1973

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Recommended Citation

(1973) "Enforcement of Money Judgments Against Real Property in New York," Hofstra Law Review: Vol. 1: Iss. 1, Article 15.
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ENFORCEMENT OF MONEY JUDGMENTS AGAINST REAL PROPERTY IN NEW YORK

New York's statutory procedures for collecting money judgments through forced sales of debtors' real property were revised in 1963 when the Civil Practice Law and Rules was enacted. Experience since 1963, particularly in those areas of the State where population growth has generated housing shortages, indicates that the new procedures have created a situation which is unfair both to debtors and to legitimate creditors.

Because the CPLR draftsmen believed that the procedural requirements in the old Civil Practice Act unduly hampered the judgment creditor, the revisions embodied in the CPLR are designed to facilitate the collection of judgments. The new procedures are less complicated and more efficient, and the debtor protective devices contained in the old act have been eliminated. The judgment creditor is no longer required to exhaust his debtor's personal property (e.g., bank accounts and automobiles) before taking action against his real property, and the judgment debtor whose real property is sold is no longer permitted to redeem his property after a sale.

The CPLR draftsmen proposed no new debtor protections to replace those eliminated, other than a new grant of authority to the courts to supervise enforcement procedures. The CPLR does not

1. N.Y. Civil Practice Law and Rules (McKinney 1970) [hereinafter CPLR]. The enforcement procedures are found in article 52.
2. The situation which obtained under the Civil Practice Act [hereinafter CPA] (repealed by CPLR § 10001 [McKinney 1965]) was described by the CPLR draftsmen:
   The great number of such judgments which are never satisfied and the number which are satisfied only after years of post-judgment litigation, frustration, harassment and deception, involving substantial expenditures of time and money, point to the pressing need for a complete revision. 1958 N.Y. Leg. Doc. No. 17, Preliminary Report of the Advisory Committee on Practice and Procedure 233 [hereinafter Third Rep.]. The draftsmen were particularly concerned with simplifying the enforcement procedures, which were needlessly complex and contributed to the creditors' frustrations. See Third Rep. at 233-244. See also J. Weinstein, Trends in Civil Practice, 62 Colum. L. Rev. 1431, 1443 (1962).
3. CPA § 643.
4. CPA §§ 724, 725.
5. CPLR § 5240. The statutory scheme established by the CPLR is heavily dependent on court supervision of enforcement procedures. The draftsmen underscored this when they admonished the courts as follows:
   Despite the fact that the purpose of most litigation is the enforcement of rights rather than their bare declaration, post-judgment procedures have received ... only minimal attention from the courts. ... Whether the proposed procedure is used to take advantage of and to unmercifully harass honest debtors without assets or means to acquire them or whether it is used to permit judgment debtors

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require that real property be appraised and sold for no less than a given percentage of its market value as is true of similar statutes in many other states, nor does it contain a viable homestead exemption provision. The CPLR does not provide protection equal to that provided by other New York statutes for other classes of debtors.

Finally, because the CPLR draftsmen's assignment was limited to a revision of civil procedures, the effect of other New York statutes on the debtor-creditor relationship was ignored. Thus, the draftsmen did not discuss the impact of New York's illogical adaptation of the ancient tenancy by the entirety; nor did they consider the possibility that persons other than creditors might find the simplified procedures, the lack of built-in protections, and the abolition of the right of redemption an invitation to speculate in the business of enforcing judgments.

Empirical data, discussed below, demonstrate that the results of the new procedures can be disastrous for the judgment debtor: prices paid for real property sold at execution sales are often unconscionably low; debtors can and do lose equities far larger than their obligations; debtors are sometimes harassed by speculators who make a business of executing the liens of judgments taken on assignment and of purchasing property at the subsequent sales. Because the CPLR permits a taking of property for an inadequate consideration and provides no remedy for those debtors who lack access to the judicial process, it can be argued that the statute fails to meet recently expanded due process requirements.

with the ability to pay judgments to flout the law and defraud their creditors depends, in the ultimate analysis, upon the integrity of the bar and the seriousness with which courts view the questions involved in the collection of judgments.

THIRD REP. at 233-234.

6. See notes 94, 95, 96 and 97 infra. The CPLR draftsmen took note of the fact that these provisions exist in the statutes of other states (THIRD REP. at 304) but they made no similar recommendation for New York, presumably because they believed that abolition of the right of redemption would insure fair prices since purchasers at execution sales would take immediate title. See THIRD REP. at 305.

7. The homestead exemption provision is found in CPLR § 5206. The draftsmen noted that this exemption provides protection "more theoretical than real" (THIRD REP. at 120) and they suggested that it be reviewed, but they refused to revise it themselves on the ground that such a revision involves a major change in social policy which should be dealt with separately. THIRD REP. at 93.


9. New York's adaptation of the tenancy by the entirety was promulgated in Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1893). The effect it has on the debtor-creditor relationship is discussed infra, sec. I B of this Comment.

10. There is "collusion" among bidders at judgment sales according to the Nassau County Sheriff. See N.Y. Times, Feb. 24, 1973, at 33, col. 7.

On the other hand, the CPLR revisions have not been a panacea for the judgment creditor. The fact that court intervention is the only debtor protection available has created vast uncertainties for the creditor; the courts have shown a willingness to intervene in enforcement procedures on behalf of those debtors who manage to get their cases before the courts and have shown imagination in devising remedies. As a result, creditors can never be sure that their efforts, even when procedurally correct, will meet with judicial approval. Furthermore, the prices paid at execution sales are often too low to satisfy the judgment.

The CPLR's failures are particularly apparent in the fast-growing, heavily populated suburban counties of Nassau and Suffolk on Long Island, where execution sales are considerably more frequent than they are throughout the rest of the state—and considerably more frequent today than they were under the old CPA. Recent cases and empirical data indicate a need for legislative action.

I. REAL PROPERTY SUBJECT TO EXECUTION

Any property which can be assigned or transferred may be subjected to an execution sale in satisfaction of a money judgment, except for property which is exempt. Like 45 other states, New York provides a special protection for the "homestead." This ex-
emption, however, is virtually unknown, unused and unrelated to the financial realities of modern life. Few homes are exempt, because homeowners must record the exemption before a debt is contracted and the archaically low financial protection gives them little incentive to do so.

Although few homeowning New York judgment debtors evade their creditors by taking advantage of the homestead exemption, many attempt to discourage their creditors by exploiting New York’s almost unique law respecting tenancies by the entirety. New York’s judicial interpretation of this old estate represents an unsuccessful attempt to reconcile the desire to protect the marital community with the desire to protect the rights of creditors. The result is that neither interest is protected and the consequences are often bizarre for both debtor and creditor. Both the homestead exemption and the tenancy by the entirety are important in an evaluation of New York’s procedures for enforcing money judgments.

A. The Homestead Exemption

CPLR § 5206(a) provides that property “not exceeding two thousand dollars in value, owned and occupied as a principal residence by a householder or a woman” may be exempt from application to the satisfaction of money judgments if it is so designated. There is no exemption from debts incurred prior to the designation (and no exemption from taxation or from a purchase money mortgage). In order to designate property as exempt the owner must record the fact that he has claimed the exemption in the office of the county clerk. Homesteads worth more than $2000 are exempt up to that

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Laws of 1850, c. 260) and the Court of Appeals defined its rationale shortly thereafter in Robinson v. Wiley, 15 N.Y. 489, 494 (1857):

The legislature were of the opinion, looking to the advantages belonging to the family state in the preservation of morals, the education of children, and possibly even, in the encouragement of hope in unfortunate debtors, that this degree of exemption would promote the public welfare, and perhaps in the end, benefit the creditor.

