1982

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Recommended Citation
Thomas M. Binder, Bankruptcy - Preferences - Payment to Judgment Creditor Pursuant to an Income Execution Served before the Ninety-Day Period Is Not an Avoidable Preference, 27 Vill. L. Rev. 1286 (1982).
Available at: https://digitalcommons.law.villanova.edu/vlr/vol27/iss6/7

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BANKRUPTCY—PREFERENCES—PAYMENT TO JUDGMENT CREDITOR PURSUANT TO AN INCOME EXECUTION SERVED BEFORE THE NINETY-DAY PERIOD IS NOT AN AVOIDABLE PREFERENCE.


On December 3, 1979, David B. and Susan R. Riddervold filed voluntary petitions in bankruptcy 1 seeking relief under Chapter 7 2 of the Bankruptcy Code (Code). 3 Within the ninety days prior to the filing of the bankruptcy petitions, 4 approximately $227 had been deducted from David Riddervold’s wages and paid to his creditor—the Saratoga Hospital. 5 The deduction and payment to the hospital

1. Riddervold v. Saratoga Hosp. (In re Riddervold), 647 F.2d 342, 343 (2d Cir. 1981). It is not clear whether the petitions filed by David and Susan Riddervold were separate or joint petitions. Id. If separate petitions were filed, it appears that they were consolidated under Bankruptcy Rule 13-111(b) for ease of administration, as only a single trustee was appointed. See 11 U.S.C. App. Rule 13-111(b) (1976).

2. 647 F.2d at 343. See 11 U.S.C. §§ 101-1330 (Supp. III 1979). Chapter 7 provides for liquidation of the debtor’s estate, while preserving certain property of the debtor as exempt. See id. §§ 701-766 (Supp. III 1979). Under Chapter 7, a voluntary case is commenced by the filing of a petition which constitutes an “order for relief” under the Code. See id. § 301. An involuntary case may be similarly commenced in certain circumstances. See id. § 303. An interim trustee is appointed promptly by the court. If no trustee is elected by the creditors, the interim trustee serves as trustee. See id. § 702. The trustee’s primary duty is to collect and distribute the property of the estate. See id. § 704(1). Property of the estate includes various interests which the debtor had, has, or will have in property, reduced by property which is properly exempted by the debtor. See id. §§ 522, 541. Following a meeting of creditors, the trustee liquidates the debtor’s estate and distributes it to creditors in accordance with the priority of their claims. See id. §§ 341, 701, 726.


4. 647 F.2d at 344. The 90-day period preceding the filing of a petition in bankruptcy is critical under the Code’s preference provisions. See 11 U.S.C. § 547(b)(4)(A) (Supp. III 1979). Any transfer of the debtor’s property made within this period to a creditor may be avoided and be subject to recall into the debtor’s estate if certain conditions are met. See generally id. § 547(b). For a discussion of the Code’s preference section, see notes 28-41 and accompanying text infra.

5. 647 F.2d at 344. There was some confusion as to the amount of money in controversy. See id. at 344 n.1. This figure comes from Riddervold’s brief on appeal. Id.

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were made in accordance with an income execution permitted under New York law. The execution was served upon Riddervold's employer eleven months prior to the date the Riddervolds filed their bankruptcy petitions. On January 5, 1980, the Riddervolds filed a complaint against, inter alia, the Saratoga Hospital seeking to recover the money as an avoidable preference under section 547(b) of the Code. The


7. 647 F.2d at 345. The hospital obtained a judgment against David Riddervold in a New York state court on March 17, 1977, in the amount of $1,410.50 for unpaid medical bills arising from services rendered to Susan Riddervold. Id. at 344. The judgment was recorded in the office of the Saratoga County clerk. Id. An income execution based on the judgment was issued under §5231 of the New York Civil Practice Law and Rules against Riddervold's employer, the State of New York, on January 17, 1978. Id. The Riddervold court assumed that the actual service on the employer occurred long before the 90 days prior to the Riddervold's filing of a bankruptcy petition on December 3, 1979. Id. at 345.

