text accompanying notes 52–53.

[341] UNIF. FRAUDULENT CONVEYANCE ACT § 1.

[342] *See Conner*, 251 N.Y. at 7, 166 N.E. at 785 ("Certainty would, indeed, have been promoted if [the UFCA] had said in so many words that judgment and a lien should no longer be essential. We think it said as much, however, by fair and natural implication.").

[343] *See* GLENN, *supra* note 10, § 88 ("The time begins to run . . . from the moment when the creditor gets into a position to attack the fraudulent transfer."); *see also* Scholle v. Finnell, 137 P. 241, 245 (Cal. 1913) (reinforcing that "the allowance of the claim in probate . . . had the same force and effect as a judgment").

[344] *See* Holland v. Grote, 193 N.Y. 262, 271, 86 N.E. 30, 34 (1908). *Holland* illustrates how pro-creditor matters were before the UFCA. In *Holland*, *C* obtained a money judgment against *D* in 1888. The judgment was docketed so as to create a ten-year judicial lien on land that *D* owned. In 1893, *D* conveyed the land to *X*. *C* could have enforced the lien against *X*'s land until 1898. In 1899, after *C*'s lien lapsed, *X* sold the land to a bona fide purchaser for value. In 1907, *D* served an execution on the sheriff who returned it *nulla bona*. The court ruled the cause of action accrued in 1907 (though *X* was free on remand to show the execution was actually returned at an earlier date). *See id.* Thus, *C*'s cause of action against *X* was still valid fourteen years after the fraudulent transfer.

[345] *See* UNIF. FRAUDULENT CONVEYANCE ACT § 10 (providing creditors whose fraudulent transfer claims had not matured "may proceed in a court . . . against any person against whom he could have proceeded has his claim matured").

[346] *See* Sands v. New Age Fam. P'ship, Ltd., 897 P.2d 917, 920 (Colo. App. 1995) (holding that it is no longer the rule that "the statute of limitations on a fraudulent conveyance claim does not begin to run until the creditor's claim is reduced to judgment").

[347] 282 N.W. 661 (Minn. 1938).

induced to bring an earlier action against *X* when it was not clear *C* would ever get judgment against *D*.[348] This incentive counted against such an interpretation. In any case, *X* was perceived a villain who scarcely deserved the tender sympathy of a short statute of limitations:

> As to his grantee, who holds only an apparent title, a mere cloak under which is hidden the hideous skeleton of deceit, the real owner being the scheming and shifty judgment debtor,—what reason has he to complain when the six year statute giving repose to the remedy has not expired since entry of judgment?[349]

The *Lind* court therefore thought that, since the UFCA had no express statute of limitations, the UFCA was not intended to change the prior rule.[350] Accordingly, the limitation period only commenced to run from the time an execution is returned *nulla bona*. Thus, *C* was invited to extend the statutory period for years by the device of dilatorily procuring a writ of execution.

The UFTA has added a statute of limitations. With regard to actual frauds, the period commences "4 years after the transfer was made," together with discovery rule.[351] For constructive fraudulent transfers, the discovery rule does not apply, and four years is the invariant statutory period.[352]

In *Cortez v. Vogt*,[353] a modern California court held that, UFTA notwithstanding, the statutory period commences to run when *C* has judgment against *D*. Relying on *Lind*,[354] the *Cortez* court reasoned that, under California law prior to the UFCA, *C* enjoyed the rule that the period commenced with *C*'s judgment against *D*.[355] The

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[348] *Id.* at 668 ("A construction should not be adopted compelling a creditor . . . to institute proceedings of this nature until the debtor's liability has been established by final judicial determination.").

[349] *Id.*

[350] *Id.* at 667.

[351] UNIF. FRAUDULENT TRANSFER ACT § 9 (UNIF. L. COMM'N 1984) ("A [claim for relief] [cause of action] with respect to a fraudulent transfer . . . under this [Act] is extinguished unless the action is brought: (a) under Section 4(a)(1), within 4 years after the transfer was made . . . or, if later, within one year after the transfer . . . was or could reasonably have been discovered by the claimant. . . ." (alterations in original)).

[352] *See* Foster v. Evans, 429 N.E.2d 995, 1000–01 (Mass. 1981). In *Foster*, D conveyed property to *X* and six years elapsed. *C* then obtained a judgment against *D*. Two years later, *C* commenced a set-aside action against *X*. The court permitted the set-aside. *Id.* This is consistent with *Lind*, but the court indicated that it was applying the twenty-year statute of limitations for the enforcement of judgments. Such a holding implies that there *is* no limitation on challenging fraudulent transfer at all. Nevertheless, the same court, in 2011, certainly implied that the four-year statute of limitations of the UFTA applies to fraudulent transfer. *See* Cavadi v. DeYoso, 941 N.E.2d 23, 39 (Mass. 2011).

[353] 60 Cal. Rptr. 2d 841 (Ct. App. 1997).

[354] *Id.* at 852–53.

[355] *Id.* at 848–49 (citing Adams v. Bell, 703 P.2d 208, 210 (Cal. 1936)). For a case refusing to allow bankruptcy trustees from exploiting *Cortez*, see *In re* Castiglione, No. 07-11278-B-7, 2010 WL 9474767, at *8–10 (Bankr. E.D. Cal. Jan. 20, 2010). In *Cortez*, it appears, *C* had commenced an action against *D* and sought to commence an ancillary proceeding against *X*. In *Castiglione*, no creditor had commenced a pre-petition action against *D*. Ergo, *Cortez* was supposedly distinguished. *But see* Macedo v. Bosio, 104 Cal. Rptr. 3d 1, 5–6 (Ct. App. 2001) (rejecting any such limitation on *Cortez*).

UFCA and also the UFTA[356] were intended to expand, not contract, creditors' rights. So, *C* had the right to choose between the pre-UFCA rule and the UFTA rule.[357] The *Cortez* opinion, basically, has been disdained in other UFTA jurisdictions.[358]

California, however, adds to its UFTA a non-uniform seven-year "statute of repose," which cuts off the *Cortez* extension.[359] A statute of repose differs from a statute of limitations in that a statute of limitations is a defense, which, if not pleaded, is deemed waived.[360] A statute of repose defies waiver.[361] In California, the *Cortez* extension has a very limited horizon.[362]

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[356] California has since enacted the UVTA. *See* Potter v. All. United Ins. Co., 250 Cal. Rptr. 3d 282, 290–91 (Ct. App. 2019) (applying *Cortez* under the UVTA).

[357] The *Cortez* court noted that the drafters' comment to UFTA section 9 (statute of limitations) refers to UFTA section 7 (remedies). The former comment provides: "The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to § 7(b). . . ." UNIF. FRAUDULENT TRANSFER ACT § 9 cmt. (2) (UNIF. L. COMM'N 1984). To my eye, this provision insists the basic four-year period applies no matter what. But the comment to UFTA section 7 exalts the cumulative nature of various fraudulent transfer remedies. UNIF. FRAUDULENT TRANSFER ACT § 7 cmt. (6). In the course of this encomium, the drafters cite page 150 of GLENN, *supra* note 10. *Id.* In this citation, Professor Glenn endorses the holding of *Lind*, which is discussed above. GLENN, *supra* note 10, § 88 (citing Lind v. O. N. Johnson Co. 282 N.W. 661 (Minn. 1938)). Thus, the *Cortez* court assumes the UFTA drafters *also* endorsed the *Lind* result, which contradicts the test of UFTA section 9.

[358] *See* Schmidt v. HSC, Inc., 319 P.3d 416, 430–31 (Haw. 2014); K-B Bldg., Co. v. Sheesley Constr., Inc., 833 A.2d 1132, 1136–37 (Pa. Super. Ct. 2003); Moore v. Browning, 50 P.3d 852, 859 (Ariz. Ct. App. 2002); Sasco 1997 NI, LLC v. Zudkewich, 767 A.2d 469, 474 (N.J. 2001); Gulf Ins. Co. v. Clark, 20 P.3d 780, 788 (Mont. 2001); Levy v. Markal Sales Corp., 724 N.E.2d 1008, 1012 (Ill. App. Ct. 2000). *But see* ProtoComm Corp. v. Novell, Inc., 55 F. Supp. 2d 319, 326 (E.D. Pa. 1999) (predicting the Pennsylvania high court would follow *Cortez*); GEA Grp. AG v. Flex-N-Gate (*In re* GEA Group AG), 740 F.3d 411, 417–18 (7th Cir. 2014) (praising the wisdom of *Cortez*).

[359] *See* CAL. CIV. CODE § 3439.09(c) (West 2016) ("Notwithstanding any other provision of law, a cause of action under [the UFTA] with respect to a transfer . . . is extinguished if no action is brought or levy made within seven years after the transfer was made. . . .").

[360] *See In re* Pugh, 158 F.3d 530, 537 (11th Cir.1998) (concluding the two Bankruptcy Code provisions at issue are "true statutes of limitations that can be waived").

[361] *See In re* JMC Telecom LLC, 416 B.R. 738, 742 (C.D. Cal. 2009) (explaining that "a statute of repose . . . creates an absolute backstop of seven years within which a cause of action for fraudulent transfer must be filed"); *see also* PGA W. Residential Ass'n v. Hulven Int'l, Inc., 221 Cal. Rptr. 3d 353, 369–70 (Ct. App. 2017) (concluding that "a statute of repose . . . is not subject to forfeiture"). Incidentally, the fraudulent transfer in *PGA* was supposedly a grant of a mortgage to *X,* where *X* never advanced credit (and was a fictional character to boot—though later willed into existence by subsequent incorporation). As with article 9 security interests, mortgages "exist" only if (i) the debtor has rights in the collateral, (ii) an agreement creates the mortgage, and (iii) the *creditor gives value*. *Cf.* U.C.C. § 9-203 (AM. L. INST. & UNIF. L. COMM'N 2017). What we have in *PGA* is a *lie*, not the creation of a mortgage lien. There ought to be no statute of repose against exposing a lie. *See PGA W. Residential*, 221 Cal. Rptr. 3d at 369 ("Therefore, although [*D*] never incurred a real obligation to [*X*] under the deed of trust and note, and [*X*] apparently never really existed as a corporate entity, [*D*]'s fraudulent attempt to transfer the equity in his condominium to [*X*] to insulate that asset from potential creditors constitutes a 'transfer'. . . .").

[362] *See In re* Polichuk, 506 B.R. 405, 420 (Bankr. E.D. Pa. 2014). In *Polichuk*, *D* fraudulently transferred property to *X* and years later went bankrupt. The four-year statute of limitations in UFTA section 9 had run. The trustee subrogated to the IRS, which had an unassessed tax claim against *D*. The IRS has its own extended ten-year *federal* statute of limitations for recovering a tax claim. *See id.* (referencing 26 U.S.C. §§ 6501, 6502 (2018)). The trustee was therefore able to avoid the UFTA four-year period. *X* responded by claiming the UFTA was in general a statute of repose, so that the state-law fraudulent transfer rights of the IRS had died. This claim was rejected; UFTA section 9 was found to be a statute of limitations, not a statute of repose. *Id.* at 419–20.

B. Joinder

Years before many states had adopted the UFCA, the Federal Rules of Civil Procedure issued a joinder rule that directly referenced fraudulent transfers. Today, Rule 18(b) provides:

> A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.[363]

The Rule reverses *Scott v. Neely*,[364] where *C* did not yet have judgment against *D*. The *Neely* court prohibited *C* from joining a fraudulent transfer action against *X* to *C v. D*.[365] Rule 18(b) was designed to achieve for federal cases what the UFCA achieved for state cases—removing the requirement that *C* can set aside a fraudulent transfer only after *C* has obtained judgment against *D*.

Rule 18(b) is a rule of *joinder* of one claim to another.[366] Thus, if *C* files a claim against *D*, then *C* may adjoin thereto a fraudulent transfer claim against *X*.[367] It says

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[363] FED. R. CIV. P. 18(b).

[364] 140 U.S. 106, 111 (1891) ("[S]uch blending of [legal and equitable] remedies is not permissible. . . ."); *see also* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470–71 (1962) (recounting the history of Rule 18(a)).

[365] *Scott*, 140 U.S. at 111–13; *see also* Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693, 696 (Fed Cir. 1990) (explaining how, historically, causes of action for equitable relief and relief at law could not be brought in the same action); Glenn, *Without Judgment*, *supra* note 213, at 206–07 (discussing the holding in *Scott v. Neely*).

[366] Joinder of *X* to the *D v. C* lawsuit in federal court is much facilitated by the concept of "supplemental jurisdiction." *D v. C* must be predicated on federal question or diversity jurisdiction. But jurisdiction over *D v. X* for fraudulent transfer (a state-law theory) can be sustained under "pendant" jurisdiction. This has been true at least since 1887. *See* Dewey v. W. Fairmont Gas Coal Co., 123 U.S. 329, 333 (1887) ("The suit in equity was an exercise of jurisdiction on the part of the circuit court ancillary to that which it had already acquired in the action at law. . . ."); *see also* Fulton Nat'l Bank v. Hozier, 267 U.S. 276, 280 (1925) ("The general rule is that . . . no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."); Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 F.2d 295, 296–97 (2d Cir. 1927) ("A fraudulent conveyance is void under the New York statute, and may be disregarded, even by a creditor whose judgment is entered afterwards. A suit to set it aside is not therefore essential, but is only an alternative remedy. It clears the title of the creditor in limine. . . ." (citations omitted)); Epperson v. Ent. Express, Inc., 242 F.3d 100, 104 (2d Cir. 2001) (holding that the set aside action was within the ancillary jurisdiction of the district court). Pendant jurisdiction refers to federal jurisdiction over claims and parties outside federal power that are brought into the litigation by the plaintiff. Ancillary jurisdiction refers to "federal jurisdiction over claims and parties ordinarily outside federal power that are brought into the litigation by defendants or intervenors. . . . Whatever their differences, pendant and ancillary jurisdiction should be viewed as identical at the constitutional level." Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1401 n.1 (1983). The term "supplemental jurisdiction" encompasses both pendant and ancillary jurisdiction. *See id.* at 1402 n.3.