Throughout the 20th Century the homestead exemption has been regarded with increasing skepticism: need for such an exemption in an urbanized society is “less urgent and universal” (Comment, State Homestead Exemption Laws, 46 YALE L.J. 1023, 1040 [1936-1937]; the exemption exemplifies “favoritism shown the upper or middle-class citizen” (Davis, Exempt Property, 53 IOWA L. REV. 366, 373 [1967-68]); the exemption is unfair to the urban and the poor (1967 N.Y. LEG. DOC. No. 90, TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE 207).

19. CPLR § 5206(a).

20. CPLR § 5206(b). The statute uses the words “recording officer.” In New York City the City Register is the recording officer (for all boroughs except Staten Island which has its own county clerk).
amount, the lien of the judgment attaching to the surplus.\textsuperscript{21} A judgment creditor must commence a special proceeding in order to force a sale of designated property worth more than $2000.\textsuperscript{22} If a sale is ordered by the court it can be conducted either by the sheriff or a receiver, at the judge's discretion. The court then marshals the proceeds of the sale so that "the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold."\textsuperscript{23}

CPLR § 5206(a) was amended in 1969 to raise the exemption from $1000 (the figure set when the law was first adopted in 1850) to $2000.\textsuperscript{24} The amendment was based on a proposal made by the State's Attorney General as an antidote for the abuses of enforcement procedures detected in some parts of the State by the Bureau of Consumer Frauds and Protection. The Bureau had made a study which disclosed that in many cases homes are sold for "shockingly low" prices and that the judgments involved are frequently for small sums.\textsuperscript{25}

The majority of states which have homestead exemption statutes have set dollar limits which are considerably higher than New York's $2000. The dollar limits in these states range to a high of $40,000;\textsuperscript{26} four states have unlimited exemptions.\textsuperscript{27} Only 14 states in addition to New York have dollar limits of $2000 or less.\textsuperscript{28}

\begin{itemize}
  \item \textsuperscript{21} CPLR § 5206(c).
  \item \textsuperscript{22} CPLR § 5206(f).
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} N.Y. Laws 1969, c. 961, effective Jan. 1, 1970.
  \item \textsuperscript{25} 1969 New York State Legislative Annual 5-6. The Attorney General recommended that the exemption be raised to $5000.
  \item \textsuperscript{27} Fla. Const. art. 10 § 4 (1968); Texas Const. art. 16 § 51 (Supp. 1972) (rural property-no dollar limit); Minn. Const. art. 1 § 12, Minn. Stat. Ann. § 510.01 (1966); Minn. Stat. Ann. § 510.02 (Supp. 1972-73); Kan. Const. art. 15 § 9 (1969).
  \item \textsuperscript{28} Alabama § 2,000, Ala. Code tit. 7, § 625 (1960); Georgia § 500, Ga. Code Ann.
New York is one of but four states which require that a homeowner must record the fact that he has designated his home as exempt and must record that fact prior to contracting the debt. Some of those states which require recordation provide only that the exemption must be filed prior to a judgment sale. Statistics from the four states which require recordation prior to the contracting of the debt indicate that homeowners in these states do not take advantage of this protection.

It is difficult to ascertain the number of exemptions which are claimed in New York, because the designation can be recorded either in a conveyance or in a separate homestead exemption recording book. However, few homes are recorded by either method in New York's 62 counties. Reports from 49 counties which maintain homestead exemption recording books (not all counties provide this alternative method of recordation) show that only 59 exemptions were recorded in these 49 books during the period 1950 to the summer of 1972; only 14 exemptions had been recorded during the two and one-half years following the effective date (January 1, 1970) of the amendment increasing the exemption. In Nassau and Suffolk Counties, where execution sales are more frequent than in the rest of the state and often highly publicized, only 17 homes were designated exempt.

§ 51-1301 (1965); Iowa §500, IOWA CODE ANN. § 561.2 (1950); Kentucky §1,000, KY. REV. STAT. ANN. § 427.060 (1970); Maryland §500, MD. ANN. CODE art. 83, § 8 (Supp. 1971); Missouri §1,500 (rural), MO. ANN. STAT. § 513.475 (1952); Nebraska §2,000, NEB. REV. STAT. § 40-101 (1968); New Hampshire §1,500, N.H. REV. STAT. ANN. § 480.1 (1968); North Carolina §1,000, N.C. CONSTR. ART. X § 2 (1970); Ohio §1,000, OHIO REV. CODE ANN. § 2329.73 (Page 1954); South Carolina §1,000, S.C. CODE ANN. § 34-1 (1962); Tennessee §1,000, TENN. CODE ANN. § 26-301 (1955); Virginia §2,000, VA. CODE ANN. § 34-4 (1970); West Virginia §1,000, W. VA. CODE ANN. § 38-9-1 (1966).

29. The other three states are: Maine, ME. REV. STAT. ANN. tit. 14, § 4552 (1964); Massachusetts, MASS. GEN. LAWS ANN. ch. 188, § 2 (1959); West Virginia, W. VA. CODE ANN. § 38-9-2 (1966).


31. A note in 97 U. PA. L. REV. 677 (1948-1949) describes a survey of recorded declarations in Maine and W. Va. where recordings are separately filed. In 33 of the 73 counties in the two states only 66 exemptions had been filed in the 20 year period 1928-1948. The authors noted that few exemptions were claimed in Massachusetts. Hawkins, Homestead Exemptions, 65 HARV. L. REV. 1289, 1300, 1301 (1949-1950) commented on this study and concluded that homestead exemptions in states which require recordation prior to contracting the debt "atrophy from disuse."

32. CPLR § 5206(b).

33. The Hofstra L. REV. directed inquiries to the county clerks or recording officers of New York's 62 counties during the summer of 1972. Replies were received from 56 counties; 49 counties reported that they maintained homestead exemption recording books. Tabulations of the entries were made by officials in the offices or, in a few cases, by members of the REVIEW.

34. See note 14 supra.

35. See note 119 infra.
as exempt in homestead exemption recording books during the period 1950-1972.

Although it would be impossible to count the number of exemptions recorded in conveyances, some authorities have estimated that there are not many: an official in the New York City Register's Office estimates that "no more than one dozen homes have been recorded in the last forty years" by homeowners in the Bronx, Queens, Brooklyn, and Manhattan, and "no more than four" of these have been recorded since the 1970 amendment took effect. An official in the Monroe County Clerk's Office (in the City of Rochester) writes that "the statute is still in existence, but it hasn’t been used in years."

In its current moribund state, New York's homestead exemption law presents no obstacle to the executing judgment creditor or his assignee. Only two sheriffs from the 36 counties surveyed by the Hofstra Law Review, had ever had any experience with exempt real property.

B. The Tenancy By The Entirety

A tenancy by the entirety is "created by a conveyance to husband and wife, whereupon each becomes seized and possessed of the entire estate and after the death of one the survivor takes the whole." Unlike a joint tenancy or a tenancy in common, the tenancy by the entirety is an interest in land which cannot be divided, except by the joint acts of the parties or by divorce. In New York State, § 6-2.2(b) of the Estates, Powers and Trusts Law stipulates that a "disposition of real property to a husband and wife

38. See note 14 supra.
39. Black's Law Dictionary 1635 (rev. 4th ed. 1968), Pollaro v. Pollaro, 144 App. Div. 242, 130 N.Y.S. 1133 (2nd Dept. 1911) held that one tenant by the entirety could not force partition without the consent of the other.
40. See 4A Powell, The Law of Real Property § 615 (1972): "The... joint tenancy stressed the presence of the four unities—the unity of interest, the unity of title, the unity of time, and the unity of possession. All four of these unities, plus the additional fact of the tenants being husband and wife, characterized the tenancy by the entireties." And id. at § 618: "[E]ach joint tenant has the privileged power to convey his fraction of the ownership. ... A partition accomplishes a severance after judgment."
41. See, id., § 601: "The characteristic attribute of a tenancy in common is unity of possession... Historically, tenancies in common were... differentiated from joint tenancies by the absence from tenancies in common of a right of survivorship."
creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common."