8. Id. at 343. The complaint alleged two causes of action. Id. The first cause of action sought to avoid certain judicial liens to the extent that those liens impaired the Riddervold's equity in their residence which was claimed as exempt property in the petition. Id. See 11 U.S.C. §522(d)(1), (f) (Supp. III 1979). The second cause of action, filed on behalf of David Riddervold only, is the issue considered in this case. 647 F.2d at 343. See note 9 infra.

9. 647 F.2d at 343. The cause of action against the hospital asserted that 1) between September 3, and December 3, 1979, the hospital caused monies to be deducted from David Riddervold's wages pursuant to an income execution served upon his employer; 2) that such monies constituted preferences which the trustee in bankruptcy could have avoided; 3) that if the trustee had avoided these payments, Riddervold could have exempted them under §522(d)(5); and 4) that the trustee had not attempted and would not attempt to recover the alleged preferences. Id. Riddervold contended that because the trust had not and would not initiate proceedings to that end, he (Riddervold) was entitled to do so under §522(h). Id. at 344. See 11 U.S.C. §522(h) (Supp. III 1979).

In its answer, the hospital asked that this cause of action be dismissed. 647 F.2d at 343. The hospital alleged: 1) that the income execution constitutes a judicial lien fixed on January 17, 1978, the date on which it was served on the employer; 2) that the lien was filed prior to the 90-day period preceding the debtor's filing of the petition in bankruptcy; and, 3) that, therefore, the payments made to the hospital were made pursuant to the operation of that judicial lien, and as such are not avoidable as preferences under §547(b). Answer of the Saratoga Hospital, Riddervold v. Saratoga Hosp. (In re Riddervold), No. 79-10139 (N.D.N.Y. Oct. 20, 1980).

10. A preference is a transfer of the property of the debtor to a creditor within a short time prior to bankruptcy which enables that creditor to receive payment of a greater percentage of his claim against the debtor than other creditors similarly situated at the time of the bankruptcy. See generally 11 U.S.C. §547(b) (Supp. III 1979). For a more complete discussion of the preference section of the Code, see notes 28-41 and accompanying text infra.

11. 11 U.S.C. §547. For a discussion of §547, the preference section of the Code, see notes 28-41 and accompanying text infra.
Bankruptcy Court for the Northern District of New York issued an order dismissing Riddervold's claim for recovery of the money, holding that the payments made to the hospital were merely enforcing a judicial lien and levy which had been created prior to the ninety-day period, and, therefore, were not subject to avoidance as preferences. On direct appeal by agreement of the parties, the United States Court of Appeals for the Second Circuit affirmed the order, holding that payments made within the ninety-day period prior to the filing of the petition in bankruptcy pursuant to an income execution filed prior to that period did not constitute transfer of the property of the debtor avoidable under section 547(b) of the Code. *Riddervold v. Saratoga Hospital (In re Riddervold)*, 647 F.2d 342 (2d Cir. 1981).

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in the bankruptcy law, thereby initiating a process which culminated in the enactment of the Code. One of the major purposes of the Code was to provide adequate relief for individual debtors by providing the debtor with “adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start.” Accordingly, the law governing the


13. Id. The court concluded that the transfer of property of the debtor took place on January 17, 1978 when the income execution was effective against Riddervold's employer, nearly a year before the debtor filed his petition in bankruptcy. *Id.* See 11 U.S.C. § 547(b)(4)(A) (Supp. III 1979).

14. 647 F.2d at 343. This appeal was made directly to the court of appeals by agreement of the parties as provided in § 405(c)(1) of the 1978 Act. *Id.* at 344. *See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(c)(1), 92 Stat. 2685 (1978).* This provision of the Code controls direct appeals during the transition period. *See id.* § 402, 92 Stat. 2682. The parties incorrectly asserted jurisdiction under 28 U.S.C. § 1295(b) which does not take effect until April 1, 1984. *See 647 F.2d at 343-44. See also note 78 infra.*


18. H.R. REP. No. 595, *supra* note 15, at 118. The primary goals of the Code's preference section may be stated as follows:

The purpose of the preference section is twofold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a
averted of preferential transfers of the debtor's property was substantially revised.\textsuperscript{18}

Prior to the Code's enactment, avoidance of preferential transfers was governed by section 60 of the Bankruptcy Act of 1898 (prior Act).\textsuperscript{20} In addition, section 67 of the prior Act\textsuperscript{21} allowed the trustee to avoid short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally.