[367] In the days when law courts and equity courts were literally different bodies, such joinder was impossible. *See* Gross v. Pa. Mortg. & Loan Co., 146 A. 328, 329–30 (N.J. 1929) (holding that a statute, attempting to

nothing about whether *C* may proceed straight out against *X* when she is not currently seeking any remedy against *D*.[368] Nor does it imply that *C* can *first* recover a fraudulently transferred thing from *X* and *thereafter* recover a judgment against *D*. Nor does it say whether, having recovered entirely from *X*'s property, *C* might dispense with *any* kind of judgment against *D*.

The paradigm of the joinder rule is that the main action is against *D*. The action against *X* is purely *ancillary* to the main action. The logic of the paradigm is that, first, the court decides *C v. D* in *C*'s favor—something that may take years. Thereafter, if *C* does eventually have a judgment against *D*, only then will the court turn to the case against *X*. When it does so, a major predicate of the fraudulent transfer action—*C* really *is* a creditor of *D*—will have been satisfied. Joinder of *X* has the advantage of making *C v. D* binding on *X*.[369]

Sequence of litigation is an issue because *C* may lose a judgment against *D* eventually and prove not to be a creditor. In *Freidman v. Heart Institute of Port St. Lucie, Inc.*,[370] the Florida Supreme Court held that a trial court need not stay the *C v. X* action pending the resolution of *C v. D*. But this should not mean *C* gets paid before *C v. D* is resolved. The court should hold the asset in abeyance until the *C v. D* judgment, just as if *C* had an attachment lien on *X*'s property. A court should be empowered to embargo the property independent of an attachment lien, on principles of *in custodia legis*.

According to the Wyoming Supreme Court in *Platte Co. State Bank v. Frantz*,[371] it is unfair to make *C*'s claim against *X* await a final *C v. D* judgment:

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authorize Court of Chancery jurisdiction of actions solely within the jurisdiction of the law courts, was unconstitutional); Deerhurst Ests. v. Meadow, 175 A.2d 662, 664 (N.J. Super. Ct. App. Div. 1961) ("Our present Superior court, with general jurisdiction, both legal and equitable, no longer suffers from the constitutional limitations applicable to the old Court of Chancery."). *See also* Recent Decisions, *Actions—Equity—Validity of Statute Permitting General Creditor to Set Aside Fraudulent Conveyance*, 29 COLUM. L. REV. 1149 (1929) (discussing the holding in *Gross*).

[368] *See* Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738, 743 (7th Cir. 1985) ("Rule 18(b) deals only with the joinder of remedies at the pleading stage of the litigation. . . ."). Nor may *C* "join" *X* to the case against *D* after the federal court has already entered judgment against *D*. Rather, the court is restricted to state procedures pursuant to Rule 69(a). FED. R. CIV. P. 69(a)(1) ("The procedure on execution . . . must accord with the procedure of the state. . . ."). Tennessee procedure indicates that *D* must commence an original action against *X*. *See* Nelson v. Maiden, 402 F. Supp. 1307, 1309–10 (E.D. Tenn. 1975) ("Such an action [to set aside fraudulent conveyances] by its nature is original and not ancillary to the judgment creditor's first action."). *See also* Julien J. Studley, Inc. v. Lefrak, 412 N.Y.S.2d 901, 907–08, 66 A.D.2d 208, 217–18 (1979), *aff'd*, 48 N.Y. 954, 401 N.E.2d 187 (holding that, so long as *C* had commenced an action against *D*, *C* could sue *X* in a new, separate suit).

[369] *See* DFS Secured Healthcare Receivables Tr. v. Caregivers Great Lakes, Inc., 384 F.3d 338, 351 (7th Cir. 2004) ("Where the judgment against [*D*] has been rendered . . . *it is* . . . *conclusive* . . . and *cannot* be collaterally impeached by [*X*] in a suit to set aside the conveyance as fraudulent."(quotation omitted)); *see also* Weisenburg v. Cragholm, 489 P.2d 1126, 1129 (Cal. 1971) (stating that the lower court barred *X* from re-litigating *D v. C*, where *X* had been joined); Tsiatsios v. Tsiatsios, 744 A.2d 75, 78–79 (N.H. 1999) (finding that, where *C* sued *D*'s estate and *X* was executrix of the estate, *C v. D* binding in *C v. X*). Otherwise, *X* could claim that the *C v. D* judgment is not binding on *X* and that *X* can re-litigate to prove that, judgment notwithstanding, *C* is not really a creditor.

[370] 863 So. 2d 189 (Fla. 2003).

[371] 239 P. 531 (Wyo. 1925).

> We might add that many persons are sued, though the plaintiff's claim is ultimately proved to be unfounded. Such defendants are in no worse position than a grantee of a conveyance whose conduct is alleged to be fraudulent. Further, if a creditor, like that in the case at bar, must wait in bringing a creditor's bill till he recovers judgment, he might have to wait a considerable time, during which his evidence, which a suit helps him to marshal to show the fraud, might be scattered and lost. We are inclined to the view that a creditor, entitled to and who secures an attachment lien on the property claimed to have been fraudulently conveyed, may bring his action to set such conveyance aside without waiting until his indebtedness is reduced to judgment, although of course, no decree setting such conveyance aside should be entered until the indebtedness is definitely established by judgment.[372]

Thus, a trial in *C v. X* may be held presently, but final judgment must be deferred until *C v. D* is concluded in *C*'s favor. These remarks are strictly dicta. In *Frantz*, *C* had commenced the action against *D*, as in the paradigm. In that action, *C* had a writ of attachment issued that created a lien on land fraudulently received by *X*—a shine-through lien. Thereafter, *C* commenced the action against *X*. The actual litigation against *X* was conducted only after *C* had a judgment against *D*. In short, *Frantz* could be viewed as a case in which equity came to the aid of an attachment lien, quieting title in anticipation of the day when *C* finally obtained a judgment against *D*.

The joinder rule seems to have been engendered by the merger of the law courts and the equity courts. In the days when these were literally separate courts, joinder in equity was thought to impair *D*'s right to a jury trial, as equity did not empanel juries. But once the courts were merged, there was no reason a court could not empanel a jury (in *C v. D*) and thereafter set aside the fraudulent transfer to *X*.[373]

C. D as a "Necessary and Indispensable Party"

Does the UFCA allow an action against *X* where *D* is not joined? UFCA section 10 is written as if *C* can sue *X* straight off, without ever bothering to sue *D*.[374] This prospect perturbed the conservative sensibilities of the *Columbia Law Review*:

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[372] *Id.* at 535.

[373] *See* Damsky v. Zavatt, 289 F.2d 46, 57 (2d Cir. 1961) (concluding that "the basic principles of equity as recognized in 1791 would have permitted the joinder" of the debtor); *see also* Fin. Corp. of New Eng. v. Scard, 124 A. 715, 717 (Conn. 1924) (stating that, under the union of equitable and legal remedies, all plaintiff had to show was that "the conveyance was fraudulent, and that it was necessary that the interest of [*D*] in the property conveyed be appropriated to the payment of [the current] judgment").

[374] *See* UNIF. FRAUDULENT CONVEYANCE ACT § 10 (UNIF. L. COMM'N 1918).

> This section, if taken according to its words, would be revolutionary. . . . But for the creditor-to-be-perhaps to attack before he has anything on which he could obtain judgment, is to anticipate a future even which later might be averted. . . . Further, it is to allow immediate litigation, and that, too, in equity. [sic] over the validity of a thing *in posse* which may never become a debt, whereas the debtor might well claim his constitutional right to be sued on a debt [only] at law where he may have the benefit of a jury trial.
>
> If these considerations be sound, the result will probably be such a judicial interpretation of [UFCA section 10] as to deprive it of many, if not all, of its turbulent possibilities.[375]

Turbulent indeed is how Judge Benjamin N. Cardozo read section 10 in the much-cited *American Surety Co. v. Conner*.[376] Struggling to fathom the newly enacted UFCA, an obviously perplexed Judge Cardozo noted that, under it, *C*, without a judgment, "may seek the aid of equity, and without attachment or execution, may establish his debt, whether matured or unmatured, and challenge the conveyance in the compass of a single suit."[377] This remark seems to be about joinder. It reflects Judge Cardozo's reasonable assumption that UFCA section 10 is designed *solely* to allow *C* to escape dismissal when *C* joins *X* to *C v. D*.[378] It seems to say nothing about whether *C* can proceed against *X* without having commenced an action against *D*.

Where *C* already has a judgment, courts rehearse the point that *D* is a *proper* party but not a *necessary* one.[379] This observation is based on the equitable metaphysics of voidability. Per that metaphysic, *D* has no property in the thing transferred. *X* has

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[375] Charles S. Ascher & James M. Wolf, Current Legislation, *The Uniform Fraudulent Conveyance Act*, 20 COLUM. L. REV. 339, 341 (1920); *see also* Nolan E. Clark, Note, *Tort Liability for Fraudulent Conveyances*, 19 STAN. L. REV. 636, 637–38 (1967) ("[U]nder the [UFCA], any general creditor can set aside a fraudulent conveyance, whether he has a judgment or not." (footnote omitted)).

[376] 251 N.Y. 1, 7–8, 166 N.E. 783, 785 (1929).

[377] *Id.*

[378] *See* Huntress v. Huntress, 235 F.2d 205, 207–08 (7th Cir. 1956) (interpreting Federal Rule of Civil Procedure 18(b)).

[379] *See* Pierce v. United States, 255 U.S. 398, 405 (1921). On proper verses necessary parties, Justice Samuel Freeman Miller wrote:

> There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction.

Barney v. Baltimore, 73 U.S. 280, 284 (1867).

title,[380] held in trust for the creditors of *D*. Since *X* has title and *D* has nothing, no harm is done if *D* is nevertheless made a party. But *D* is not really necessary where *D* owns no part of *X*'s thing.

This is the state of affairs when the *C v. D* judgment has already been entered. But our current topic is *C*'s pre-judgment rights. In this mode, it is arguably the case that *D* is necessary and indispensable. Without joinder, *X* is entitled to a dismissal,[381] after which *X* is at liberty to abscond.

Late in the 19th century, the Supreme Court implied that, if, without judgment in *C v. D*, *C* sued *X* to set aside a fraudulent transfer, then *D* was a *necessary and indispensable* party to the action.[382] That is, a failure to join *D* in an action on the debt required a dismissal of the action against *X*.

In *Swan Land & Cattle Co. v. Frank*,[383] *X* was the shareholder of *D Corp*.[384] *D Corp*. contracted to sell land and cattle to *C*,[385] but the deal was a swindle.[386] *X*[387] then caused *D Corp*. to convey assets to *X*. *C* brought an action against *X* with regard to the transferred assets. No action against *D Corp*. was commenced.

Was this properly a fraudulent transfer case? The Supreme Court never says so. It recites *C*'s theory as one in which *D Corp*. held its assets in trust for the creditors, and in which *X* had legal title for the benefit of *C*.[388] This tolerably describes

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[380] Obviously, *X* is a necessary party. *See* Friedman v. Friedman, 509 N.Y.S.2d 617, 125 A.D.2d 539, 541 (1986). *X* was held to be an unnecessary party in *Rutherford v. Kessel*, but under unusual circumstances. 560 F.3d 874, 881 (8th Cir. 2009). In *Rutherford*, *C* sued *D*. *D* appointed *X* as his attorney in fact. *D* (by the agency of *X*) conveyed real property to *X*. *C* never joined *X* as a party in an ancillary proceeding. After *C* prevailed in his action against *D*, *C*, by *ex parte* motion, moved to set aside *D*'s conveyance to *X*. *D* did not appeal (though *X* had general authority over *D*'s affairs and could have caused *D* to appeal). Later, *C* sued to quiet title against *X*. The court held that the *ex parte* relief was res judicata against *X*. *Id.* The case is probably best understood as holding that, when *X* has power of attorney over *D*'s affairs, making *D* a party is the same as making *X* a party. Even charitably interpreted the case seems wrong, unless the court was articulating a shine-through lien that made avoidance unnecessary.

[381] *See* Armour & Co. v. B.F. Bailey, Inc., 132 F.2d 386, 387 (5th Cir. 1942); Mullens v. Frazer, 59 S.E.2d 694, 700 (W. Va. 1950). A recent case forbids *C v. X* in the absence of *C v. D*, where *C* and *X* are partners. In *Drenis v. Haligiannis*, 412 F. Supp. 2d 418 (S.D.N.Y. 2006), *C* and *X* were limited partners in *D*. *D* turned out to be a Ponzi scheme. *X* cashed out and was, in Ponzi argot, a "net winner." *C* was a net loser. After *D* crashed and burned, *C* sued *X* to set aside a fraudulent transfer. According to the court, *C v. X* was premature. *Drenis*, 412 F. Supp. at 430. *C* had not yet sued *D* for an accounting, which was thought to be a prerequisite to any suit between partners.

[382] *See* Swan Land & Cattle Co. v. Frank, 148 U.S. 603, 610 (1893) ("[T]he various corporations charged with the fraud which has resulted in damage to the complainant are necessary and indispensable parties to any suit to establish the alleged fraud and to determine the damages arising therefrom. Unless made parties to the proceeding . . . neither they nor their other stockholders would be concluded by the decree.").