This ancient estate is derived from the common law fiction that husband and wife are one. The common law tenancy by the entirety, which existed before married women were given the right to control and use their own property, denied the wife any interests in the estate aside from the right of survivorship. Under the common law, because the husband controlled the property held by the entirety and could use his interest therein as a basis for credit, his creditors were permitted to reach his entire interest in the estate. The wife's interest, however, "although indefeasible without her consent, was a mere expectancy of speculative value, and was regarded at common law as being unavailable to her creditors." Accordingly the wife's separate creditors could not levy on her interest. The transferee of the husband's interest at an execution sale took that interest subject to the wife's right of survivorship: if she survived her husband, the whole fee vested in her; if the wife predeceased her husband, the transferee was able to take the entire fee.

The tenancy by the entirety was abolished in approximately half the states as a result of passage of Married Women's Property Acts during the 19th century. Among those states which retained the tenancy, only Massachusetts retained it in its pure common law form; the others made efforts to modify the tenancy so that it would be in harmony with the new equality granted to married women. In these jurisdictions the common law immunity from creditors that had been reserved to the wife's interest was extended to the husband's too, with the result that in those states today creditors cannot levy on the separate interest of either spouse. New York and three other states (New Jersey, Arkansas, and Oregon) modified the tenancy by the entirety to permit creditors to reach the separate interest of either spouse but not to the extent of destroying the non-debtor

44. N.Y. Est. Powers & Trusts Law § 6-2.2(b) (McKinney 1967).
45. 2 J. Kent, Commentaries * 132. Beach v. Hollister, 3 Hun. 519, 520 (Sup. Ct. Monroe County 1895).
47. Id. at 313, 39 N.E. at 339.
49. Id. at 198, 199.
50. See, e.g., Raptes v. Pappas, 259 Mass. 37, 155 N.E. 787 (1927) (creditor can reach the husband's interest); Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929) (creditor can not reach the wife's interest).
51. Huber, supra note 48, at 203.
spouse's right of survivorship. Thus, in New York, although the creditor can force a sale of the debtor-spouse's interest, the purchaser of such an interest is not permitted to partition the property. The purchaser is entitled to one-half the rents and profits, if any, during the joint lives. In addition, some courts have held that a purchaser is entitled to share the occupancy of non-income producing residential property with the non-debtor spouse. If there are no rents or profits and if the purchaser does not wish to share occupancy, or is denied the right to occupancy by the courts, the purchaser is limited to engaging in a macabre death watch: if his predecessor in interest dies before the non-debtor spouse the purchaser has lost his investment, since the non-debtor spouse will then take the entire fee by virtue of the right of survivorship; however, if the non-debtor spouse predeceases the debtor, the purchaser will have gambled and won since he will then take the whole fee.

Predictably, the prices paid for one tenant's interest in a tenancy by the entirety in New York are low: in Community Capital Corp. v. Lee, for example, a husband's interest in an $18,000 home (encumbered by a $5000 mortgage) was sold for $197.25 in an attempt to satisfy a $330.05 judgment; in Department of State v. Blackman one tenant's interest in a $75,000 home (encumbered by a $30,000 mortgage) was sold for $575.49. The low prices, plus the fact that in New York debtors can no longer redeem property after a sale, seem to encourage speculation. A case in point is Department of State v. Blackman wherein the respondents operated a collection agency on Long Island and made a practice of soliciting judgment creditors and purchasing, or agreeing to collect for a fee, money judgments which had been entered against individuals who owned

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54. Bartowaik v. Sampson, 73 Misc. 446, 133 N.Y.S. 401 (Oneida County Ct. 1911).
61. New York Department of State, Division of Licensing Services, hearing, Oct. 18, 1971 (mimeo).
property with their spouses as tenants by the entirety. After acquiring a judgment, they would execute it, knowing "that the execution sale of the interest of a tenant by the entirety would have very little market value" thus eliminating public bidding and allowing the respondents to purchase the interest at minimum cost.\textsuperscript{62} Having purchased such an interest they would try to purchase the interest of the remaining spouse as well, or resell the interest acquired to the debtor, or "attempt to harass and intimidate the spouse in possession to surrender possession thereof."\textsuperscript{63}

The low prices paid for interests in tenancies by the entirety probably account for the fact that creditors do not often initiate such sales. Reports from sheriffs throughout New York indicate that creditors often direct them "not to go this route" with property so held and that few such sales are conducted.\textsuperscript{64} Another deterrent is the attitude of the courts. The courts occasionally are willing to use the broad discretionary powers to supervise enforcement procedures, granted them by the CPLR, to prevent the sale of an interest in a tenancy by the entirety when such a sale threatens unfortunate results for the debtor. (Judicial supervision of enforcement procedures is discussed below.)

When creditors do effect a forced sale of an interest in a tenancy by the entirety they not only run the risk that the price will be too low to satisfy the judgment, but they also run the risk that what money is realized will be withheld if separate judgments are enforced against each spouse, on the theory that the proceeds of the sale retain the characteristics of the real property. Thus, in \textit{In re Chairmaster, Inc.},\textsuperscript{65} for example, property held as a tenancy by the entirety was subjected to a sheriff's sale in satisfaction of three judgments. The City of New York had a judgment against the husband which had been docketed in May, 1971, and a judgment creditor had a judgment against the husband which had been docketed in October, 1971. In addition, the same judgment creditor had a judgment against the wife. The court was faced with the problem of how to divide the proceeds of the sale. Since New York statutes stipulate that priority is determined by the order of docketing (see discussion of procedures below), New York City's judgment was a prior claim on the proceeds of a sale of the husband's interest. But New York City had no claim on the proceeds of a sale of the wife's interest.

\textsuperscript{62} Id. at 9.
\textsuperscript{63} Id.
\textsuperscript{64} See note 14 supra.
\textsuperscript{65} (Sup. Ct. Nassau County) 168 N.Y.L.J. 13, July 20, 1972, at 11, col. 8.
The court decided that the proceeds would be withheld from both claimants; distribution would "await the happening of the death of the wife or that of the husband." 66

New York's adaptation of the tenancy by the entirety has many critics. Some have urged that the tenancy be abolished in favor of a joint tenancy or that, at least, a purchaser at an execution sale be entitled to partition. 67 If there were a right to partition it would curtail speculation, would lead to fairer prices, and would introduce an element of certainty into enforcement procedures. There are better ways to protect the marital community. 68 The protection afforded by the tenancy by the entirety is purely speculative since the debtor’s family loses the home entirely should the non-debtor spouse predecease the debtor. New York should fish or cut bait: if the justification for the tenancy is the protection of the marital community, New York should do what the majority of states which have retained the tenancy have done—immunize the spouses’ separate interests from separate creditors completely; if the justification is the protection of the rights of creditors, the creditor or purchaser should be allowed to sell the property and share the proceeds with the non-debtor spouse.