A third purpose of the preference section and of the bankruptcy law in general was noted by the Supreme Court in \textit{Chicago, Burlington & Quincy RY. Co. v. Hall}, 229 U.S. 511 (1913). The Court determined that §67(f) of the prior Act operated to void liens against both exempt and nonexempt property, commenting:

This view, we think, is supported both by the language of the section and the general policy of the act which was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt.


\textit{19.} For a discussion of the specific revisions made by the Code, see notes 30-32 & 59-41 and accompanying text \textit{infra}. For a discussion of the law of preferential transfers prior to the Code, see notes 20-27 and accompanying text \textit{infra}.


a. (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title: \textit{Provided, however,} That if such person is not finally adjudged a bankrupt in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it has not been nullified and voided.

\ldots

(3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the trustee or debtor, as the case may be, except that
certain liens\textsuperscript{22} obtained against the property of the debtor during the critical period prior to bankruptcy,\textsuperscript{23} and to recall into the bankrupt’s estate any property transferred in satisfaction of such liens.\textsuperscript{24} Under the prior Act, transfers of the debtor’s property made to a creditor pursuant to an income execution were more easily avoided by the trustee under provisions of section 67 rather than section 60.\textsuperscript{25} As a result, the case law generated under the prior Act regarding such transfers is couched in terms of lien avoidance rather than avoidance of preferences.\textsuperscript{26} Because of changes introduced by the Code, judicial liens obtained within ninety days of the filing of the bankruptcy petition which were previously voidable under section 67a of the prior Act, are now voidable as preferences under section 547 of the Code.\textsuperscript{27}

the court may on due notice order any such lien to be preserved for the benefit of the estate, and the court may direct such conveyance as may be proper or adequate to evidence the title thereto of the trustee or debtor, as the case may be: Provided, however, That the title of a bona fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property.

Id. For a discussion of the operation of §67a under the prior Act, see Teofan and Creel, supra note 26, at 553.

\textsuperscript{22} Bankruptcy Act of July 1, 1898, ch. 541, § 67, 30 Stat. 564 (codified at 11 U.S.C. § 107 (1976)) (repealed 1978). Under §67a(1) of the prior Act the trustee could avoid liens obtained against the bankrupt’s property by legal or equitable process such as attachment, garnishment, or levy of execution, and, under §67a(5) of the prior Act, the trustee could recover any property transferred on account of such liens. See Teofan and Creel, supra note 20, at 558. For the text of §67a, see note 21 supra.

\textsuperscript{23} Bankruptcy Act of July 1, 1898, ch. 541, § 67, 30 Stat. 564 (codified at 11 U.S.C. § 107 (1976)) (repealed 1978). The “critical period” under the prior Act was the four-month period preceding the filing of the bankrupt’s petition. Id. Based on a recommendation by the Commission on the Bankruptcy Laws of the United States that the period be reduced, the Code shortened the “critical period” to only 90 days. Report on Bankruptcy Laws, supra note 18, at 201. For a discussion of the critical period under the Code, see note 4 supra.


\textsuperscript{25} See Teofan and Creel, supra note 20. This was true because the preference section of the prior Act, §60, required the trustee to prove that the creditor receiving the transfer had “reasonable cause to believe” that the debtor was insolvent at the time of the transfer. Id. at 549-50. A lien obtained under an income execution is a “lien obtained by legal process,” and therefore fell within the operation of §67a of the prior Act. See notes 21-22 supra. While the effect under §60 of the prior Act would have been identical, §67 provided a more attractive tool for the trustee because it had no “reasonable cause to believe” requirement, a requirement which was next to impossible to prove. See Teofan and Creel, supra note 20, at 549-50.