[383] *Id.*

[384] *D Corp*. is a composite of three Wyoming corporations.

[385] *C* was the Swan Land & Cattle Company.

[386] *D Corp*. promised 89,167 head of cattle but delivered 30,000 head less than that.

[387] *X* is a composite of the parties Justice Jackson describes as the "Illinois defendants."

[388] *C*'s claim is described as follows:

> Your orator further showeth that the assets of said corporation were in the hands of said corporations a trust fund, held by said corporations in trust to satisfy the claim of your orator herein set forth, before the shareholders of said corporations were entitled to receive any portion of the same, and said shareholders, in receiving said assets, did take

fraudulent transfer law. What is usually said is that, as a general creditor of *D Corp*., *C* has no interest in *D Corp*. property until a judicial lien arises after or, perhaps before, judgment.[389] But the minute *D Corp*. conveys legal title to *X*, *X* holds the fraudulently received property as trustee for the creditors of *D*. Thus, in *Swan*, *C* may have been attempting to articulate a fraudulent transfer claim, with a nervous eye toward the then-current restriction that fraudulent transfers could be pursued only *after* the *C v. D* judgment was entered.[390]

X moved to dismiss the action for failure to join *D Corp*., an indispensable party. Justice Howell Edmunds Jackson posed and answered the issue as follows:

> [C]an a party having a claim for unliquidated damages against a corporation, which has not been dissolved, but has merely distributed its corporate funds amongst its stockholders, and ceased or suspended business, maintain a suit on the equity side of the United States Circuit Court against a portion of such stockholders, to reach and subject the assets so received by them to the payment and satisfaction of his claim, without first reducing such claim to judgment and without making the corporation a defendant and bringing it before the court? This question . . . hardly needs or requires more than its bare statement to indicate the answer that must be made thereto. . . . [391]

Thus, *C*'s case against *X* had to be dismissed. *D Corp*. was a necessary and indispensable party. Justice Jackson observed that, if *C* had judgment against *X*, *D Corp*. would not later be precluded from re-litigating.[392] It was unfair that *X* should be made to pay now, when later, it might turn out that *C* was not a creditor of *D Corp*.

> and now hold the same as trustees in place of said corporations, and subject to the lien of your orator's aforesaid claim, and should account for the same to your orator, and apply the same, so far as necessary, in satisfaction of your orator's claim herein set forth.

Id. at 608 (quotations omitted).

[389] *See* Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 497 (1923); *see also* Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 381–82, 386 (1893) (explaining how describing assets of a corporation as a trust fund is just a metaphor and finding an unsecured creditor has no interest in *D Corp*.'s property).

[390] *See* Cates v. Allen, 149 U.S. 451, 457 (1893) ("The existence of judgment, or of judgment and execution, is necessary—First, as adjudicating and definitely establishing the legal demand; and, second, as exhausting the legal remedy."); Scott v. Neely, 140 U.S. 106, 113–14 (1891). There is another possibility. *X* may have been a thief with no title. If *X* simply took the assets out of their scope of authority, *D* still had title to the assets. In that case, *C* did not need an avoidance theory. Once *C* had a judgment against *D Corp*., *C* could simply levy execution against *D Corp*.'s property now in the possession of *X*. In this case, it is obvious that *C* cannot proceed without a judgment against *D Corp*., or without a pre-judgment attachment in which *D Corp*. is the party in the attachment proceeding. *See* Carlson, *Mere Conduit*, *supra* note 19, at 485–91. We don't know whether the *X* were acting in or outside the scope of authority when they helped themselves to the assets of *D Corp*. That would be a question of 19th century Wyoming law. At any rate, the court assumed that *X* had title because *D Corp*. voluntarily conveyed its assets to *X* via the acts of *X* as *D Corp*.'s agent.

[391] *Swan Lake & Cattle Co.*, 148 U.S. at 604–05.

[392] *Id.* at 610.

after all.[393] Therefore, the case stands for the proposition that, where *C* has no judgment against *D*, *C* cannot sue *X* without also simultaneously suing *D*.[394] What is a sufficient condition—*C* may sue *D* and may join *X*—also becomes a necessary one.[395] Of course, we must, in modern times, read the Supreme Court's opinion in *Swan* as a humble *Erie* guess as to the status of Wyoming law.

D. Priority

According to the Supreme Court's best guess as to Wyoming law, *D* is a necessary party to *C*'s fraudulent transfer suit against *X*.[396] Commencement of *C v. D* is a condition precedent for bringing an action against *X*. *C* can, however, commence a proceeding against *D* on some debt and may simultaneously join *X*, such that *X* is not entitled to a dismissal.

Does *C* get some sort of bounty on *X*'s property by being the first to commence an action against *X*? If *C* achieves an attachment lien on *X*'s property, clearly *C* is first in line for *X*'s asset. But what if *C* forgoes the remedy at law and seeks an avoidance on the equity side of the court? According to Judge Cardozo, *C* (without a judgment) "may seek the aid of equity, and without attachment or execution may establish his debt, whether matured or unmatured, and challenge the conveyance in the compass of a single suit."[397] Here, Judge Cardozo implies that, *even in the absence of an attachment lien*, the conveyance might be set aside for the benefit of *C*.

Where *C* already has a judgment, and *C* commences a set-aside action against *X*, *C* has a lien at least by the time of commencement[398] and maybe even before.[399] But where *C* has no judgment, does *C* have a lien? Courts are divided.

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[393] *See id.* The majority opinion drew a dissent from Justice Henry Billings Brown: Judgment against *D Corp*. was impossible because *D Corp*. had simply faded away. It had neither officers nor a place of business with whom or where service of process might be accomplished. If *D Corp*. had been formally dissolved, then admittedly suit could proceed against *X* without judgment against *D Corp*. *See id.* at 613 (Brown, J., dissenting) (claiming that, if the debtor had properly dissolved, the creditor could proceed against the defendant).

[394] *See* Ozan Lumber Co. v. Davis Sewing Mach. Co., 283 F. 436, 437 (D. Del. 1922) (concluding that *D* is an indispensable party to a creditor's bill); *see also* Chadbourne v. Coe, 51 F. 479, 482 (8th Cir. 1892) (finding that *C* cannot maintain a bill to annul *D*'s conveyances without making *D* a party to the bill); Barcus v. Parlin-Orendorf Implement Co., 184 S.W. 640, 643 (Tex. Civ. App. 1916) (highlighting that the court cannot render a judgment against *D*s who are not party to the suit).

[395] *See* Mather Invs., LLC v. Larson, 720 N.W.2d 575, 578 (Mich. Ct. App. 2006) (dismissing *C v. X* because *C v. D* not commenced); Riback v. Margulis, 842 N.Y.S.2d 54, 55, 43 A.D.3d 1023, 1023 (2007) (affirming the Surrogate's Court's dismissal based upon the failure to join a necessary party); Manor v. Vidal, No. 29966/05, 2008 WL 115432, at *6–7 (Sup. Ct. Jan. 11, 2008) (dismissing the action for failure to join a necessary party in the absence of a monetary judgment against the same); Ranno v. Ranno, 150 N.Y.S.2d 58, 59–60, 2 Misc.2d 940, 941 (Sup. Ct. 1956) (dismissing *C v. X* where *C v. D* not commenced).

[396] *See Swan Lake & Cattle Co.*, 148 U.S. at 610–11.

[397] Am. Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 7–8, 166 N.E. 783, 785 (1929).

[398] *See* Metcalf v. Barker, 187 U.S. 165, 174 (1902).

[399] That depends on whether *C* has a shine-through lien before commencing the action against *X*. *See supra* text accompanying notes 184–205.

Some courts think commencement does create a lien.[400] Thus, no subsequent creditor can prime *C* with regard to *X*'s thing. This accords with the concept of *in custodia legis*. The law has custody of *X*'s thing once *C* commences the set-aside action against *X*.

Some courts think that, where *C* has no judgment, commencement has no lien significance.

In *Emrich v. Erickson*,[401] *D* fraudulently transferred assets to *X*. *C* brought an action against *D* and joined *X* in a pendant claim to set aside the fraudulent transfer. Just before judgment, *D* was adjudicated a bankrupt. The bankruptcy trustee sought an injunction against *C* from proceeding further against *X*. *C* objected, claiming a lien on *X*'s asset by virtue of having commenced the set-aside action a year prior to the bankruptcy. The court held commencing the action created no lien: "The effect of the Minnesota [UFCA] is to permit a simple contract creditor to reduce his claim to judgment and set aside a fraudulent conveyance in the same action. It does not affect the time at which the lien attaches, but merely expedites procedure."[402]

An ancient New York case holds likewise. In *Robinson v. Stewart*,[403] *D* fraudulently conveyed property to *X* and then died insolvent. *C*, who had no judgment against *D*, commenced an action against *X*. Said the court: "[*C*] had not acquired any lien at law, not having obtained any judgment against [*D*], and was not therefore entitled to a priority over the other creditors. Equity only requires that the fund should be distributed among the creditors *pro rata*."[404] In *Robinson*, *X* had volunteered to pay some of *D*'s creditors. *X* was permitted to subrogate to those creditors and share *pro rata* with *C*.

In *Libman-Spanjer Corp. v. Royal Hall, Inc.*,[405] a UFCA case, C_1 commenced an action against *D* and added a fraudulent transfer count against *X*. C_2, who *did* have a judgment, intervened. The court held that C_1 and C_2 should share *pro rata*.[406] The case would have been different if C_1 had a judgment. In such a case, C_1's action would have been in aid of execution. If C_1 had a judgment, commencing such an action *does* create a lien for C_1 (at least under New York law in 1932).[407] The UFCA may have authorized a set-aside before C_1 had a judgment. But the UFCA did not, the *Libman* court ruled, create for C_1 a lien in the absence of a judgment.[408] This may be

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[400] *See* Emarine v. Haley, 892 P.2d 343, 346–49 (Colo. App. 1994) (holding that *C*'s claim was properly brought despite the absence of a prior judgment against *D* and *C* had a lien only upon filing a *lis pendens*); Guar. Nat'l Bank v. State Motor Sales, Inc., 147 S.E.2d 495, 500–01 (W. Va. 1966); Wallace's Adm'r v. Treakle, 68 Va. (27 Gratt.) 479, 486 (1876); *see also* Lipskey v. Volshen, 141 A. 402, 405 (Md. 1928) (holding that commencement against *X* outside the four-month statutory period before *D*'s bankruptcy does not bar relief against a fraudulent conveyance).

[401] 78 F.2d 858 (8th Cir. 1935).

[402] *Id.* at 859.

[403] 10 N.Y. 189 (1854).

[404] *Id.* at 196.

[405] 263 N.Y.S. 98, 146 Misc. 348 (Sup. Ct. 1932); *see also* Libman-Spanjer Corp. v. Royal Hall, Inc., 263 N.Y.S. 101, 146 Misc. 351 (Sup. Ct. 1932).

[406] Since C_2 had a judgment, it would seem to favor C_2's priority. But this was not pondered by the court.

[407] *See* Metcalf v. Barker, 187 U.S. 165, 173–74 (1902).

[408] *Libman-Spanjer Corp.*, 263 N.Y.S. at 100, 146 Misc. at 350.

questioned, in that C_1 brought *X*'s property *in custodia legis*. Why did *this* principle not create a lien for C_1? The answer seemed to be that C_1's action lay in equity, and equity favors equality among creditors. C_1's eventual judgment against *D* portended passage out of equity into the dark side of "law." Meanwhile, the *Libman* court pointed out that the UFCA invited C_1 to proceed in attachment, which C_1 did not do and which would have created a lien.[409] But the UFCA referred to attachment as the right of a *mature* creditor. C_1 was an *immature* creditor.[410]

Anciently, the Supreme Court denied that liens arise for *C* when *C* commences *C v. X*, where *C* did not yet have a judgment against *D*. Its decision, however, must be read narrowly. In *Day v. Washburn*,[411] *D* made an assignment for the benefit of creditors to *X*. That meant *X* held the assets in trust for the creditors of *D* on a *pro rata* basis. A court of equity would have intervened to enforce the trust, but any individual creditor of *D* would be entitled to a mere *pro rata* share of the whole, consistent with the trust. Not satisfied with a mere share, C_1, a creditor of *D*, commenced an action against *X* sounding in fraudulent transfer. C_2 intervened and asserted equality with C_1 as to the avails of the action. The court ruled, since C_1 did not have a lien, C_1 was a "creditor at large" and was not to be preferred:

> The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a *pro rata* distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution that a legal preference is acquired. . . .[412]

The court ruled that C_1's fraudulent transfer action properly should have been dismissed, if only someone had moved to dismiss: "The objection that the demands of the appellants had not been reduced to judgment and execution before filing the bill, would have been fatal to the relief sought, if taken in time by the defendants. It was waived, however. . . ."[413] But the chancery court was upheld as re-instituting the rule of *pro rata* sharing within the compass of a fraudulent transfer action.[414] Thus, the fraudulent transfer action was treated as if it were an equitable proceeding to

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[409] *See id.*

[410] *Accord* Colburn v. Ward, 40 S.W.2d 878, 881 (Tex. Civ. App. 1931). In *Colburn*, *C* had judgments, but none docketed where the fraudulently transferred real property was located. *C* commenced a set-aside action but was held not to have a lien merely by commencement. *See id.* at 881. Accordingly, a bankruptcy trustee was substituted for *C* as the plaintiff.

[411] 65 U.S. 352 (1861).

[412] *Id.* at 355–56 (emphasis added).