II. Execution Sales

A. Pre-Sale Procedures

In order to effect an execution sale of real property, regardless of whether the property is held by the debtor in his own name or concurrently with his spouse, the judgment creditor must first have secured a judgment “for a sum of money or directing the payment of a sum of money." 69 The large number of default judgments en-

66. Id. There is precedent for this approach. In Hawthorne v. Hawthorne, 24 Misc. 2d 508, 511, 208 N.Y.S.2d 79, 82 (Sup. Ct. Herkimer County 1960), it was held that a tenancy by the entirety could not be terminated by an involuntary act such as destruction of the property by fire: the “entirety relationship continued from the destroyed structure into the proceeds of the fire insurance policy.” Bennett v. Fish, 2 Misc. 2d 1051, 157 N.Y.S.2d 871 (Sup. Ct. Albany County 1956), involved a surplus money proceeding following a mortgage foreclosure on property held as a tenancy by the entirety. The court held that the surplus funds were constructively real property and, hence, distribution to the judgment creditor claimants must await termination of the estate by the death of one of the tenants.


68. Huber, supra note 48, at 205-207, suggests that better protection for the marital community can be provided by revised exemption laws.

69. CPLR § 105(4). CPLR § 5101 provides that a “money judgment and an order directing the payment of money, including motion costs may be enforced as prescribed in article 52.”
tered in New York courts because debtors fail to defend judgment actions has been attributed, in a study by Caplovitz, to the fact that often defendants are not served with the summons and complaint.\textsuperscript{70} Process serving in New York is a private industry and “has been widely criticised for stimulating ‘sewer service.'”\textsuperscript{71}

The CPLR contains no minimum limit on the size of a judgment which may be enforced against real property, and many judgments sought to be satisfied in this manner are for small sums. During the first six months of 1972, for example, 152 judgment creditors (or their assignees) delivered executions to the Sheriff of Suffolk County directing him to levy on their debtor’s real property. The judgments were for sums of money ranging from a low of $122.47 to a high of $120,456.05; the great majority (131) were for sums of less than $5000; 36 were for less than $500. In Nassau County the Sheriff received 190 executions directing a sale of real property during this same period and the judgments ranged from a high of $60,794.60 to a low of $156.44.\textsuperscript{72}

The CPLR provides that a money judgment has a life span of 20 years during which time it is good and enforceable.\textsuperscript{73} The enforcement procedures provided in the CPLR are simple and effective.

A condition precedent to enforcement is that the judgment be docketed in the county wherein the debtor’s real property is located; an automatic lien on the property is created by the docketing.\textsuperscript{74} The lien, which has a life of ten years,\textsuperscript{75} prevents evasive action by the debtor: no transfer of the property, with a few exceptions,\textsuperscript{76} is effec-

\textsuperscript{70} D. Caplovitz, Debtors in Default, Report to the O.E.O., grant no. 669702, N.Y. CAP, Jan. 1970 (mimeo).
\textsuperscript{71} Id. at 495.
\textsuperscript{72} See note 14 supra.
\textsuperscript{73} CPLR § 211(b).
\textsuperscript{74} CPLR § 5203(a). It should be noted that procedure with respect to registered property is detailed in the REAL PROPERTY LAW § 417 (McKinney 1968).
\textsuperscript{75} CPLR § 5203(a). This section stipulates that the 10-year period begins with the filing of the judgment-roll. Since this precedes the docketing, the life of the lien could be less than ten years, particularly in those cases where the judgment is filed in one county and the land is situated in another. In that case, a transcript must be filed with the clerk of the county wherein the real property is located. See 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5203.04 (1971).
\textsuperscript{76} CPLR § 5203(a) contains six exceptions: (1) a transfer or the payment of the proceeds of a judicial sale, which shall include an execution sale, in satisfaction either of a judgment previously so docketed or of a judgment where a notice of levy pursuant to an execution thereon was previously so filed; or (2) a transfer in satisfaction of a mortgage given to secure the payment of the purchase price of the judgment debtor’s interest in the property; or (3) a transfer to a purchaser for value at a judicial sale, which shall include an execution sale; or (4) when the judgment was entered after the death of the judgment debtor; or (5) when the judgment debtor is the state, an officer, department, board or commission of the state, or a municipal corpo-
tive against the lienor. The judgment debtor can not escape the lien by selling the property or by putting it in his spouse's name; property acquired after the docketing is immediately subject to the lien. At any time during this ten-year period the judgment creditor or his assignee may force a sale of the property (or of his debtor's interest in the property) by simply issuing an execution to the sheriff of the county in which the property is located. The sale will be held as a public auction eight weeks after the sheriff publishes a notice of sale, unless it is postponed by the sheriff or stayed or canceled by the courts. After the expiration of the lien, the judgment creditor or his assignee may re-establish a lien on specific property at any time during the remaining years of the judgment's life by issuing an execution directing the sheriff to file a notice of levy describing the particular property to be sold.

Although the enforcement procedures are simple they are closely supervised by the courts. A senior creditor will lose his priority with respect to the proceeds of a sale, in the event there are multiple creditors, if he does not get his judgment docketed first. And if a sale produces or threatens to produce inequitable results for the debtor the courts will scrutinize the procedures closely in an effort to find a way to help the debtor.

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80. CPLR § 5236(a). Subsection c provides that the sheriff will deliver the notice of sale to the debtor by personal service and will notify others having liens on or recorded interests in the property.
81. CPLR § 5225.
83. In the Practice Commentary for CPLR § 5236 (McKinney Supp. 1971) at 147, Siegel cites Community Capital Corp. v. Lee, 58 Misc. 2d 94, 35, 294 N.Y.S.2d 836, 837 (Sup. Ct. Nassau County 1968), as an example of the courts' "strong inclination to seek out ways of helping the judgment debtor." In this case the homeowners filed a counterclaim attacking the legality of the sale when the purchaser (a collection agency) of the husband's interest sought a declaratory judgment putting it into possession of the house with the debtor's wife. The attack was based on a technicality. The judgment, docketed in 1966, had been executed in 1966, five days before the lien expired. However, it was executed pursuant to the provisions for re-establishing a lien after the expiration of the lien created by the docketing of the judgment (CPLR § 5225). The debtors contended that the creditor's assignee should have waited five days before using this procedure. The court agreed, and vacated the sale. According to Siegel, this holding was "a hypertechnical construction" of the CPLR, inconsistent with its "creditor protecting aims." See Kazmeroff v. Ehlinger, 43 Misc. 2d 942, 252 N.Y.S.2d 560 (Sup. Ct. Nassau County 1964), wherein junior judgment creditors failed to prevent...
B. The Sale

The CPLR contains no provisions for insuring that fair prices are paid at execution sales. The CPLR draftsmen predicted that the abolition of the right of redemption would result in higher prices, since the purchaser at an execution sale would take immediate title instead of waiting for fifteen months to take title as was true under the old CPA. However, statistics demonstrate that higher prices have not resulted. In Suffolk County, for example, the winning bids at the sales conducted during the first six months of 1972 ranged from a low of $200 to a high of $8500; the majority of the winning bids (fifteen out of twenty-five) were for less than $1000. In Nassau during this same six-month period the winning bids ranged from a low of $180.74 to a rare high of $34,000. These figures, in some cases, can be explained by factors such as whether or not the debtor’s interest in the property was an undivided interest, whether or not the property was mortgaged, since the purchaser at a judgment sale takes the property subject to a prior mortgage, and whether or not the property was subject to a federal lien. Even so, the prices paid bear little resemblance to market values in those counties where the demand for housing exceeds the supply. The low prices explain why only four judgments were satisfied by the 25 sales conducted during the first six months of 1972 in Suffolk County.