\textsuperscript{27} See Teofan and Creel, supra note 20, at 552.
The Code, in section 547,\(^{28}\) contains a wholesale revision of preference law as it existed under the prior Act.\(^{29}\) The Code removes certain obstacles which had limited the trustee's power to avoid preferential transfers,\(^{30}\) and extends the power of avoidance to reach transfers of exempt property of the debtor.\(^{31}\) Further, the Code provides the debtor with the right to exercise, on his own behalf, the avoidance powers of the trustee under limited circumstances.\(^{32}\) Under section 547 of the Code,\(^{33}\) in order to recover a payment toward an old, unsecured debt, the trustee or the debtor must prove that there was a transfer of the debtor's property, and that such transfer was: 1) to or for the benefit of a creditor;\(^{34}\) 2) on account of an antecedent debt;\(^{35}\) 3) made within ninety days prior to the filing of the petition in bankruptcy;\(^{36}\) 4) made while the debtor was insolvent;\(^{37}\) and 5) a payment or transfer which allowed the creditor to receive more than he would have received under


}\(^{29}\) 29. See REPORT ON BANKRUPTCY LAWS, supra note 18, at 201; H.R. REP. No. 595, supra note 15, at 179.

}\(^{30}\) 30. See H.R. REP. No. 595, supra note 15, at 178. The Code no longer requires the trustee to prove that the creditor receiving the transfer had reasonable cause to believe that the debtor was insolvent at the time of transfer. Id. See 11 U.S.C. § 547(b) (Supp. III 1979). In addition, the Code creates a presumption of the debtor's insolvency during the 90-day period preceding the filing of the petition. See id. § 547(f). See also Teofan and Creel, supra note 20, at 550-51. For further discussion of preferential transfers under the Code, see notes 33-41 and accompanying text infra.

}\(^{31}\) 31. REPORT ON BANKRUPTCY LAWS, supra note 18, at 204. Under the prior Act, as construed by the courts, only nonexempt property which would be distributed to creditors as part of the debtor's estate could be recovered under the preference section. Id. The Code is clearly intended to eradicate this distinction between exempt and nonexempt property for the purpose of preferential recovery under § 547. Id. See also Note, Avoidance of Preferential Transfers Under the Bankruptcy Reform Act of 1978, 65 IOWA L. REV. 209, 220 (1979).

}\(^{32}\) 32. 11 U.S.C. § 522(b) (Supp. III 1979). If the trustee does not pursue the power to avoid and recover a transfer of property that would be exempt, the debtor may pursue it and exempt the property if the transfer was involuntary and the debtor did not conceal the property. H.R. REP. No. 595, supra note 15, at 362. See also 9 AM. JUR. 2D Bankruptcy § 319 (1980).

}\(^{33}\) 33. 11 U.S.C. § 547 (1978). Subsection 547(b) is the operative provision of this section. See S. REP. No. 989, 95th Cong., 2d Sess. 87, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5873. Section 547(b) authorizes the trustee to avoid a transfer if five conditions are met. Id. For a discussion of these five conditions, see notes 34-38 and accompanying text infra. See also Teofan and Creel, supra note 20, at 549-52.


}\(^{35}\) 35. Id. § 547(b)(2).

}\(^{36}\) 36. Id. § 547(b)(4)(A).

}\(^{37}\) 37. Id. § 547(b)(3). In connection with this condition, § 547(f) creates a presumption of insolvency during the 90 days preceding the filing of the bankruptcy petition. See id. § 547(f). For a discussion of § 547(f), see note 30 supra.
a Chapter 7 liquidation absent the transfer. The most significant changes in the preference section are the creation of a presumption of insolvency during the ninety-day critical period, and the removal of the requirement that the creditor receiving the preference had "reasonable cause to believe" the debtor was insolvent at the time of the transfer. In addition, section 547(e)(3) of the Code's preference section specifies that "a transfer is not made until the debtor has acquired rights in the property transferred."  