[413] *Id.* at 356–57.

[414] *See id.* at 356.

enforce a trust for all the creditors as a group. Where there had been no assignment for the benefit of creditors and where *C* was simply out to collect, *Day* provides no authority against awarding *C* a commencement lien.

So, should *in custodia legis* work for *C* in *C v. X*, when *C v. D* is yet to be resolved? It does work for *C after C v. D* is resolved.[415] I see no reason why it should not work in the pre-judgment context. But in expressing this opinion, I may have a formidable opponent in Professor Glenn, who viewed attachment as the key to the limit on *C*'s right (without judgment against *D*) to pursue *X* for fraudulently received property:

> The courts, it is suggested, should assign to the [UFCA] a purpose to complete the work attempted by American extensions of attachment law. The statute can be viewed as arming the creditor with a substitute for the old *capias* in every case where the debtor has fraudulently conveyed his property or is about to do so, equitable process being exerted as "a measure of conservation". . . .[416]

The implication is that liens come from attachment and never from commencement of *C v. X*. If so, *C* should *always*: (1) commence *C v. D*, (2) join *X*, and (3) seek an attachment lien on *X*'s fraudulently received property in the same action. Then, "equity" is in aid of the legal remedy. Perhaps, then, *in custodia legis* operates to relate *C*'s lien back to the moment of commencement.

E. The Failure of C's Claim Against D

"Set aside" or "avoid" is mentioned as a remedy for creditors without judgments. What might this mean, where *C* does not yet have a final judgment against *D*? Ultimately *C* might lose.[417] Fraudulent transfer law is all about *C* getting a judicial

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[415] *See supra* text accompanying notes 366–73.

[416] Glenn, *Without Judgment*, *supra* note 213, at 214. Glenn hints that if attachment requires a bond, so does commencement of an action against *X*, where commencement creates a lien.

[417] Said the court in *Rinchey v. Stryker*:

> And if by application of this rule fraudulent purchasers should occasionally be beaten by persons who subsequently fail to establish their alleged debts in their actions against their debtors, the only result would be that some concoctors of frauds would be punished by the wrong persons. That is all. A like result would follow where the creditor recovers a judgment against his debtor and takes property on execution which [*D*] had fraudulently disposed of, if such judgment should subsequently be reversed and the creditor finally beaten by his alleged debtor after having beaten the fraudulent purchaser of the property in the action brought by such purchaser for the property.

28 N.Y. 45, 52–53 (1863). In *Whitney v. Davis*, 148 N.Y. 256, 42 N.E. 661 (1896), *C* sued *D* in Massachusetts. Prior to judgment, *D* conveyed New York real property to *X*. *D* sought attachment against *X* in New York but was denied on the ground that no remedy against fraudulent transfer was possible before the *C v. D* judgment in Massachusetts was obtained. *Id.* at 263–64, 42 N.E. at 663. In short, pre-judgment attachment against *X*'s

lien on *X*'s property, so perhaps it is the case that the phrase "avoid" means "obtain a lien," as in the case of an order of attachment. Therefore, consequences of the ultimate failure of *C v. D* should be similar to the consequences for an attachment lien when *C* loses a judgment to *D*.

If property is attached, and if *C* ultimately loses in her action against *D*, the attachment lien is revoked and *C* is liable for wrongful attachment.[418] In fraudulent transfer litigation, *X* is presumably entitled to the same relief, even if there is no specific attachment lien on *X*'s property. That is to say, if *C* has an equitable lien on *X*'s property by virtue of commencing a set-aside action, such a lien should be considered dissolved when *C*'s claim against *D* fails.

In *Weisenburg v. Craghom*,[419] *D* fraudulently transferred real property to *X*. *C* brought an action against *D* and joined *X* in a fraudulent transfer count. *C* obtained judgment against *D*. Subsequently, in the set-aside action, *X* was held bound by the *C v. D* determination that *C* was indeed a creditor of *D*. The court set aside *X*'s title to the real property and confirmed that *C* had a lien on *X*'s property that related back to the *C v. D* judgment.[420] *D*, however, appealed the *C v. D* judgment, and *X* appealed the *C v. X* judgment. *D* won a reversal. *X* asserted on appeal that the set-aside judgment in *C v. X* should also be reversed. The California Supreme Court agreed, declaring *X* deserved the opportunity to show *C* was never a creditor of *D*.[421] The case reflects the ancillarity of fraudulent transfer law. When *C*'s judgment against *D* fails, *C*'s judgment against *X* fails as well.

F. Attachment

As indicated, statute hath purged the commonweal by authorizing a pre-judgment remedy at law—attachment.[422] Briefly, attachment grew out of jurisdiction-securing actions by courts. In ancient days, an *in personam* lawsuit was commenced when the sheriff *arrested* the defendant (*capias ad respondendum*). This soon feebly devolved into modern service of process on the person of the defendant, rather than arrest.[423]

Where *D* could not be found in the jurisdiction, it became the custom to arrest *D*'s property that happened to be located within the jurisdiction of the sheriff. The sheriff

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property was simply not allowed. Incidentally, *D* prevailed in the Massachusetts action. But this played no direct part in the court's decision.

[418] *See* N.Y. C.P.L.R. § 6212(e) (McKinney 2020) (stating plaintiff's liability should not be limited by the amount of the undertaking if they were not entitled to attachment).

[419] 489 P.2d 1126 (Cal. 1971).

[420] *Id.* at 1128.

[421] *Id.* at 1129.

[422] Some jurisdictions use "attachment" to mean *both* pre-judgment liens and post-judgment liens. *See, e.g.*, John C. Flood of MD, Inc. v. Brighthaupt, 122 A.3d 937, 940–41 (D.C. 2015). For purposes of this Article, I will use the phrase "attachment" to mean pre-judgment procedure and "execution" to mean post-judgment procedure.

[423] *See* GLENN, *supra* note 10, at § 16 ("This writ of *capias ad satisfaciendum* (the 'ca sa' of the old lawyers), was the mortar of the Marshalsea, the Fleet, the King's Bench Prison, and all the 'sponging houses' of the eighteenth century and Mid-Victorian literature.").

would then hold the goods, and a trial *against the goods* could be held (*quasi in rem* jurisdiction).

In England, if *D* personally showed up and submitted to service, the goods were released by the sheriff.[424] In its conspicuous genius, American law provided that even if *D* submitted to *in personam* jurisdiction, the goods would not be released. Rather, the sheriff held them for the benefit of *C* in case *C* prevailed in litigation against *D*.[425]

Because it was a statutory creation *ex nihilo*, attachment typically could be had against equitable assets (garnishment, it was called). Ironically, *C* could encumber *D*'s choses in action prior to trial,[426] if an order of attachment was acquired and served on the garnishee. But, after trial, *C* could not encumber the chose in action by writ of execution. Only a creditor's bill in equity provided access and passage to the equitable asset, and this required a previous execution returned *nulla bona*.

Thus, in the 19th century, fraudulent transfer law had a weird relation to attachment. Courts reached the peculiar conclusion that, where the property was tangible (land or chattels), an attachment lien was available to *C* by which to encumber *X*'s property.[427] This was so because law viewed the fraudulent transfer as void. On the other hand, if *C* wished to encumber equitable property conveyed by *D* to *X*, attachment was not a means to vindicate a fraudulent transfer theory.[428] This was so even though *C* could use attachment to access *D*'s equitable property that *D* had not fraudulently transferred. The reason why was that, in the post-judgment period, in order to reach equitable assets, *C* had to procure an execution returned *nulla bona*. *C* should not be permitted to avoid that requirement by attaching *X*'s property prior to

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[424] *See* Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 272 (1992) ("The sole purpose of the attachment . . . was to compel [*D*'s] appearance. . . . [I]f [*D*] appeared in that action after attachment, his property was discharged."); Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1157–58 (1978).

[425] *See* Cooper v. Reynolds, 77 U.S. 308, 318 (1870); GLENN, *supra* note 10, § 16; Wasserman, *supra* note 424, at 274–75; *see also* Kalo, *supra* note 424, at 1160 (tracing this development to a Massachusetts statute enacted in 1650).

[426] *See* Castriotis v. Guar. Tr. Co. of N.Y., 229 N.Y. 74, 78–79, 127 N.E. 900, 901–02 (1920).

[427] *See* Hess v. Hess 117 N.Y. 306, 308, 22 N.E. 956, 956 (1889); Anthony v. Wood, 96 N.Y. 180, 185 (1884); Rinchey v. Stryker, 28 N.Y. 45, 54 (1863).

[428] *See* Hart v. A. L. Clarke & Co., 194 N.Y. 403, 407, 87 N.E. 808, 810 (1909) ("There are some exceptions to the general rule that an action will not lie by an attachment recovery of a judgment and the return of an execution thereon unsatisfied."); People ex rel. Cauffman v. Van Buren, 136 N.Y. 252, 260–61, 32 N.E. 775, 776–77 (1892); *Anthony*, 96 N.Y. at 185–86 (1884) (stating a note or bond fraudulently transferred could not be attached); Thurber v. Blanck, 50 N.Y. 80, 85–86 (1872). In *Anthony*, *D* owned a promissory note secured by a mortgage on *O*'s land. *C* obtained and served on the sheriff an order of attachment. The sheriff attempted to levy the promissory note but failed. *D* assigned the note and mortgage to *X*, but without delivering the note itself. Agents of *D* finally put the sheriff in possession of the note. *O* defaulted, and *X* commenced a foreclosure proceeding. The sheriff intervened and demanded the right to foreclose for the benefit of *C*. This was granted but was reversed on appeal. By the time of the levy, *X* had become the owner of the promissory note. It was an "equitable asset" of *X*, and *C*'s attachment lien could not reach equitable assets. Therefore, the sheriff was not entitled to control *X*'s foreclosure proceeding against *O*. *See Anthony*, 96 N.Y. at 186–87.

judgment. The assault on *X*'s equitable assets, therefore, had to await a final judgment and the execution *nulla bona*.[429]

In the main, the law-equity split replays in the pre-judgment period, with the law side employing the "void" theory for attachments whereby *X*'s property was treated as *D*'s property. As we have seen, on the equity side, courts disagreed whether *C*, prior to the *C v. D* judgment, gained a lien by commencing a fraudulent transfer action against *X*. But where an attachment lien was in the offing, equity would aid with a set-aside action so that the attachment lien could have its effect.[430]

The UFCA does not mention attachment as a remedy available to an immature creditor. The UFCA empowers a court to:

> (a) Restrain the defendant from disposing of his property,[431]
> (b) Appoint a receiver to take charge of the property,
> (c) Set aside the conveyance . . . , or
> (d) Make any order which the circumstances of the case may require.[432]

Absent from this list is *C*'s right to *attach X*'s property. Nevertheless, UFCA cases exist in which *C* (without a judgment against *D*) was held entitled, thanks to the UFCA, to an order of attachment.[433]

Attachment, however, is mentioned by UFCA section 9 as a remedy for "mature" creditors.[434] Section 9 seems to contemplate that *C* (judgment against *D* having been obtained) commences a fraudulent transfer action against *X* and wishes to obtain a pre-judgment lien against *X*'s property.[435] But, as we have seen, in some states commencing the fraudulent transfer against *X* brings the fraudulently transferred thing

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[429] *See Thurber*, 50 N.Y. at 87 ("Any other rule would transform [attachment] into a substitute for creditors' bills, and produce great confusion. . . .").

[430] *See* Glenn, *Without Judgment*, *supra* note 213, at 213; Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684, 695 (1950) (concluding that the admiralty court of the Panama Canal Zone could issue an attachment order to secure a fraudulently transferred vessel). Where the fraudulent transfer law of the Canal Zone came from is an interesting, but unaddressed, question.

[431] "Defendant" is not a defined term, but presumably it refers to *X* since *D* no longer has any property after the transfer is accomplished.

[432] UNIF. FRAUDULENT CONVEYANCE ACT § 10 (UNIF. L. COMM'N 1918).

[433] *See* Mandl v. Mandl, 61 N.Y.S. 2d 364, 367–68, 187 Misc. 185, 187–88 (Sup. Ct. 1946) ("Property assigned in fraud of creditors is subject to attachment in the hands of the assignee by *any creditor* thus defrauded." (emphasis added)); Great Lakes Carbon Corp. v. Fontana, 387 N.Y.S.2d 115, 116, 54 A.D.2d 548, 548–49 (1976); Exch. Nat'l Bank v. Washington, 30 N.Y.S.2d 43, 44–45 (Sup. Ct. 1941).

[434] UNIF. FRAUDULENT CONVEYANCE ACT § 9(1).

[435] *See* Gen. Elec. Co. v. Chuly Int'l LLC, 118 So.3d 325, 328 (Fla. Dist. Ct. App. 2013) ("[*C*] amply demonstrated, by competent substantial evidence, sufficient statutory grounds for prejudgment attachment."). A different function for attachment is posited by *Spokane Merchants Ass'n v. Chittick*, 143 N.W. 915 (Minn. 1913), where *D* lived in Washington but owned land in Minnesota. *C* commenced a quasi in rem case by attaching the land. *X* (who *really* owned the land) was never made a party. Because fraudulent transfers are "void," an attachment lien against *X*'s land was upheld. *Id.* at 915–16. This is not as outrageous as it seems. In Minnesota, if *C* forecloses on the attachment lien and *B* is the buyer, *B* will still have to proceed against *X* in order to quiet title. *See supra* text accompanying notes 77–80.

in custodia legis, thereby creating a lien for *X*.[436] If that is the rule, attachment adds nothing. In states like New York or Minnesota, however, commencement of the action apparently does *not* signify that *C* has a lien. In New York, the court order commanding *X* to turn the goods over to the sheriff (a turnover order) constitutes the moment *C* has a lien.[437] Accordingly, there is utility in *C* bringing attachment proceedings prior to commencing the fraudulent transfer action against *X*. There are no reported cases, however, that reflect this procedure. The few New York attachment cases involve *C* in a pre-judgment mode with regard to *D*.