Although the CPLR contains no formal provision for insuring adequate prices, it appears to give sheriffs discretionary powers in this respect. The statute directs the sheriff to sell property at public auction “as a unit or in such parcels ... as in his judgment will bring the highest price.” One court has construed this provision as a grant of authority to the sheriff, under certain conditions, to reject bids which seem grossly inadequate. The case, Morgan v. Maher, in-
volved the Nassau County Sheriff's Office, which rejected a bid at a sale held in 1969. The rejected bid was the initial and only bid received, and it was for the announced minimum amount—§174.43—necessary to cover the costs of the sale. The Sheriff, according to the court, had made no effort to ascertain the value of the property or the extent of the debtor's interest. The court held that "rejection of a bid and postponement of the sale should . . . be based upon something more than mere conjecture or surmise."92 Accordingly, the court ordered the Sheriff to deliver a deed to the purchaser. This decision suggests that if the sheriff makes an effort to estimate the value of the property to be sold, he can reject bids which are inadequate. If this interpretation is followed, the courts would uphold the practice followed by the Sheriff's Office of the City of New York: there, an informal appraisal of all real property which has been levied on is made and the auctioneers are instructed not to accept bids without first checking with the Office. If a bid is deemed inadequate the sale is adjourned and rescheduled for a later date. This procedure has not been challenged in the courts.93

Better and more reliable protective devices exist in many other states. In some jurisdictions a formal appraisal is required by statute before real property can be subjected to an execution sale, and the statutes define what relationship the sale price must bear to the appraised market value. Fifteen states provide for an appraisal;94 in five of these real property cannot be sold at a forced sale for less than two-thirds of its appraised market value.95 Pennsylvania has set up "a fair market value"96 standard, while Hawaii requires judicial review and the withholding of approval if the price is "inadequate."97 In comparison with these provisions, New York's grant of discretionary power to sheriffs to make such determinations (if indeed that is the legislative intent) would seem inadequate: there is no provision which compels sheriffs to take this approach (and note

92. Id. at 644, 303 N.Y.S.2d at 578.
94. CONN. GEN. STAT. ANN. § 52-371 (1958); IND. ANN. STAT. § 2-3701 (1968); IOWA CODE ANN. § 626.93 (1950); LA. CODE CIV. PROC. art. 2332 (1961); KY. REV. STAT. ANN. § 427.020 (1970); ME. REV. STAT. ANN. tit. 14, § 2001 (1964); MASS. GEN. LAWS ANN. ch. 236, § 3 (1959); MICH. COMP. LAWS ANN. § 600.6025 (1968); N.H. REV. STAT. ANN. § 529.2 (1955); N.M. STAT. ANN. § 24-2-7 (1953); OHIO REV. CODE ANN. § 2329.17 (Page 1954); OKLA. STAT. ANN. tit. 12, § 751 (1960); UTAH CODE ANN. § 78-23-2 (1953); W. VA. CODE ANN. § 38-4-22 (1966); Wyo. STAT. ANN. § 1-377 (1957).
95. IND. ANN. STAT. § 2-3701 (1968); IOWA CODE ANN. § 626.93 (1950); N.M. STAT. ANN. § 24-2-5 (1955); OHIO REV. CODE ANN. § 2329.20 (Page 1954); Wyo. STAT. ANN. § 1-379 (1957).
that the Nassau Sheriff's Office has ceased the practice altogether since Morgan); there is no provision which mandates a formal appraisal; and there are no established standards for determining what relationship the bid price should have to the market value of the property sold.

With respect to price considerations, the judgment debtor in New York is not afforded statutory protection equal to that provided another class of debtor—the mortgagor whose mortgage is foreclosed. The Real Property Actions and Procedures Law, which permits deficiency judgments to be entered following mortgage foreclosures, provides that "the fair and reasonable market value" of the premises sold shall be deducted from the amount owed if the market value is higher than the sale price. In the case of an execution sale, an unsatisfied judgment remains as a lien on the debtor's other property (or if the sale was held pursuant to a notice of levy filed after the expiration of the lien, the judgment creditor is at liberty to take similar action against other property). In either case the inadequacy of the price realized at the sale is not considered in determining what the debtor still owes.

C. Finality of the Sale

Under the old CPA a debtor was provided some protection since he had the option of redeeming the property within twelve months after sale. In addition, a creditor was permitted to redeem during a three-month period following the year allotted to the debtor. During this 15-month period the debtor retained possession of the property and was entitled to rents and profits. The CPLR draftsmen proposed that these provisions be abolished and that an eight-week delay between the notice of sale and sale itself be substituted. The draftsmen's comment on this proposal was that:

The purchaser at a judicial sale will take immediate title, and the judgment debtor or other creditors will not be able to redeem the property after sale. This should substantially increase the purchase price at the judicial sale and should therefore inure to the benefit of both judgment debtors and creditors.
This revision has failed to insure higher prices. In addition, it has had other repercussions. Some observers have suggested that it has resulted in an increase in execution sales, and the court in Lee v. Community Capital Corp. suggested that it explains the pervasive presence of the professional collector:

Contrary to expectations, the legislative intent in abolishing the right of redemption has not consistently led to fair sales at full value but [to] a practice of purchasing judgments for the sole purpose of levy and execution against real property.

The New York State Sheriff's Association advocates the re-establishment of a period for redemption. The CPLR grants sheriffs discretionary power to postpone sales, and now that the sale effectively terminates the debtor's interest in the property, there is considerable pressure exerted upon sheriffs by judgment debtors to permit them adequate time in which to satisfy the judgment (and the interest accrued since it was docketed) and prevent the sale.

New York is one of only twenty-one states, including the District of Columbia, which have no provision for redeeming real property after it has been sold at a judgment sale. Thirty states provide periods of redemption ranging from three months to two years.


103. Letter from Edward Dillon, Counsel for the New York State Sheriffs' Association, to Hofstra L. Rev., Sept. 5, 1972: "[T]his Association was very decided in its views that the former redemption period should be restored by the legislature, with respect to sale of real property . . . . This Association still feels that the redemption period should be re-adopted."

104. CPLR § 5236(a).

105. CPLR §§ 5003, 5004.


With respect to the right of redemption, New York discriminates among classes of debtors: delinquent taxpayers are permitted to redeem property within one year of a tax sale; lessees are permitted to redeem within one year in those cases where the remaining term of the lease is more than five years.

Although the abolition of the right of redemption has failed to achieve its purpose, the inauguration of an eight-week delay between the notice of sale and the sale itself has had positive results. Many sales are canceled after an execution has been issued because the debtor has managed to pay off the obligation or has achieved a settlement with the creditor. Thus, the mere threat of an execution sale would seem to be a potent weapon in the creditor's arsenal. The sheriffs often play a significant role in this process, using their discretionary authority to postpone sales when, in their opinion, the debtor is making an effort to satisfy the judgment or when requested to postpone a sale by the creditor.

Although the CPLR's substitution of a pre-sale hiatus in place of the CPA's redemption period enables some debtors to satisfy their obligations and prevent a sale of their homes, it provides no protection at all for the debtor who can not raise the money in time. Such a debtor is destined to lose his home and, possibly, because the CPLR contains no systematic procedures which insure fair prices, to

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108. N.Y. REAL PROP. TAX LAW § 1010 (McKinney 1960).
110. For example, during the first six months of 1972, 76 executions were filed with the Sheriff of New York City, directing a sale of real property; 25 of the underlying judgments were satisfied during that six month period and six were settled; in Nassau 74 proposed sales were canceled during that period because judgments were satisfied or settled (out of 190 executions delivered during the six month period). See note 14 supra.
111. The Suffolk County Sheriff's office has established standard procedures which include personal visits to the homes of debtors whose property has been levied on in those cases where the amount of the judgment is $1,000 or less. An attempt is made to work out arrangements to satisfy the judgment before publication of the notice of sale. See Suggested Procedure to Follow, Sale of Real Property, Execution, handbook used in the Suffolk Sheriff's office, no date, no pagination. The Sheriff of rural Jefferson County, where there has not been an execution sale within the memory of anyone working in the Civil Department, writes that every effort is made "for the defendant to pay under other circumstances." See note 14 supra. It should be noted that CPLR § 8012(b)(2) provides that the sheriff is entitled to poundage (a percentage of the value of the property) even when the sale is canceled because of a settlement.
lose it for an inadequate consideration unless he has access to a court.