Since the Code's enactment, there have been no cases which have considered the effect of section 547 on payments made during the ninety-day period pursuant to an income execution under the New York statute. However, several earlier cases have considered the nearly identical issue of whether judicial liens obtained within the critical period before bankruptcy were voidable under section 67a of the prior Act.

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38. 11 U.S.C. § 547(b)(5) (Supp. III 1979). This provision contains the mechanics of the "greater percentage test." Section 547(b)(5) in pertinent part provides as follows:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor—

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Id. The legislative history explains the operation of the test set forth in § 547(b)(5) as follows:

Under this language, the court must focus on the relative distribution between classes as well as the amount that will be received by the members of the class of which the preferee is a member. The language also requires the court to focus on the allowability of the claim for which the preference was made. If the claim would have been entirely disallowed, for example, then the test of paragraph (5) will be met, because the creditor would have received nothing under the distributive provisions of the bankruptcy code.


42. Several cases have examined the effect of § 547 on similar or analogous situations. See, e.g., In re Emery, 15 Bankr. 689 (D. Vt. 1981); In re Diversified World Invs., Ltd., 12 Bankr. 517 (S.D. Tex. 1981); In re Brengle, 10 Bankr. 360 (D. Del. 1981); In re Woodman, 8 Bankr. 686 (W.D. Wis. 1981); In re Cox, 7 BANKR. CT. DEC. (CRR) 733 (D. Md. 1981).

43. See, e.g., In re Tamari, 4 BANKR. CT. DEC. (CRR) 1028 (S.D.N.Y. 1978); In re Parten, 3 BANKR. CT. DEC. (CRR) 402 (N.D. Ala. 1977); In re Duffy, 34 F. Supp. 804 (W.D.N.Y. 1940); In re Smith, 8 F. Supp. 49 (W.D.N.Y. 1934); In re Prunotto, 51 F.2d 602 (W.D.N.Y. 1931); In re Wodzicki, 238 F. 571
Generally, under section 67a of the prior Act courts faced with the question of whether a transfer of the debtor's property to a creditor made within the critical period preceding bankruptcy pursuant to an income execution served outside the period was avoidable, have found the critical issue to be when the levy enforcing the income execution attached to the debtor's wages.\(^4^4\) Several courts have rendered their decisions in accordance with their perceptions as to how the purposes and policies underlying the bankruptcy law would best be served.\(^4^6\)

At least one court has confronted and rejected the novel argument that when a garnishing creditor obtains a judgment directly against the garnishee, a novation results, thereby completely extinguishing the debtor's rights to the garnished funds.\(^4^6\)

(S.D.N.Y. 1916); In re Beck, 238 F. 653 (S.D.N.Y. 1915); In re Sims, 176 F. 645 (S.D.N.Y. 1910).

44. See, e.g., In re Tamari, 4 Bankr. Ct. Dec. (CRR) 1028, 1029 (S.D.N.Y. 1978). In this regard the courts generally look to state law characterizing installment payments under a wage garnishment because state law determines the nature of the liens. See In re Marsters, 101 F.2d 365, 367 (7th Cir. 1938). The courts have taken two opposing views on the issue of when the levy is obtained against the debtor's periodic wages. A majority of cases subscribe to the view that the lien and levy are not obtained until the wages are earned by the debtor. See, e.g., In re Tamari, 4 Bankr. Ct. Dec. (CRR) 1028, 1029 (S.D.N.Y. 1978); In re Parten, 3 Bankr. Ct. Dec. (CRR) 402, 405 (N.D. Ala. 1977); In re Beck, 238 F. 653, 654 (S.D.N.Y. 1915).

Several courts have held that the lien and levy on all wages earned after the income execution is served upon the garnishee relates back to the original date of levy. See, e.g., In re Sims, 176 F. 645, 646 (S.D.N.Y. 1910).