The UFTA made significant changes, which are carried forward by the UVTA. The UFTA, thankfully, drops the phrase "immature" claimant. It makes clear that a court may restrain not only *X*, but *D*, from disposing of property. It also adds that *C* (with no judgment) may obtain "an attachment or other provisional remedy against the asset transferred or other property of the transferee *in accordance with the procedure* prescribed by [ ]."[438]

Typically, attachments require grounds—non-residency or past (or impending) fraudulent transfers *by the defendant*.[439] Where *D* has already fraudulently transferred to X_1, it would appear that X_1 is the defendant under these statutes. Thus, where X_1 has shown no inclination to dispose of the property to some X_2, there can be attachment of X_1's fraudulently received property. Such an attachment lien would not accord with procedure.[440]

What is the current law pertaining to using attachment against *X*'s property because *D* fraudulently transferred that property to *X*? Basically, I believe that two propositions are true:

> (1) *C* must have commenced an action against *D* before *C* can attach *X*'s property. This simply repeats a point made earlier—that pursuit of *X* for fraudulent transfer is ancillary to *C*'s claim against *D*.
> (2) *C* must have commenced a set-aside against *X* in a proceeding ancillary to the *C v. D* action.[441] That is, *X* must be made a defendant in that action. Attachment works to encumber a defendant's property, not third-party property. Where *C v. D* has been commenced, but *C v. X* has not, *X* is not a defendant, and *C* is not

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[436] *See supra* text accompanying notes 129–31, 144–49, 231–33.

[437] *See* N.Y. C.P.L.R. §§ 5202(b), 5234(c), 5225(b) (McKinney 2020).

[438] UNIF. FRAUDULENT TRANSFER ACT § 7(a)(2) (UNIF. L. COMM'N 1984) (emphasis added).

[439] *See* N.Y. C.P.L.R. § 6201.

[440] In *In re Teknek, LLC*, 343 B.R. 850 (Bankr. N.D. Ill. 2006), *D* fraudulently transferred assets to X_1, which transferred assets to X_2, where X_2 was a passive recipient with no guilty intent. Reading the Illinois attachment statue, the *Teknek* court ruled that X_2 was not described in the statute, which mentions "about to remove his or her property from this State" and "about fraudulent . . . assign his or her property." *Id.* at 871–72 (quoting 735 ILL. COMP. STAT. ANN. 5/4–101 (West 2020)).

[441] *See* Ford Motor Credit Co. v. Hickey Ford Sales, Inc., 62 N.Y.2d 291, 296, 465 N.E.2d 330, 331 (1984) ("To sustain a warrant of attachment against the property of a defendant, the moving papers must establish both a cause of action and a ground for attachment as to that particular defendant.").

> entitled to an order of attachment—in spite of the "void" theory of fraudulent transfers.

This second point is constitutionally required.[442] Earlier, assuming *C* already had judgment against *D*, we opined that levying execution against *X* was unconstitutional. Attachment statutes, however, after significant tutoring from the Supreme Court, *are* probably constitutional. But this depends on *X* being made an *attachment defendant*. Where *C* has commenced a set-aside action against *X*, *X* becomes a "defendant," and *C* can have attachment against *X* in the same manner as *C* could proceed against any defendant. But where *X* is not a defendant, attaching *X*'s property as if it were *D*'s property raises grave constitutional questions.

Ford Motor Credit Co. v. Hickey Ford Sales, Inc.[443] is almost on point. *D* had fraudulently conveyed real property to *X*. *C* commenced an action against *D* and *X*. The cause of action alleged was that *X* had guaranteed the obligation of *D Corp*. (of which *D* was a shareholder). *C* did not allege that *D*'s conveyance to *X* was fraudulent. *C* proved that *D* was about to buy a house in Florida, so that *C* had "grounds" for an order of attachment against *D* under N.Y. C.P.L.R. section 6201(3): "the defendant, with intent to defraud his creditors . . . has assigned . . . property, or removed it from the state or is about to do [so]. . . ."[444] But *C* never showed that *X* had made or was about to make fraudulent transfers or move to Florida. Therefore, the levy of *X*'s property under the order of attachment was found to be invalid.[445]

More clearly in support of our second point is *Helicon Partners, LLC v. Kim's Provision Co*.[446] In *Helicon*, *D* fraudulently transferred funds to *X*, and *X* deposited the funds with *X Bank*. *C* commenced an action in New York against *D* and obtained an order of attachment. *D* had not commenced an action against *X*. The sheriff served the order of attachment on *X Bank*, where *X* had an account.[447] Technically, this levy was ineffective. According to N.Y. C.P.L.R. section 6214(b):

> A levy by service of an order of attachment upon a person other than the defendant is effective only if, at the time of service, such person owes a debt to the defendant or such person is in the possession or custody of property in which such person knows or has reason to believe the defendant has an interest, or if the plaintiff has stated in

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[442] *See id.* at 334, 465 N.E.2d at 334 ("Indeed to hold that the property of defendant A may be attached solely upon proof that as to defendant B there is ground for attachment would raise serious due process questions."); *see also* U.S. Fid. & Guar. Co. v. J. United Elec. Contracting Corp., 62 F. Supp. 2d 915, 924–25 (E.D.N.Y. 1999) (adopting the magistrate judge's Report and Recommendation).

[443] 62 N.Y.2d 291, 465 N.E.2d 330.

[444] N.Y. C.P.L.R. § 6201(3). Note that N.Y. C.P.L.R. section 6201(3) requires *actual* intent to defraud. Mere "constructive" fraud will not do. *See* DLJ Mortg. Cap., Inc., v. Kontogiannis, 594 F. Supp. 2d 308, 321–22 (E.D.N.Y. 2009).

[445] *See Ford Motor Credit*, 62 N.Y.2d at 301, 465 N.E.2d at 334.

[446] No. 12-01602 (SMB), 2013 WL 1881744 (Bankr. S.D.N.Y. May 6, 2013).

[447] The court described this as taking "constructive possession or custody of the property." *Id.* at *4.

> a notice which shall be served with the order that a specified debt is owed by the person served to the defendant. . . .[448]

X Bank owed a debt to *X* (not to *D*). Thus, *C* could not properly allege in a notice that *X Corp*. owed a debt to *D*. The levy should have been viewed as a non-event. Apparently, *X Bank* did not think so. *X Bank* froze *X*'s account, so that *X* could not withdraw funds.

The next day *D* filed for bankruptcy in New Jersey. Properly, *X*'s deposit account was property of the bankruptcy estate, as it was proceeds of fraudulently transferred property. Recognizing this, the bankruptcy court in New York[449] would ultimately order that *D*'s bankruptcy trustee (T_D) be substituted for *C* as the attachment plaintiff and beneficiary of the order of attachment.[450]

Ordinarily, *D* was required to move for confirmation of the order of attachment within five days of the levy.[451] But *D*'s bankruptcy tolled this duty for the duration of the bankruptcy.[452] *C* (in New York) moved to lift the automatic stay generated by *D*'s bankruptcy petition (in New Jersey), so that confirmation of the order of attachment in state court could be pursued. *X* intervened and moved the bankruptcy court to quash the order of attachment[453] because *X* was not made a party to the attachment proceeding. The court agreed that, for the attachment order to stand, *C* would have to make *X* a party to a set-aside proceeding—something the automatic stay prohibited. The court allowed *C* (or rather T_D as *C*'s successor) to perfect the order of attachment by filing a fraudulent transfer action against *X*.[454]

Procedurally, T_D needed the attachment lien on the *X Bank* deposit account. It is not clear *X* was prohibited by the automatic stay from liquidating the account, for the obscure reason that, under Second Circuit doctrine, fraudulently transferred property does not enter the bankruptcy estate until the property is *recovered*.[455] The levy of *X*

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[448] N.Y. C.P.L.R. § 6214(b).

[449] How did a New York bankruptcy judge obtain jurisdiction over a case related to a New Jersey bankruptcy? After bankruptcy, *C* caused the New York state action to be removed to federal district court in New York. A district court then remanded the case to the bankruptcy court because the case was "related to" the New Jersey bankruptcy. *See Helicon Partners*, 2013 WL 1881744, at *3; *see* 28 U.S.C. § 157(a) (2020).

[450] *See id.* at *9.

[451] *See* N.Y. C.P.L.R. § 6211(b).

[452] *See* 11 U.S.C. § 108(c) (2018) ("[A]n order entered in a nonbankruptcy proceeding . . . fixes a period for commencing or continuing a civil action . . . [which] does not expire until the later of— (1) the end of such period . . . or (2) 30 days after notice of the termination or expiration of the stay. . . .").

[453] *See* N.Y. C.P.L.R. § 6223(a) ("Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment.").

[454] *Helicon Partners*, 2013 WL 1881744, at *9. *See also* N.Y. C.P.L.R. § 6223(a) ("Upon the motion, the court may give the plaintiff a reasonable opportunity to correct any defect.").

[455] *See* 11 U.S.C. § 541(a)(3) (codifying property of the estate includes "[a]ny interest in property that the trustee recovers under section [550]"); *see also* Fed. Deposit Ins. Co. v. Hirsch (*In re* Colonial Realty Co.), 980 F.2d 125, 130–32 (2d Cir. 1992); *In re* Direct Access Partners, LLC, 602 B.R. 495, 559 (Bankr. S.D.N.Y 2019). On this controversial position, see Carlson, *Bankruptcy's Organizing Principle*, *supra* note 3, at 576–79. In *In re Colonial Realty*, *D* fraudulently transferred to *X*. *C* commenced a set-aside action against *X*. *D* filed for bankruptcy. T_D claimed *C*'s continuation of the action violated the automatic stay, 11 U.S.C. § 362(a).

Bank on T_D's behalf under the order of attachment therefore prevented *X Bank* from paying *X* prior to the fraudulent transfer recovery.[456] In the Fifth Circuit, however, the deposit account of *X* is considered *D*'s pre-petition property (on the "void" theory of fraudulent transfers).[457] The "void" theory implies that T_D is a lien creditor as to all property *D* fraudulently transferred prior to bankruptcy. Accordingly, T_D in the Fifth Circuit has no need for pre-judgment attachment liens—a positive development for bankruptcy trustees.[458]

Another New York bankruptcy case, however, contradicts our second point that attachment of *X*'s property requires prompt commencement of a set-aside action against *X*. In *In re Hypnotic Taxi LLC*,[459] *C* lent funds to *D Corp.*, and *D* guaranteed the loan. After defaults all around, *D Corp.* filed for bankruptcy. *D* then fraudulently transferred shares in various limited liability companies to *X* (offshore trusts for the benefit of family members). In contrast to *Helicon*, *D* did not file for bankruptcy.

In state court, *C* commenced suit against *D* and sought an order of attachment from New York Supreme Court against *X*, aimed at *X*'s LLC shares. Thus, in *Hypnotic*, *C* sought relief that violates our proposed rule (2). Peculiarly, the case was removed to federal bankruptcy court since *D Corp*. was bankrupt.[460]

The court held that the fraudulently transferred property was not yet in the bankruptcy estate under Bankruptcy Code section 541(a)(3) because T_D had not yet recovered it. *See In re* Colonial Realty, 980 F.2d at 131. But *C* was nevertheless guilty of violating the stay. *See id.* at 132–37. Suing *X* was the same thing as suing *D* (certainly a contestable proposition). *See id.* at 131–32. For our purposes, under *Colonial Realty*, the automatic stay does not constrain *X*, and so (absent the attachment lien) *X* could withdraw the funds on deposit with *X Bank*, to the prejudice of T_D.

[456] *See* N.Y. C.P.L.R. § 6214(b) ("Until such payment [to the sheriff] is made, or until the expiration of ninety days after the service of the order of attachment upon him . . . , the garnishee is forbidden to . . . pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court.").

[457] *See* Am. Nat'l Bank v. MortgageAmerica Corp. (*In re* MortgageAmerica Corp.), 714 F.2d 1266, 1276–78 (5th Cir. 1983).

[458] Orders of attachment are only effective in the state wherein the federal court is located. *See* Cap. Distrib. Servs. v. Ducor Express Airlines, Inc., 440 F. Supp. 2d 195, 209 (E.D.N.Y. 2006); *In re* Big Springs Realty LLC, 426 B.R. 860, 867–71 (Bankr. D. Mont. 2010). The trustee's hypothetical judicial lien is nationwide. If *X*'s asset were to be in Connecticut, the bankruptcy court would have to follow Connecticut procedure to issue an order of attachment. *See* FED. R. CIV. P. 64(a) ("At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies."). Rule 64 suggests a New York bankruptcy judge has access to New York procedure only.

[459] 543 B.R. 365 (Bankr. E.D.N.Y. 2016).

[460] *See* 28 U.S.C. § 1334(b) (2018) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11."). A standing order of the Eastern District of New York delegates bankruptcy business to the bankruptcy courts. *See* Citibank N.A. v. Bombshell Taxi LLC, No. 15 Civ. 5067 (BMC), 2017 WL 3054832, at *1 (E.D.N.Y July 19, 2017) (removing the action to federal district court based on federal bankruptcy jurisdiction). Jurisdictionally, *Bombshell* stands for the proposition, when *D Corp*. files for bankruptcy, obligees under suretyship principals can commence actions against sureties in bankruptcy court, regardless of diversity.