Professor Siegel, author of the CPLR's official commentary, has observed:112

[T]he judgment debtor we deal with here is one whose economic status makes him less responsive to the processes of the law, not out of indifference, but apparently out of ignorance and fear.

... ...

[U]ntil public media bring home to all people of every economic level... the methods of securing legal assistance, these abuses will continue.

Siegel urges that legislative correction of abuses involve some sort of mandatory scheme for bringing the home-owner into court prior to a sale.

III. JUDICIAL SUPERVISION OF ENFORCEMENT PROCEEDINGS

Because judicial supervision of enforcement procedures is the only debtor protection provided by the CPLR, the courts have shown a willingness to intervene on behalf of those debtors who manage to get their cases before them.113 Enforcement procedures are thus clouded with uncertainty for the judgment creditor or his assignee.

The CPLR provides several grants of authority to the courts to supervise enforcement procedures: §§ 317114 and 5015115 permit the courts to open the underlying judgment on a wide variety of grounds; § 5240116 gives broad authority for policing the procedures themselves. The courts have also attempted to curtail the activities of collection agencies engaged in executing on and purchasing real property by application of the Judiciary Law's proscriptions on champerty.117

A. Relief from Judgments

CPLR §§ 317 and 5015 provide that default judgments can be opened because of a failure of service of process or because of "excusable" default; § 5015 provides, in addition, that any judgment can

113. See, e.g., note 83 supra.
114. CPLR § 317.
115. CPLR § 5015.
116. CPLR § 5240.
117. N.Y. JUDICIARY LAW § 489 (McKinney 1968).
be opened because of newly discovered evidence, fraud, misrepresentation, misconduct, or lack of jurisdiction.

Weinstein, Korn and Miller, in their treatise on the CPLR, assert that:

The practice in New York relating to granting relief from judgments and orders has been extremely permissive. Frequently, it has led to a subordination of the policies underlying finality of judgments in favor of the avoidance of inequity in a given case.  

An example of judicial leniency with respect to judgments in cases where enforcement has produced unfortunate results is Canadian Capital Corp. v. Mascaro, wherein a default judgment was vacated twelve years after it had been entered. The judgment was in the sum of $252.40 for furniture allegedly purchased from an itinerant salesman, and had been entered in 1956. In 1968 the judgment creditor’s assignee directed the sheriff to sell the debtors’ $25,000 home. After the property had been sold for $11,000 and the debtors ordered evicted, the debtors sought to have the judgment opened. Even though affidavits of proof of service of process in connection with the original action were produced, the court vacated the judgment, the assignment, and the sale, solely on the debtors’ bare assertion that they had not been served.

B. Modification of Enforcement Procedures under § 5240

The CPLR draftsmen introduced a new and powerful debtor protective device which is available even when the judgment itself is unassailable and even when the procedures followed by the judgment creditor are technically correct. Section 5240 provides the court with authority to make an order “denying, limiting, conditioning, regulating, extending, or modifying the use of any enforcement procedure.” The draftsmen said of their innovation:

This rule is new. It is designed to prevent “unreasonable annoyance, expense, embarrassment, disadvantage, or other

118. 5 WEINSTEN, KORN S. MILLER, NEW YORK CIVIL PRACTICE ¶ 5015.02 (1971).
119. (Sup. Ct. Queens County) 160 N.Y.L.J. 85 Nov. 8, 1968 at 18, col. 7. This case was widely publicized in Long Island papers (Newsday, Oct. 15, 17, 18, 1968) and prompted State Senator Speno to call for an investigation by the Attorney General’s Bureau of Consumer Frauds and Protection. The case was complicated by the fact that the debtors also claimed not to have received a notice of the pending execution sale. CPLR § 5226(c) was amended by Laws 1969, c. 1089 to provide that the sheriff make personal service of the notice of sale on the debtor if possible.
120. THIRD REP., supra note 2, at 314.
prejudice to any person or the courts." The high incidence of harassment in the enforcement of judgments renders the increased supervision of the courts desirable. The rule is stated as broadly as possible.

The New York Court of Appeals has not ruled on the precise parameters of this section, but the Appellate Division has construed it as "clearly intended to empower the courts to prevent unreasonable annoyance and abuse in the use of the provisions of article 52 of the CPLR in enforcing judgments."

The section was construed by the Nassau County Supreme Court in October 1972 in *Holmes v. W. T. Grant, Inc.* as authorization to prevent a sale which would have had adverse effects on the family involved. The family, a husband, wife, and four children, received public assistance. The court took judicial notice of the critical housing shortage existing in the County and of the fact that it would be impossible to find other housing at a comparable cost to the family, should they be evicted. The court reasoned that "the relative enormity of the harm to the homeowner is greater than that to the creditor" and that this was "a valid basis for postponing radical enforcement and protecting the home."

Pursuant to § 5240 the proposed sale was canceled and the debtors were ordered to make monthly payments instead.

As noted above, CPLR § 5240 has been used as authority for preventing sales of one tenant's interest in tenancies by the entirety. In *Hammond v. Econo-Car of North Shore, Inc.*, for example, the court canceled the proposed sale of the debtor's interest in a home occupied by a family receiving public assistance on the ground that "the sale . . . would convey a hybrid tenancy in common, with survivorship but no partition rights, to a third-party stranger who then could have some conceivable right to use immediately an undivided one-half share of the property." The creditor was restrained from executing the lien of his judgment until such time as the house became vacant or was sold, or until the wife predeceased the husband. In *Gilchrist v. Commercial Credit Corporation*, a pending execution sale was canceled pursuant to § 5240 on the ground that the sale would work a hardship on the debtor's family (an estranged wife and four infants subsisting on a grant from the Department of Social

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123. 71 Misc. 2d 546, 547 (Sup. Ct. Nassau County 1972).
Services), since there was a risk that the children’s home would be lost if their mother did not survive their father.

CPLR § 5240 has not yet been construed as authority to vacate an execution sale of real property. However, as the cases demonstrate, completed sales can be and sometimes are vacated pursuant to the CPLR’s provisions for opening the underlying judgment.

C. The Courts and the Collection Agency

The cases tried on Long Island suggest that abuse of enforcement procedures is often attributable to the activities of professional collectors. They are an ubiquitous presence. They take assignments of money judgments, either as outright purchases or on a contingent basis. Sometimes they forego formal assignment and execute judgment liens against real property in the creditors' names, in return for a share of the proceeds. Often they appear at the subsequent sales as prospective purchasers. At least one professional collector has been shown to have acquired large amounts of real estate in Nassau County which he holds and controls through a confusing variety of corporate enterprises. Occasionally professional collectors appear in court as landlords accused of violating the law with respect to health and safety regulations.

Collection agencies take money judgments for a small fraction


127. See Department of State v. Blackman, New York Department of State, Division of Licensing Services, hearing, Oct. 18, 1971 (mimeo).


129. In People v. Berlin, 65 Misc. 2d 245, 317 N.Y.S.2d 191 (Nassau County Dist. Ct. 1971), the defendant Berlin is described as an officer in two corporations. In another action, brought by the State Attorney General, involving mortgage transactions, Berlin is described as being an officer, principal or stockholder in eight corporations which were the instruments through which the defendants held title to real property. State v. Cortelle, File Number 1025-72, filed Jan. 28, 1972 (Sup. Ct. Nassau County).