45. See, e.g., Chicago, Burlington & Quincy Ry. Co. v. Hall, 229 U.S. 511, 515 (1912) (general policy of bankruptcy law requires that §67(f) of the prior Act apply to both exempt and non-exempt property of bankrupt); In re Parten, 3 Bankr. Ct. Dec. (CRR) 402, 404 (N.D. Ala. 1977) (the various provisions of the Bankruptcy Act are to be construed when reasonably possible so as to effectuate the general purpose and policy of the Act; local rules subversive of that result cannot be accepted as controlling the action of federal courts); In re Wodzicki, 238 F. 571, 573 (S.D.N.Y. 1916) (to allow the injunction to stand would permit a result not contemplated by the act); In re Sims, 176 F. 645, 647 (S.D.N.Y. 1910) (to allow creditors to levy on wages earned after adjudication would violate the purpose of the prior act).

46. See In re Ransford, 194 F. 658 (6th Cir. 1912). In Ransford, a creditor garnished the bank account of a corporation and acquired a judgment against the corporation for $568.85. Two days later the creditor obtained a judgment against the garnishee bank for the same amount. Within four months of the initial judgment, the debtor corporation was adjudicated a bankrupt, and the rights to the garnished funds were disputed by the judgment creditor and the trustee in bankruptcy.

The district court awarded the money to the trustee and the Sixth Circuit affirmed. Id. at 660. In response to the creditor's argument that by "statutory" novation he was substituted as the bank's creditor to the exclusion of the bankruptcy debtor, the court stated:

[S]uffice it to say that under state law it is not the rendition of the garnishee judgment that extinguishes the old debt . . . and absolutely absolves the garnishee from liability to [the debtor] to the extent of the judgment, but payment of the judgment by the garnishee. . . .
The first case to consider the question in the context of the New York income execution statute was In re Sims. In Sims, a creditor sought to vacate a stay operating against the bankrupt's creditors. The stay prevented the creditor from collecting money withheld from the bankrupt's salary pursuant to an income execution served upon the bankrupt's employer in accordance with New York law. In an opinion

If payment is not made by him, the old debt still subsists as an enforceable claim.

Id. at 662-63. The court pointed out that the bankrupt debtor may restore his legal right to the money held by the garnishee by satisfying his debt to the judgment creditor. Id. at 663. The court reasoned that if garnishment on judgment operates as a satisfaction of the debt against the bankrupt debtor, then regardless of whether the garnishee pays the obligation, the original debtor is absolved from liability on the debt. Id. The court refused to create such a "snare to entrapping the creditor." Id.

47. 176 F. 645 (S.D.N.Y. 1910). The bankrupt filed his petition in bankruptcy on December 20, 1909. Id. at 646. Based on a judgment obtained eleven years earlier, the creditor obtained an income execution against the bankrupt on October 7, 1908. Id. Pursuant to the execution, the employer paid $30.76 to the creditor, and, thereafter, the sheriff collected and retained for the benefit of the creditor an additional $139.42, a portion of which represented money earned by the bankrupt and collected by the sheriff during the four months prior to the filing of the petition. Id. A trustee had been appointed. Id.

48. Id. at 646. The filing of a petition, under both the prior Act and the Code, operates as a stay, applicable to all entities, of the commencement or continuation of judicial, administrative, or other proceedings against the debtor, where the proceeding was or could have been commenced before the commencement of the bankruptcy case, or where the proceeding is one to recover a claim against the debtor that arose before the commencement of the bankruptcy case. See 11 U.S.C. § 362(a)(1) (Supp. III 1979). See generally 9 Am. Jur. 2d Bankruptcy § 458 (1980). A complimentary provision allows a creditor to petition the court to vacate the stay as it pertains to that creditor under certain circumstances. 11 U.S.C. § 362(d) (Supp. III 1979). See also 9 Am. Jur. 2d Bankruptcy § 477 (1980).

49. 176 F. at 646. The statute governing income execution in New York at this time was §1391 of the New York Code of Civil Procedure of 1876. Section 1391 provided, in pertinent part, as follows:

Said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits, due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided.

Id.