Under the N.Y. C.P.L.R., a pre-judgment plaintiff must show grounds for an order of attachment.[461] One of the grounds is, that "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts."[462] But this justifies an order of attachment[463] against property of *D*, not against property of *X*.[464]

The meaning of the New York order of attachment is that the sheriff is supposed to *levy* property "in which the defendant has an interest."[465] A levy of a third party, such as *X*, is accomplished when the sheriff delivers the order of attachment to the third party,[466] but what may be levied is "any interest of [*D*] in personal property, or upon any debt owed to the defendant."[467] A levy "is effective only if, at the time of service, such person owes a debt to the defendant or such person is in the possession or custody of property in which such person knows or has reason to believe the defendant has an interest."[468] Nowhere is the sheriff authorized to levy upon the property that *D* has no interest. Thus, if fraudulent transfers are "voidable," *D* has no interest in a thing once it is transferred to *X*. The levy is invalid. But if fraudulent transfers are "void," the statutory framework supports the levy of *X*'s bank account. We have, however, problematized the constitutionality of the "void" theory.

In *Hypnotic*, *D* objected that *X* had not been made a party to the attachment proceeding. The objection was overruled.[469] Thus, *Hypnotic* violates our proposed Rule (2).[470]

Another case that violates our second rule is *Exchange National Bank v. Washington*.[471] In the case, *D* held a remainder interest in a trust. *D* fraudulently transferred this interest to *X*. *C* obtained an order of attachment, and the sheriff levied *D*'s former trustee. There is no hint that *C* had commenced a set-aside action against *X*. *X* intervened, but *C*'s attachment lien was conditionally upheld if, in trial, it appeared *X* fraudulently received the remainder interest.[472]

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[461] *See* N.Y. C.P.L.R. § 6212(a) ("On a motion for an order of attachment, or for an order to confirm an order of attachment, the plaintiff shall show . . . that one or more grounds for attachment provided in section 6201 exist. . . .").

[462] *Id.* § 6201(3).

[463] *See id.*

[464] *See* Ford Motor Credit Co. v. Hickey Ford Sales Inc., 62 N.Y.2d 291, 302, 465 N.E.2d 330, 334 (1984) (concluding, "to hold that the property of [*X*] may be attached solely upon proof that as to [*D*] there is ground for attachment would raise serious due process questions").

[465] N.Y. C.P.L.R. § 6211(a).

[466] *See id.* § 6214(a).

[467] *Id.*

[468] *Id.* § 6214(b).

[469] *See In re* Hypnotic Taxi LLC, 543 B.R. 365, 383–85 (Bankr. E.D.N.Y. 2016).

[470] *D* also objected that the order of attachment did not specify which property of *X* the sheriff was allowed to levy. The court found no requirement for specifying assets, and so the sheriff was given a blank check to levy *X*'s property without ever granting *X* a chance to respond to *C*'s claim that a fraudulent transfer had occurred. *Id.* at 384.

[471] 30 N.Y.S.2d 43 (Sup. Ct. 1941).

[472] *Id.* at 44–45. Following the levy, the equitable life estate ended, so that the attachment lien encumbered a present possessory interest.

An impediment in New York to an order of attachment is that N.Y. C.P.L.R. section 6201 provides: "An order of attachment may be granted in any action . . . where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative to a money judgment against one or more defendants. . . ."[473] New York courts are prepared to offer a money judgment against *X in the alternative* to the set-aside.[474] Therefore, if *C* asks for a money judgment (in the alternative), *C* may have attachment against *X* if *C* can show grounds. But where *C* has not pled for a money judgment, this failure to plead becomes a reason to deny *C* the order of attachment.[475]

G. Injunctions

Where *C* does not yet have a judgment against *D*, UFCA section 10(a) invited the court to "[r]estrain the defendant from disposing of his property."[476] The word "defendant" in UFCA section 10(a) was ambiguous. Did the word mean *D* (the defendant in *C v. D*)? Or did it mean *X* (the defendant in an eventual set-aside action)? Where *D* has already conveyed property to *X*, an injunction against *D* would seem rather late. In fact, there was textual evidence that "defendant" refers to *X*. UFCA section 10's preamble provided: "Where a conveyance made . . . is fraudulent as to a creditor whose claim has not matured he may proceed against any person against whom he could have proceeded had his claim matured. . . ."[477] Apparently, "defendant" refers to "any person," and so *X* (not *D*) is "the defendant." Also, the restraint applies to "his property." "His" means *X* if we follow the "voidable" theory.[478] Admittedly, "his" means *D* if we follow the "void" theory.[479]

The UFTA improves upon the UFCA. It invites, "subject to applicable principles of equity and in accordance with applicable rules of civil procedure, (i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property."[480] Judicial power is aimed not only at locking the

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[473] N.Y. C.P.L.R. § 6201.

[474] *See* N.Y. DEBT. & CRED. LAW § 277(b) (McKinney 2020).

[475] *See* Trafalgar Power, Inc. v. Aetna Life Ins. Co., 131 F. Supp. 2d 341, 349 (N.D.N.Y. 2001). In *Trafalgar*, the court approved an injunction against *D*, preventing *D* from making any *new* conveyances, because *C* was likely to succeed on the merits of *C*'s action against *X* for fraudulent transfer relief. *Id.* at 349–50.

[476] UNIF. FRAUDULENT CONVEYANCE ACT §10(a) (UNIF. L. COMM'N 1918). This is "a less heavy-handed remedy than prejudgment attachment." Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 337 (1999) (Ginsberg, J., dissenting).

[477] UNIF. FRAUDULENT CONVEYANCE ACT §10.

[478] *See* Oliphant v. Moore, 293 S.W. 541, 542 (Tenn. 1927) (authorizing an injunction against transfers by *X*).

[479] *See* Kelley v. Thomas Solvent Co., 722 F. Supp. 1492, 1499 (W.D. Mich. 1989) (assuming both *D* and *X* can be enjoined); Lipskey v. Voloshen, 141 A. 402, 405 (Md. 1928) (assuming *X* could be restrained); Pompitus v. Frese, No. 77-892, 1979 WL 30388, at *5–6 (Wis. Ct. App. Apr. 18, 1979) (assuming *D* can be enjoined from further conveyances but finding restraint inappropriate where restrained asset was exempt).

[480] UNIF. FRAUDULENT TRANSFER ACT § 7(a)(3)(i) (UNIF. L. COMM'N 1984); *see also* UNIF. VOIDABLE TRANSACTIONS ACT § 7(a)(3) (UNIF. L. COMM'N 2014); Robinson v. Coughlin, 830 A.2d 1114, 1116 (Conn. 2003) (*C* sought an injunction against *X*'s disposition of assets where the fraudulently received property was dissipated).

barn after the cows have fled, but also at the cows themselves. And not just the cows. A court may restrain alienation of *X*'s property that was not fraudulently received.[481]

It pays to concentrate on the "other property" of *X*—property not fraudulently transferred. It has been said that "[t]he fundamental remedy for a creditor who establishes a fraudulent transfer is recovery of the property from the person to whom it has been transferred."[482] But, evidently, the UFTA and UVTA also permit the free substitution of a money judgment against *X*.[483] As the holder of fraudulently received property, *X* is not properly a debtor, in the sense of owing C money. But the UFTA allows *C* to *elect* that *X* be a debtor.[484] The reference to "other property" therefore should be understood to mean that *X*'s assets can be frozen and preserved to sustain later judicial liens arising from *C*'s future *in personam* money judgment against *X*.[485]

When fraudulent transfers are in the air, we may ignore the usual dictum that injunctions do not lie where money damages are adequate. Injunctions are available because the UFTA and UVTA *say* so.[486]

Pre-judgment injunctions must be considered in light of *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*.[487] In this case, the Supreme Court reversed a lower court for issuing a preliminary injunction to prevent *D* from conveying assets before *C*'s money judgment had been entered. The reasoning was founded upon "the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property."[488] Significantly, the Court gave away much ground in the following footnote:

> Several States have adopted the Uniform Fraudulent Conveyance Act (or its successor the Uniform Fraudulent Transfers Act [sic]),

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[481] For a case in which *X* was generally restrained because some of its property was fraudulently received, see Sargeant v. Al Saleh, 512 S.W.3d 399 (Tex. App. 2016).

[482] Challenger Gaming Sols., Inc. v. Earp, 402 S.W.3d 290, 294 (Tex. App. 2013); *see also* Emarine v. Haley, 892 P.2d 343, 346 (Colo. App. 1994) ("The primary remedy in an action for fraudulent conveyance is to return the property fraudulently conveyed to its prior status of ownership, thereby bringing it within reach of the judgment creditor of the fraudulent transferor.").

[483] In *Challenger*, the court writes that "a creditor who obtains an avoidance of the transfer pursuant to [section 7(a)] may recover a money judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claim, whichever is less." *Challenger*, 402 S.W.3d at 295. It is probably a mistake to read section 8(b) to mean that *C* must conduct an avoidance action first and proceed to a money judgment only if that remedy proves inadequate. The exact language in section 8(b) is, "to the extent a transfer is voidable in an action by a creditor under Section 7(a)(1). . . ." UNIF. FRAUDULENT TRANSFER ACT § 8(b). This only means that, hypothetically, *C could* have pursued the *in rem* theory, not that *C* must do so. *See* David Gray Carlson, *Fraudulent Transfer as a Tort* (unpublished manuscript) (on file with author) [hereinafter Carlson, *Tort*].

[484] *See* UNIF. FRAUDULENT TRANSFER ACT § 7(a); UNIF. VOIDABLE TRANSACTIONS ACT § 7(a).

[485] For a case under the Bankruptcy Code generally approving of an injunction affecting all of *X*'s property, see *Green v. Drexler* (*In re* Feit & Drexler, Inc.), 760 F.2d 406 (2d Cir. 1985).

[486] *See Sargeant*, 512 S.W.3d at 414; *see also* UNIF. FRAUDULENT TRANSFER ACT § 7(a)(3)(i); UNIF. VOIDABLE TRANSACTIONS ACT § 7(a)(3)(i).

[487] 527 U.S. 308 (1999) (holding that an injunction preventing the transfer of assets was improper prior to a money judgment being entered).

[488] *Id.* at 319–20.

> which has been interpreted as conferring on a nonjudgment creditor the right to bring a fraudulent conveyance claim. Insofar as Rule 18(b) applies to such an action, the state statute eliminating the need for a judgment may have altered the common-law rule that a general contract creditor has no interest in his debtor's property. Because this case does not involve a claim of fraudulent conveyance, we express no opinion on the point.[489]

The footnote alludes to the *in rem* nature of a fraudulent transfer claim. Suppose insolvent *D* owns a gold brick and *D* breaches a contract with *C*. *C* is just a general creditor with no cognizable interest in the brick. Now, *D* transfers all title to *X*. At this very moment, *D* transfers *legal* title to *X* and *equitable* title to *C*. The following points prove this. Suppose X_1 gives the brick to X_2, a bad faith purchaser of title. *C* can still avoid the *D*-X_1 transfer and obtain a judicial lien on X_2's brick. That *C* can do this proves that X_1 never had the fee simple of the brick. X_1 had less than that. The missing property interest is precisely *C*'s equitable interest in the brick. In short, *C* (a creditor of *D*) is no creditor of X_1. *C* is the beneficial owner of a brick held in trust by X_1.[490] We shall refer to *C*'s property as *C*'s "inchoate interest."

Because of *C*'s inchoate interest, lawyers have usually proven able to blow right past *Grupo Mexicano* by adding "and *D* has or is contemplating fraudulently transferring assets."[491] *Grupo Mexicano* ends up having no application, where allegations of past or future fraudulent transfers are plausible.[492]

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[489] *Id.* at 324 n.7 (citation omitted); *see also In re* G-I Holdings, Inc., 327 B.R. 730, 743 n.12 (Bankr. D.N.J. 2005) ("The possible upshot of footnote 7 [in *Grupo Mexicano*] is that a creditor prosecuting a fraudulent conveyance action . . . may be able to obtain a preliminary injunction preventing the debtor from otherwise lawfully disposing of its assets, despite the fact that a judgment has not yet been entered in the creditor's favor.").

[490] Julie Sirota Kourchin, Note, *Fraudulent Conveyance Law as a Property Right*, 9 CARDOZO L. REV. 843, 846–48 (1987).

[491] *See* Wimbledon Fund, SPC Class TT v. Graybox, LLC, 648 F. App'x. 701, 702 (9th Cir. 2016) ("Because this is a fraudulent conveyance case and one in which Wimbledon sought equitable relief, *Grupo Mexicano* does not bar a preliminary injunction."); New Falls Corp. v. Soni Holdings, LLC, 2:19-CV-00449 (ADS)(AKT), 2019 WL 3712127, at *1–2, *4–5 (E.D.N.Y. Aug. 7, 2019); Iantosca v. Step Plan Servs., Inc., 604 F.3d 24, 33–34 (1st Cir. 2010) (holding that a preliminary injunction is appropriate where fraudulent transfer allegations were involved); Rubin v. Pringle (*In re* Focus Media Inc.), 387 F.3d 1077, 1084–85 (9th Cir. 2004) (holding where "a party in an adversary bankruptcy proceeding alleges fraudulent conveyance or other equitable causes of action, *Grupo Mexicano* does not bar the issuance of a preliminary injunction"); United States ex rel. Rahman v. Oncology Assocs., 198 F.3d 489, 498–89 (4th Cir. 1999); *Sargeant*, 512 S.W.3d at 401 (holding that the trial court did not abuse its discretion issuing a temporary injunction to prevent a fraudulent conveyance).