130. See Blackman v. Walker, 316 N.Y.S.2d 930 (Nassau County Dist. Ct. 1970), a summary proceeding brought by a landlord seeking eviction of a tenant for non-payment of rent. The tenant, who received public assistance, was permitted to impede the Department of Social Services which had allegedly withheld rent because of violations affecting health and safety. The landlord was Sheila Blackman, described in Bottenus v. Blackman, 336 N.Y.S.2d 790 (Sup. Ct. Nassau County 1972), as a person engaged in the business of collecting judgments.
of their value. In one case the respondents purchased judgments totaling “over $700 for the sum of $275” and agreed to collect others for one-third of the amount realized. 181 In another case a $3,134.57 judgment was purchased for $310. 182 Collection agencies which bid at the sales are often the beneficiaries of the low prices realized. 183

The court in Lee v. Community Capital Corp. had this to say about collection agencies: 184

The question that persistently lingers before the Court is how to protect the uninitiated against the professional “collector” who has cloaked himself within the protective garb of superficial due process and exploited an unfortunate set of circumstances to reap a windfall by application of the law with technical precision. . . .

. . . In order to avoid a CPLR 5236 sale of real property by the professional collector, the Legislature should, in effect, prohibit a CPLR 5236 sale by an assignee of such judgments. This practice has evolved because of the reluctance of reputable firms, department stores, and professional individuals, who, although they reduce a legitimate obligation to judgment, are unwilling to resort to a CPLR 5236 sale of real property because of the adverse publicity that may result. This reluctance, in effect, has given birth to the professional collector who takes the assignment on a contingent basis and proceeds to institute the necessary procedure to consummate a CPLR 5236 sale.

The Lee court, casting about for statutory authorization to cancel the execution sale proposed by the collection agency, turned to New York’s Judiciary Law, which contains proscriptions on champertous activities by attorneys, corporations and collection agencies. The holding represented a novel construction of that arcane law and paved the way for subsequent decisions which completely reversed traditional interpretations. If the decisions withstand appellate review, it will be illegal in New York for a collection agency to pur-

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181. Department of State v. Blackman, New York Department of State, Division of Licensing Services, hearing, Oct. 18, 1971 (mimeo) at 6, 8.
chase a money judgment or to take an assignment thereof for the purpose of executing its lien.

“Champerty” is defined as:

A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject to be recovered.135

The purpose of New York’s statutory proscription on such activities, according to the Court of Appeals, is to “prevent the resulting strife, discord and harassment which could result from permitting attorneys and corporations to purchase claims for the purpose of bringing actions thereon”136 and to prevent “the real or implied . . . practice of law by corporations.”137

New York’s proscriptions on champerty are found in sections 488 and 489 of the Judiciary Law. Section 489, entitled “Purchase of claims by corporations or collection agencies,” provides, in pertinent part, that:

No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association . . . shall solicit, buy or take an assignment of or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon.

This clause is followed by a proviso relating to fiduciaries engaged in the settlement of estates:

. . . provided however, that bills receivable, notes receivable, bills of exchange, judgments or other things in action may be solicited, bought or assignment thereof taken, from any executor, administrator, assignee for the benefit of creditors, trustees or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate, through court actions, proceeding or otherwise.

Section 488 of the Judiciary Law spells out proscriptions similar to those in first part of § 489, but applies them to attorneys. The two sections are construed in pari materia.130

Traditionally, these two sections have been held to be inapplicable to judgments taken for the purpose of executing their liens. This determination has been made on two separate theories: 1) since a judgment execution is simply a continuation of a prior action it cannot be the commencement (or bringing) of an action or proceeding as required by the statute;140 2) since a judgment execution does not require application to the courts it is not an action or proceeding within the meaning of the statute.141

The court, in Lee v. Community Capital Corporation,142 refused to follow this precedent and instead focused on the method of payment, distinguishing between an outright purchase of a judgment and an assignment taken on a contingent basis; if the assignee had given even a nominal consideration for the judgment the transaction would not have been in violation of the law.

There is precedent for this approach in cases dating from the period 1934 to 1939. Prior to 1934 the law applying to corporations (Penal Law § 276, forerunner of Judiciary Law § 489) had proscribed solicitation of claims or things in action for the purpose of bringing an action or proceeding, but had not proscribed assignment or purchase. In 1934 the law was amended by the addition of a proscription on the taking of assignments of claims or of things in action,143 and in 1939 purchase of claims or things in action was proscribed.144 The decisions rendered during the period 1934 to 1939 make the same distinction the Lee court did: it was a violation for a corporation to take an assignment on a contingent basis, but it was not a violation to make an outright purchase.145

After the Lee decision, several other courts abandoned precedent

142. 67 Misc. 2d 609, 703, 324 N.Y.S.2d 583, 587 (Sup. Ct. Nassau County 1971).
143. N.Y. PENAL LAW §§ 274 and 276 as amended by Laws 1934, c. 534.
144. N.Y. PENAL LAW § 275 as amended by Laws 1939, c. 822.
completely and found that both the purchases and assignments taken of judgments by a collection agency for the purpose of executing their liens violate the Judiciary Law. These decisions are based on a determination of the effect of the proviso in § 489, which provides that listed things, including judgments, may be purchased, or assignment taken thereof, from fiduciaries engaged in settling estates. In addition, the phrases thing in action and action or proceeding have been construed to include judgments and executions.

In Blackman v. Pincus, the Appellate Term, noting that the word judgment occurs in the proviso but is not included among the proscribed things listed in the first part of the section, reasoned that the effect must be to proscribe the acquisition of judgments by individuals, corporations and collection agencies in any manner other than from the designated fiduciaries. This holding was followed several months later in Bottenus v. Blackman: "Unless judgments were within a statutory prohibition in the first place, this clause providing a permissible exception for these particular judgments would make no sense."

The Bottenus court reinforced its holding by construing the phrase thing in action as necessarily including judgments. Since a "judgment is a right to recover money, and there are legal enforcement provisions to back it up," it "comes within the statutory 'thing in action' characterization."

Having found on two separate grounds that the purchase or assignment taken of a judgment by one engaged in the collection business violates the law, the Bottenus court held that since "a wrongdoer may not reap the benefit inuring from an illegal act," a judgment execution by such a person is also void. The court buttressed this contention by construing the word proceeding as it is used in the statute: proceeding is broad enough to cover the CPLR's enforcement procedures, since they are incidental to court derived judgments.

As noted above, there is very little precedent for construing the statute in this fashion. In 1886, a New York court reasoned that a judgment could be deemed a thing in action if it were purchased

146. (Appellate Term, Second Dept.) 168 N.Y.L.J. 18, Jan. 26, 1972, at 15, col. 3.
147. 336 N.Y.S.2d 790 (Sup. Ct. Nassau County 1972). This decision will be appealed.
148. Id. at 794.
149. Id. at 793-794.
150. Id. at 795.
151. Id. at 794.
“with intent to sue the judgment debtor thereon” but that “it is quite another thing to buy a judgment with the intent to enforce it by execution.” This approach was followed in 1971 by the Nassau County Court, and in 1972 by the Nassau County Supreme Court, in Roslyn Savings Bank v. Jones, which determined that a surplus money proceeding initiated by a judgment assignee could be a proceeding as proscribed by the statute, in which case the underlying judgment would be a thing in action. According to Bottenus, however, a judgment is within the statutory proscription even when acquired by a collection agency merely for the purpose of executing its lien.

If Bottenus is upheld on appeal, the activities of collection agencies will be circumscribed. However, they will still be at liberty to execute the liens of money judgments against real property in the name of the creditor. The Nassau County Sheriff’s Office reports that the number of executions directing a sale of real property delivered by assignees fell off sharply during the first six months of 1972 (after the Lee decision), but that over half the executions received were delivered by attorneys connected with collection agencies but executing in creditors’ names. Siegel claims that action is often taken by collection agencies without the knowledge of the creditor.

In summary, the cases indicate that the courts have ample discretionary powers to prevent or undo inequities for those judgment debtors who manage to get their cases before a court. The courts have shown a willingness to construe these provisions liberally, and even to make new law when the provisions seem inadequate. The result is often the creation, by judicial mandate, of real property exemptions from application to the satisfaction of money judgments. Since the property thus exempted was possibly the basis for credit in the first place, prior notice is denied the creditor. Certainty in

153. Id. at 493.
155. 69 Misc. 2d 735, 330 N.Y.S.2d 954 (Sup. Ct. Nassau County 1972). The initiation of the surplus money proceeding would be a violation of the statute if it could be shown that the judgment assignee’s intent and purpose was to bring such a proceeding when he purchased the judgment. The court relied on Fairchild Hiller Corp. v. McDonnell Douglas Corp., 28 N.Y.2d 325, 330, 270 N.Y.S.2d 691, 693, 321 N.Y.S.2d 857, 860 (1971), which stipulated that the “assignment must be made for the very purpose of bringing suit and this implies an exclusion of any other purpose.”
156. A similar determination had been made by an administrative agency a year before Bottenus. Department of State v. Blackman, New York Department of State, Division of Licensing Services, hearing, Oct. 18, 1971 (mimeo), supra note 61 and accompanying text.
157. Note 14, supra.
158. Siegel, Practice Commentary, CPLR § 5236 (McKinney Supp. 1972) at 153.
the enforcement process exists only for that creditor (or judgment assignee) whose debtor lacks legal assistance, lacks knowledge of the fact that judicial protection is available and lacks access to the courts.

Because court intervention is the only debtor protection provided by New York statutes, the courts' *ad hoc* decisions do not solve the underlying problem. As the *Lee* court observed, its decision "is of no consequence and negligible consolation to those individuals who are victims of such a reprehensible practice because for one reason or another they have not availed themselves of their ‘enlightened day in court.’"¹⁵⁹ This fact, said the court, raises important questions of due process of law.

**CONCLUSIONS**

Constitutional questions compound the practical inequities of New York's enforcement procedures. CPLR § 5236 authorizes a taking of real property for an inadequate consideration and provides no remedy other than application to the courts. Since the poor homeowner may not have legal assistance and access to the judicial process, the rationale of *Boddie v. Connecticut* may serve to characterize the entire procedure as a denial of due process.¹⁶⁰ To satisfy constitutional requirements and to remove the possibility of unconscionable results for the debtor, New York law should be amended to provide for court supervision of all execution sales


¹⁶⁰. 401 U.S. 371, 377 (1971). "[D]ue process requires at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." The appellants in *Boddie* were welfare recipients who were challenging state procedures which required payment of court fees and costs in order to obtain a divorce. *Boddie* was construed in *In re Kras*, 331 F. Supp. 1207 (E.D.N.Y. 1971) at 1212: "[A] proper interpretation of *Boddie* requires that, as applied to petitioner herein, the statutory requirement of prepayment of a filing fee to obtain a discharge in bankruptcy violates his Fifth Amendment right of due process, including equal protection."

Due process protections have recently been extended to prejudgment procedures which entail a taking of debtors' property. In *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337 (1969), the Court held that Wisconsin's prejudgment wage garnishment law denied due process because there was no notice or prior opportunity to be heard. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), prejudgment replevin statutes existing in Florida and Pennsylvania were invalidated on similar grounds. New York's prejudgment replevin statute was declared unconstitutional in *Laprease v. Raymours Furniture Company*, 315 F. Supp. 716 (N.D.N.Y. 1970), because it too provided no notice or prior hearing. Arguably, CPLR § 5236 is a denial of due process on similar grounds with respect to those debtors whose real property is sold to satisfy default judgments entered after the debtor failed to defend the action because he was not served, and with respect to those debtors who waive notice by signing a confession of judgment.
and/or to provide built-in devices which would insure adequate prices.

A. Mandatory Court Supervision

There are many ways in which court supervision could be mandated. One way is to change the present homestead exemption law. If the legislature approves the public policy considerations expressed by the exemption, this provision could be amended to abolish the recordation requirement.

The ostensible reason for recordation is that it puts creditors on notice, but if all owner-occupied homes were exempt (except for those cases where the homeowner chooses to waive the exemption), the need for specific notice would be eliminated. If a low monetary limit were retained, the exemption would not significantly reduce the availability of real property as a basis for credit, particularly if this revision were accompanied by a revision in the tenancy by the entirety law to permit purchasers the right to partition.

Abolition of the recordation requirement would accomplish most of the reforms urged by critics of present procedures: it would exempt all homes worth less than the limit completely and it would force judgment creditors or collection agencies to initiate a special proceeding in order to sell homes worth more than the limit, thus bringing all judgment debtors whose homes are threatened into court prior to a sale. The sale itself would be supervised by the court.

B. Insuring Adequate Prices

CPLR § 5236 could be amended to require appraisal and to mandate that real property can not be sold for less than a percentage of its appraised market value. This solution has three advantages: it does not continue the discrimination in favor of property owners as opposed to lessees represented by the homestead exemption; it would include commercial and industrial property as well as residential (a consideration of interest to few debtors since most property sold at forced sales is residential); and it would not create an additional

161. See note 18 supra.
163. Approximately 80% of the executions directing a sale of real property delivered to the sheriffs who participated in the Revuzw's survey (see note 14 supra) directed a sale of residential property; in New York City, 75 of the 76 executions delivered to the Sheriff during the six month period covered by the survey directed a sale of residential property; in Nassau County 188 out of 190 executions involved residential property.
burden on the courts. In addition, it would introduce an element of certainty for the creditor, at least insofar as it is combined with a provision permitting execution sale purchasers to partition property held as a tenancy by the entirety. However, it would not allow for the case-by-case balancing of debtor’s needs versus creditor’s rights possible under a plan which brings all cases into court.

A scheme which combines these two approaches would seem to be preferable to either alone. It would provide the courts with an objective criterion with respect to prices and it would allow judicial modification in those cases where an eviction would be disastrous for the debtor and his family.164

C. Other Possibilities

There are many other possibilities: the court in Lee v. Community Capital Corp. suggested that the Attorney General’s office be permitted to intervene as a necessary party to such proceedings;165 Professor Siegel suggests that informal hearings be required for the purpose of giving the debtor a chance to talk to a judge or clerk with a view to instituting formal proceedings if that seems warranted;166 the Sheriffs’ Association has proposed that a period of redemption be re-established;167 others have suggested that a minimum limit be imposed on money judgments which may be enforced against real property.

Hopefully, the legislature will consider the alternatives before the Nassau-Suffolk experience is repeated in other areas where rapid population growth and housing shortages are in prospect.

164. Other guidelines might be established which would provide additional criteria for judicial action and prior notice for the creditor. For example, the old CPA requirement that judgment creditors exhaust their debtors’ personal property first might be readopted. Or the legislation might provide that homes of welfare recipients not be sold in areas where alternative housing is scarce. Provisions for additional time before a sale might be stipulated for those debtors who make an honest effort to pay off the obligation.


166. Siegel, Practice Commentary, CPLR § 5236 (McKinney Supp. 1972) at 155.

167. See note 103 supra.