[492] Mere conclusory allegations, however, will not suffice. *See* DLJ Mortg. Capital, Inc., v. Kontogiannis, 594 F. Supp. 2d 308, 321–22 (E.D.N.Y. 2009) ("[T]he mere fact that the transaction occurred in temporal proximity to the start of this case does not overcome the conclusory nature of the allegation and does not evince fraudulent intent."); *see id.* at 328–29 (applying *Grupo Mexicano* where no plausible claim of fraudulent transfer could be made but nevertheless issuing an injunction against one of the fraudulent transferees).

To further aggravate matters, *Grupo Mexicano* is a holding with regard to Federal Rule of Civil Procedure 65 injunctions.[493] Under Rule 64, the federal court can issue a preliminary injunction any time state law provides for one.[494] And, as we have seen, the UFTA and UVTA both invite injunctions against either *D* or *X*, both with regard to *X*'s fraudulently received property and "other" property of *D* and *X*.[495]

Properly, *Grupo Mexicano* interprets the Judiciary Act of 1789, which statutorily chokes off expansion of equity powers beyond that which existed in 1789.[496] Being statutory, this limitation on equity power can be countermanded by further statutory enlargement, and Justice Antonin Scalia agreed that Rule 64 (pre-judgment remedies) is just such a vehicle.[497]

One case holds (erroneously) that *Grupo* bars preliminary injunctions in fraudulent transfer cases. In *In re Teknek, LLC*,[498] *D* conveyed all its business assets to X_1, which in turn conveyed the assets to X_2. *D* basically had one creditor (*C*), which had a judgment against *D* in a patent infringement suit.

D's trustee (*T*) requested an order prohibiting X_2 from transferring assets out of the ordinary course of business. After initially issuing a temporary restraining order, the court, citing *Grupo*, concluded it had no power to restrain X_2, even though UFTA section 7(a)(3)(i) directly authorized it. The court noted that ejectments, replevins, and money judgments were actions at law.[499] It reasoned that fraudulent transfer actions ultimately sought the return of real property (ejectments), personal property (replevins), and money judgments.[500] Therefore, fraudulent transfer litigation was not "equitable," and *Grupo* applied to prevent injunctions against X_2.[501]

This reasoning is faulty. Take ejection of a trespasser from real property. This legal action entitles the former owner to take possession. But that is not what *C* was seeking. *C* was seeking a judicial lien on X_2's real property in order that X_2's property

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[493] *See In re* Teknek, LLC, 343 B.R. 850, 868 (Bankr. N.D. Ill. 2006) ("As a result of the Supreme Court's holding in [*Grupo*], this Court may not use preliminary equitable relief under federal law—relief such as a TRO or preliminary injunction under Federal Rule of Civil Procedure 65. . . .").

[494] *See* Charlesbank Equity Fund II, LP v. Blinds To Go, Inc., 370 F.3d 151, 161 (1st Cir. 2004) (stating that Rule 64 "authorizes use of state prejudgment remedies" but urging caution in granting injunctions under Rule 64).

[495] For a case illustrating this matter, see JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc., 295 F. Supp. 2d 366 (S.D.N.Y. 2003). In *JSC*, *C* had a judgment against *D Corp*. *D* (a shareholder of *D Corp*.) transferred land and stock to *X*. *Id.* at 371. *C* claimed a right to pierce the *D Corp*. veil so that *D* would be liable on the judgment against *D Corp.* C sought a preliminary injunction against *D* to restrain further fraudulent transfers. The court erroneously held that *Grupo Mexicano* barred the preliminary injunction against *D* because *C* was essentially seeking a money judgment against *D*. *Id.* at 389. Maybe so, but *D* was accused of making fraudulent transfers, and that allegation, plus a money judgment, justified the preliminary injunction under Rule 65. Or, if not, Rule 64 justified the preliminary injunction, as the court acknowledged. *Id.* at 390.

[496] *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999).

[497] *See id.* at 330–33.

[498] 343 B.R. 850.

[499] *Id.* at 852; *see also* Whitehead v. Shattuck, 138 U.S. 146, 151 (1891) ("[W]here an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.").

[500] *In re* Teknek, 343 B.R. at 870.

[501] *See id.*

could be liquidated. *C* was neither seeking nor entitled to a possessory right. *C* had commenced a set-aside action, and this was clearly an action in equity.[502]

In any case, we have shown, prior to the UFTA, *C always* proceeded in equity against *X*.[503] That is because *X* holds fraudulently received property in trust for *C*, and equity took jurisdiction over trusts. *Grupo* does not apply and the restraint against X_2 could have been sustained, as *C* was no mere general creditor of *X*. As soon as *D* conveyed to *X*, *C* had an *in rem* interest in the fraudulently transferred property received by *X*. At that very point, *X* held the fraudulently received property *in trust* for *C*.[504] Thus, the *Teknek* court was incorrect when it wrote "the Chapter 7 trustee is an unsecured creditor without a fraudulent-transfer . . . judgment against [*X*]."[505] *T* was a property owner by virtue of his inchoate interest and, therefore, a nonrecourse *secured* creditor of *X*. The *Grupo* rule only applies to unsecured creditors.[506]

The *Teknek* court went on to ratify the appointment of a receiver for X_2's assets.[507] Receivership is as much an equitable remedy as injunction.[508] If *Grupo* bars injunctions, it also bars receiverships. Neither is barred in a fraudulent transfer case. Both are expressly invited.[509]

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[502] In *Mali v. United States*, *C* argued that a fraudulent transfer avoidance:

> is unlike an ejectment action because [*C*] does not seek to repossess the real property itself—it never had the right of possession. Nor does it seek to recover the titles by having the property titled to itself or to [*D*]. The sole purpose of the action is to set aside or void the transfers *only as to* [*C*] such that [*C*'s] tax liens attach to the property and the tax liens so attached can be enforced.

United States' Reply in Support of its Motion to Strike Jury Demand at 6, Mali v. United States, No. 2:16-cv-12865-GAD-APP, 2018 WL 7134532 (E.D. Mich. Nov. 7, 2018).

[503] *See supra* text accompanying notes 207–22.

[504] I cover these matters in an unpublished manuscript. *See* Carlson, *Tort, supra* note 483.

[505] *In re* Teknek, 343 B.R. at 868.

[506] *See* Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 330 (1999) (explaining "the historical principle that before judgment . . . an unsecured creditor has no rights at law or in equity in the property of his debtor").

[507] *In re* Teknek, 343 B.R. at 873; *see* 11 U.S.C. § 105(b) (2018) ("[A] court may not appoint a receiver in a case under this title."). The *Teknek* court ruled section 105(b) did not apply to an adversary proceeding *within* a case where Rule 64 invited state-law remedies. *In re* Teknek, 343 B.R. at 873.

[508] *See* Compton v. Paul K. Harding Realty Co., 285 N.E.2d 574, 580–81 (Ill. Ct. App. 1972) ("The appointment of a receiver is a branch of equity jurisdiction not dependent upon any statute. . . .").

[509] *Grupo Mexicano* influenced the New York court of appeals to make a very similar ruling as a matter of state law. According to New York's C.P.L.R. section 6301: "A preliminary injunction may be granted in any action where it appears the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action. . . ." N.Y. C.P.L.R. § 6301 (McKinney 2020). Section 6301 is thus precisely analogous to Federal Rule of Civil Procedure 65(a). *See* Credit Agricole Indosuez v. Roassitysky Kredit Bank, 94 N.Y.2d 541, 546–47, 729 N.E.2d 683, 686–87 (2000). Meanwhile, article 62 of the C.P.L.R. governs attachment, which is directly invoked in federal litigation by Rule 64. In *Credit Agricole*, *C* commenced *C v. D* and sought a section 6301 preliminary injunction restraining dissipation of *D* assets. Citing *Grupo Mexicano*, the New York court ruled a preliminary injunction was not available to secure assets for a future money judgment. *Id.* at 548. It acknowledged, however, that *D* might have the remedies under N.Y. C.P.L.R. article 62 (pre-judgment attachment). *Id.* at 548. That remedy readily exists in fraudulent transfer cases. N.Y. C.P.L.R. § 6201 ("[A] court may, without notice to the defendant, grant a temporary restraining order prohibiting the transfer of assets by a garnishee as

H. Contingent Claims

Each uniform act defines creditors as including persons who have *contingent* claims.[510] In one aspect, this makes perfect sense. In another, it does not.

Here is how the definition makes sense. Under UFTA section 4(a), *present and future* creditors have avoidance rights.[511] Section 4(a) includes actual frauds and two types of constructive frauds.[512] But under section 5(a), gifts by insolvent *D* are voidable only by *present* creditors.[513]

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provided in [section 6214(B).]"). But a garnishee is someone who holds *D*'s property or owes *D* a debt. *Id.* § 6214(b). Hence, this injunction pertains to *D*'s property, not to *X*'s property. As to *X*'s own property, *X* is no garnishee. New York's version of UVTA section 7(a)(3)(i) authorizes "an injunction against further disposition by . . . a transferee . . . of the asset transferred or of other property." N.Y. DEBT. & CRED. LAW § 276(a)(3)(i) (McKinney 2020); *see also* UNIF. VOIDABLE TRANSACTIONS ACT § 7(a)(3)(i) (UNIF. L. COMM'N 2014). One court eviscerated the UVTA as it pertains to injunctions. In *UBS Securities LLC. v. Highland Capital Management, L.P.*, 977 N.Y.S.2d 610, 42 Misc.3d 580 (Sup. Ct. 2013), *D* transferred funds to *X*, and *C* alleged the transfer to be fraudulent. *C* sought a preliminary injunction restraining *X* from transferring fraudulently received property. The court noted that *C* was seeking a money judgment against *D* and that *C*'s legal remedy was adequate; therefore, *C* could not have an injunction against *X*. *Id.* at 620–21, 42 Misc.3d at 593–94. Effectively, this reads section 7(a)(3)(i) right out of the UVTA. In *every* case of fraudulent transfer, *C* seeks a money judgment against *D*. So, in *no* case is a preliminary injunction against *X* appropriate.

[510] UNIF. FRAUDULENT CONVEYANCE ACT § 1 (UNIF. L. COMM'N 1918) ("'Creditor' is a person having any claim . . . fixed or contingent."); UNIF. FRAUDULENT TRANSFER ACT § 1(3)–(4) (UNIF. L. COMM'N 1984) (defining "Creditor" as "a person who has a claim," and "Claim" as "a right to payment," which includes contingent in nature); UNIF. VOIDABLE TRANSACTIONS ACT § 1(3)–(4) (providing the same definitions as the UFTA).

[511] UNIF. FRAUDULENT TRANSFER ACT § 4(a) ("A transfer made . . . by a debtor is fraudulent as to a creditor, whether the creditor's claim *arose before or after* the transfer was made. . . ." (emphasis added)).

[512] UFTA section 4(a) provides:

> A transfer made . . . by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made . . . , if the debtor made the transfer . . . :
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer . . . , and the debtor:
>
> (i) was engaged or was about to engage in a business or transaction for which remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

Id.

[513] UFTA section 5(a) provides:

> A transfer made . . . by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer. . . .

Id. § 5(a).

Defining "creditor" as one holding a contingent claim serves to assure that, once *C*'s claim becomes vested, *C* was in retrospect a present creditor prior to the removal of the contingency. Suppose *C* is a contingent creditor of insolvent *D* when *D* fraudulently transfers property to *X* for no reasonably equivalent value. Later, *C*'s claim against *D* becomes vested. *X* would like to assert that a contingent claim is not a claim at all and that *C* was not a creditor at the time of the gift. The definition of "creditor" prevents *X* from so asserting.[514] This does not mean, however, that *C* can collect from *X* at a time when *C cannot* claim from *D* (because *D*'s obligation to pay is still contingent).

Another observation is that the definition of "claim" as contingent also helps to define insolvency in constructive fraudulent transfer cases. Thus, UFTA section 2(a) provides that a debtor is insolvent if, at a fair valuation, "the sum of the debtor's debts is greater than all of the debtor's assets. . . ."[515] "Debt" is defined as "liability on a claim."[516] And "claim" is defined to include contingent debts.[517] Putting this together, *D*'s contingent debts must be included in insolvency analysis.[518] Thus, contingency is not exclusively used to identify who may be a plaintiff in litigation against *X*.

But there is a disturbing aspect to this definition. May a creditor with a contingent claim against *D* pillage the estate of *X* on the off-chance that *C*'s contingent claim against *D* might vest in the future? This should not be permitted. According fraudulent transfers rights to contingent creditors must be limited in order to prevent *C* from realizing against *X* when *C* could not realize against *D*.

There is a traditional exception, however. Contingent claims in the uniform acts refer to the rights of a surety (*S*) who is obliged to pay *C* if *D* does not. *C* now becomes the "obligee"[519]—the person *D* is obliged to pay. *S* has a contingent claim against *D* for an indemnity, in case *C* collects from *S* instead of from *D*. Assume *D* has fraudulently transferred property to *X*. *C* has a non-contingent claim against *D* and so, based on the discussion above, *C* has fraudulent transfer rights against *X*. *S* is the contingent creditor of *D*. *S*'s right to collect from *D* is contingent on *S* reimbursing *C*. The meaning of the uniform acts is that the right of *S* to avoid the fraudulent transfer to *X* is similar to the right of *C* against *X*.[520] Prior to the enactment of the UFCA, *S*

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[514] *See* McLaughlin v. Bank of Potomac, 48 U.S. 220, 228–29 (1849) (explaining that creditor status usually requires a pre-existing debt); Post v. Stiger, 29 N.J. Eq. 554, 558 (Ch. N.J. 1878); *see also* DFS Secured Healthcare Receivables Tr. v. Caregivers Great Lakes, Inc., 384 F.3d 338, 349 (7th Cir. 2004) (inferring that a pre-judgment claim could serve to make *C* a "present creditor").

[515] UNIF. FRAUDULENT TRANSFER ACT § 2(a).

[516] *Id.* § 1(5).

[517] *Id.* § 1(3).

[518] *See In re* Tronox Inc., 503 B.R. 239, 309 (Bankr. S.D.N.Y. 2013) (holding that a contingent environmental claim had to be addressed in an insolvency analysis).

[519] *See* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 5 cmt. a (AM. L. INST. 1995) (illustrating the interplay between the law of suretyship and other bodies of law).

[520] *See* Recent Case Note, *Suretyship and Guaranty–Debtor's Fraudulent Conveyances as Limiting Rights of Surety*, 40 YALE L.J. 485, 485–86 (1931) [hereinafter Note, *Suretyship and Guaranty*] (decrying an Idaho case dismissing *S*'s action against *X* for want of a judgment in *S v. D*).

probably could not maintain an action against *X* for the general reason that only creditors *with judgments* could maintain such actions.[521]

An exception was made for *S*. The original *Restatement of Security* (1941) asserts, "Where the principal [*D*] makes a fraudulent conveyance and the surety [*S*] if [*D*'s] obligation were due, would have a right of exoneration against the [*D*] [*S*] can have the fraudulent conveyance set aside."[522] Thus, where *S* is entitled to *exoneration*, *S* has a fraudulent transfer right against *X* even if *S* has no present right to reimbursement against *D*.[523] Says the more recent *Restatement (Third) of Suretyship and Guaranty*:

> When the principal obligor [*D*] is charged with notice of the secondary obligation, [*D*] owes the secondary obligor [*S*] a duty to perform the underlying obligation. . . . While, if [*D*] breaches this duty and [*S*] is called on to perform the secondary obligation, [*D*] will have the duty to reimburse [*S*], it is inequitable for [*S*] to be compelled to suffer the inconvenience and temporary loss that performance of the secondary obligation will entail. Thus, if [*D*] has no defense to its duty of performance, [*S*] is entitled to appropriate relief protecting its interests. The right to such relief is sometimes called the right of *exoneration*.[524]

Exoneration implies the right of *S* to an injunction ordering *D* to pay *S*. According to Professor Glenn:

> That being true, it follows that the surety, who enjoys this equitable right as to the assets of the principal or co-surety, has the same privilege of interference that a judgment would give him. Therefore

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[521] *See* Saunders v. Saunders, 291 P. 1069, 1070–71 (Idaho 1930) (explaining *S* may not maintain a set-aside action against his principal or other creditors until *S* has paid the surety debt); Ellis v. Sw. Land Co., 84 N.W. 417, 418 (Wis. 1900) (holding that, because *S*'s rights are no greater than those of creditors, *S* may not maintain a set-aside action until he has paid the debt of his principal); Smith v. Young, 55 So. 425, 427 (Ala. 1911) (rejecting the argument that contingent surety claims are not claims at all, but stating *S*'s right of action does not come into existence until *S* has paid the surety debt); Note, *Suretyship and Guaranty*, 40 YALE L.J. 485 (1931) (decrying such cases).

[522] RESTATEMENT OF SECURITY § 113 (AM. L. INST. 1941).

[523] *See* Englander v. Jacoby, 28 A.2d 292, 293 (N.J. Ch. 1942) ("[*S*] in his own right has no standing to attack the transfer since he is not a judgment creditor. But, from the principles relating to exoneration of sureties, he may perhaps derive from the judgment creditor a foothold for the attack. Such is the theory of the bill—a suit to set aside a fraudulent conveyance, brought by a surety, in the right of the judgment creditor. Whether the bill would be sustained against a motion to dismiss for want of equity, I do not have to decide." (citation omitted)); Walters v. Akers, 101 S.W. 1179, 1180–81 (Ky. 1907) ("[A] surety who is liable upon a contract [may] bring an equitable action against his principal before the debt or liability becomes due or matures, and in such action assail fraudulent conveyances.").

[524] RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 21 cmt. i (AM. L. INST. 1996) (emphasis added).

> the surety has a right of interference with his principal's assets, which, as we have seen, is all that a judgment gives the creditor.[525]

As the court in *Borey v. National Union Fire Insurance Co.*[526] said:

> There are occasions when [*D*'s] situation is deteriorating during the lawsuit and it becomes increasingly likely that if [*S*] prevails on its claim for equitable relief, it will win a Pyrrhic victory because by that time [*D*] will be unable to provide the funds that will furnish the . . . exoneration relief. In these extraordinary cases, [*S*] may seek a preliminary injunction to maintain the status quo during the trial of the basic action.[527]

A preliminary injunction requires a showing that *S* is likely to suffer irreparable harm before a final decision is rendered.[528] The probable bankruptcy of *D* constitutes an irreparable harm to *S*. In any case, exoneration, according to the *Restatement*, implies the right to a *final* injunction.[529]

Referring to the original 1941 *Restatement*, it is not the injunction itself, but the *right* to it, that triggers *S*'s fraudulent transfer right against *X*. And what are those rights? They do not include the right to "levy execution"; this right is reserved for creditors with judgments.[530] But they do include the right to have the *D*-*X* transfer avoided.[531] Attachment, receiverships, and injunctions (against *D* or against *X*) are also mentioned.[532]

A paradigm case comes to mind. Suppose *C* lends to *D* and *S* guarantees it. *D* fraudulently transfers a thing to *X*. *C* joins *D* and *S* in a lawsuit, but *C* brings no action against *X*, as Federal Rule of Civil Procedure 18(b) invites *C* to do.[533] The meaning of the UFTA's empowerment of contingent creditors is to invite *S* to join *X* in an

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[525] GLENN, *supra* note 10, § 93d; *accord* Greene v. Starnes, 48 Tenn. 582, 589 (1870) ("[*S*], before payment of the debt, . . . may bring his principal and the creditor into a court of equity, and obtain exoneration out of the property, real or personal, fraudulently conveyed by the former. . . ."); Carr v. Davis, 63 N.E. 326, 328 (W. Va. 1908) ("It is thoroughly settled that a surety may, before payment, in equity, compel the principal to pay in exoneration.").

[526] 934 F.2d 30 (2d Cir. 1991).

[527] *Id.* at 33.

[528] *See id.* at 34.

[529] RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 21(2) ("Upon breach by [*D*] of a duty [to pay *C*], [*S*] is entitled to relief that will properly protect its rights with respect to [*D*'s] duty of performance."); *see* Nissenberg v. Felleman, 162 N.E.2d 304, 308–09 (Mass. 1959); *see also* LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF SURETYSHIP 198–204 (1950).

[530] *See* UNIF. FRAUDULENT TRANSFER Act § 7(b) (UNIF. L. COMM'N 1984).

[531] *See id.*

[532] *See id.* § 7(a)(2)–(3).

[533] FED. R. CIV. P. 18(b).

action, in addition to cross-claiming against *D*.[534] Whether *S* may sue *X* straight out in violation of the paradigm remains an open question for *S* as well as for *C*.[535]

Since exoneration culminates in an injunction against *D* to pay *C*, the paradigm suggests that the culmination of *S v. X* is a declaration that *X*'s property is once again *D*'s property that *D* should use to pay *C*. *S* has a lien on *X*'s fraudulently received property, on the logic of *in custodia legis*, but this lien is held in trust for *C*. If *C* should collect from *S*, then *S* is subrogated to *C*. *S* steps into *C*'s shoes and can liquidate *X*'s property to reimburse *S*.

At least one ancient case stretches the paradigm. In *Cloud v. Middleton*,[536] S_1 co-signed a promissory note issued by *D*. S_2 subsequently co-signed, but in a way that S_1 had to indemnify S_2 if S_2 were compelled to pay. S_1 then conveyed land to *X* for no consideration. At a time when S_2's indemnification right against S_1 was still contingent, S_2 commenced a set-aside action against *X*. The court awarded a "contingent" lien against *X*'s property.[537] *X* appealed, but before the appeal could be heard, S_2 actually paid *C*. The contingent lien was upheld on appeal.[538] The case stretches the paradigm because *C v. D* (here S_2 *v.* S_1) seems to have never commenced.

A recent paradigm-stretching case is *Friedman v. Wahrsager*.[539] In this case, *C* lent funds to *D* and *S* guaranteed payment. *D* fraudulently transferred to *X*. *C* obtained the appointment of a receiver (*R*) for both *D* and *S*. *R* brought a set-aside action against *X*. *X* protested that a receiver could enforce *D*'s choses in actions against third parties, but *D* had no right to recover fraudulent transfers from *X*. Therefore, *R* had no standing to sue *X* to set aside a fraudulent transfer.[540]

Properly, a receiver can be appointed to represent creditors.[541] Since creditors can bring fraudulent transfer actions, so can their representative, the receiver.[542] The *Friedman* court, however, felt bound by an unfortunate[543] Second Circuit precedent, which holds *D*'s receiver has no standing to sue *X* for fraudulent transfer.[544] Nevertheless, even if *R* had no standing as *D*'s receiver, *R* was also *S*'s receiver. *S* was

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[534] Professor Glenn thought that *C* "is a proper party always, and a necessary party if the debt is in dispute," a proposition that follows "from the fact that the [exoneration] payment properly should be made by the principal directly to this creditor." GLENN, *supra* note 10, § 93d n.64.

[535] *See supra* text accompanying notes 338–42, 512–23.

[536] 44 S.W.2d 559 (Ky. 1931).

[537] *Id.* at 561.

[538] *See id.* at 562.

[539] 848 F. Supp. 2d 278 (E.D.N.Y. 2012).

[540] In this case, it is likely *X* looted *D* of funds and was acting beyond the scope of her authority. If so, *D* had a cause of action against *X* for conversion or constructive trust. *R* would succeed in *these* causes of action. The case might properly not be a fraudulent transfer case at all, in which case *R*, *X*, and the court are all barking up the wrong tree. *See* Carlson, *When Worlds Collide*, *supra* note 164, at 435.

[541] *See* N.Y. C.P.L.R. § 5228 (McKinney 2020) ("Upon motion of a judgment creditor, upon such notice as the court may require, the court may appoint a receiver. . . ."); Comment, *Suits by Representatives to Set Aside Fraudulent Conveyances*, 45 YALE L.J. 504, 508 (1936).

[542] *See* Ward v. Petrie, 157 N.Y. 301, 308–09, 51 N.E. 1002, 1005 (1898) (explaining that a receiver "is entitled to maintain an action in equity to set aside the fraudulent transfer, so that he may receive the property, which in equity and good conscience belongs to the judgment debtor").

[543] For a detailed critique, see Carlson, *When Worlds Collide*, *supra* note 164, at 439–41.

[544] *See* Eberhard v. Marcu, 530 F.3d 122, 132–33 (2d Cir. 2008).

a contingent creditor of *D*, so that *R* (representing *S*) could sue *R* representing *D*. The decision would seem to place *R* in a conflict of interest—*R* represents *S* (a creditor of *D*) and *D* at the same time.

Encounters with contingent creditors and fraudulent transfer avoidance are rare. "Strangely enough," Professor Glenn remarked in the UFCA era, "there are as yet no decisions under the Uniform Law."[545] Sixty years of judicial experience have not served up many modern instances of the contingent creditor under the uniform acts.

CONCLUSION

This Article has explored the civil procedure of private fraudulent transfer litigation, mainly in a non-bankruptcy context. The civil procedure in question engenders a controversy about property rights. Legal theory that says fraudulent transfers are void and the equitable theory that says they are voidable. The contradiction reflects the ancient contradiction between law and equity. At present, it is impossible to say whether fraudulent transfers are void *or* voidable. One must admit they are void *and* voidable. The uniform acts legislate both positions simultaneously, in the style of *Ariadne auf Naxos*.[546]

The analysis was divided in twain. First, we considered the case where a creditor (*C*) already had judgment against a debtor (*D*). *D* had made fraudulent transfers to a third party (*X*). *C* was invited to disregard the transfer and indulge in the "legal" remedy of levying against *X*'s property, because the *D*-*X* transfer was no transfer. It was void. I have opined that the "void" theory of fraudulent transfers is probably unconstitutional: *X* is entitled to due process of law before *C* can seize *X*'s property (assuming it *is X*'s property) to pay the debts of *D*. Alternatively, *D* can proceed in equity to set aside or avoid the fraudulent transfer. *X* has title, but this title can be avoided by judicial declaration. What once was *D*'s property becomes *D*'s property again, and *C* obtains a judicial lien on the fraudulently received property.

Starting with the UFCA, *C* is invited to pursue *X* even before *C* has judgment against *D*. I have suggested that *C v. X* depends on *C* commencing an action against *D* and then *joining X* as a defendant in an ancillary proceeding. Pursuing *X* outside this context is very dubious, but admittedly, the authorities are sketchy and antique.

I conclude by observing that we have been through three generations of uniform acts. None of these efforts has attended to the procedural issues raised in this Article. Procedural guidance depends on pre-1918 sources, where the law-equity split holds sway. Next time around, perhaps the Uniform Law Commission will pay attention to procedure as well as substance.

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[545] GLENN, *supra* note 10, § 93d n.57.

[546] In the Strauss opera *Ariadne auf Naxos*, two opera companies, one comedic and one tragic, vie for the privilege of performing first. The king solves the dispute by decreeing that both opera companies perform simultaneously. And so they do, to memorable effect.