This language was continued in §1391's successor statute, §684 of the New York Civil Practice Act of 1920, but does not appear in the current New York income execution statute, §5231 of the New York Civil Practice Law and Rules. The present statute provides in pertinent part:

(d) If a judgment debtor fails to pay installments pursuant to an income execution, . . . the sheriff shall levy upon the money that the judgment debtor is receiving or will receive by serving a copy of the income execution, indorsed to indicate the extent to which paid installments have satisfied the judgment, upon the person from whom
authored by Judge Learned Hand, the court vacated the stay as to that portion of the bankrupt's salary which fell due prior to the filing of the petition, holding that the lien had attached prior to the critical period, on the basis that "the levy . . . was more than four months old when the petition was filed, and under the New York Code the execution operates as a 'continuing levy' till the judgment is paid." 50

Five years later, the United States District Court for the Southern District of New York in deciding In re Beck 51 was faced with almost identical factual circumstances. 52 Without reference to Sims, 53 the court held that the lien attached during the critical period, stating that "there could be no levy upon [the debtor's] salary until there was a salary to levy upon. Therefore, the date of levy is coincident with the date of accruing wage . . . ." 54 The court concluded that the trustee was en-

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50. 176 F. at 646. This holding relied directly upon the language of §191 of the New York Code of Civil Procedure of 1876 which provides for a "continuing levy." Id. See note 49 supra. The idea implicit in this holding is that the lien and levy on all wages earned after the income execution is served upon the garnishee relates back to the original date of service under the "continuing levy" theory. See In re Wodzicki, 238 F. 571 (S.D.N.Y. 1916). No mention of a "continuing levy" is contained in the current version of the income execution statute. See generally N.Y. Civ. Prac. Law §5231 (McKinney 1978). For a discussion of New York Code of Civil Procedure §191 and its successors, see note 49 supra.


52. Id. The bankrupt filed a voluntary petition in bankruptcy on February 16, 1915. Id. at 654. Based on a judgment obtained against the bankrupt on October 6, 1913, an income execution was issued under §191 of the New York Code of Civil Procedure shortly after October 21, 1913, when an ordinary execution was returned unsatisfied. Id. For a discussion of the income execution statutes in New York, see note 49 supra. Thereafter, the city paymaster retained a portion of the bankrupt's wages until he had in hand $101.34 at the date of the filing of the bankruptcy petition. 238 F. at 653. As in Sims, the case came before the court on motion of the creditor to vacate or modify an order staying proceedings in the state court affecting the bankruptcy. Compare id. at 653 with In re Sims, 176 F. at 646. A trustee in bankruptcy had been appointed. 238 F. at 654.

53. 238 F. at 653-54.

54. 238 F. at 654. This theory has been widely accepted since the Beck case was decided. See 4 Collier on Bankruptcy ¶ 67.10 n.4 (14th ed. 1967).
titled to the salary withheld during the critical period prior to the filing of the petition in bankruptcy.55

This same court once again examined the question in In re Wodzicki56 and considered the conflicting authority presented by Sims and Beck. Judge Mayer, writing for the court, acknowledged that "the question is a close one"57 and discussed the Sims rationale at length in dicta. The court interpreted the Sims theory to be that "the levy, throughout its continuance, was as of its original date."58 Furthermore, the court recognized that some support for this theory existed in the provision of the statute that permitted only one execution to be in operation at one time against a particular debtor.59 These statements, however, were merely dicta, as the court carefully stressed the fact that no trustee had been appointed,60 and held that only the trustee in bankruptcy has a right to oppose the creditor's claim to the money withheld, thus avoiding a resolution of the Sims-Beck controversy.61

55. 238 F. at 654. The court first noted that the trustee clearly has no claim to money withheld prior to the critical period preceding bankruptcy. Id. As to the issue of the rights of the parties to money withheld within the critical period, Judge Hough based his holding on Clarke v. Larremore, 188 U.S. 486 (1903). See 238 F. at 654. However, Clarke did not involve an income execution and the judgment, execution and levy on the bankrupt's property took place within the critical 4-month period. 188 U.S. at 486. The Supreme Court in Clarke held that where a sheriff holds money after selling the bankrupt's property on execution and has not paid it over to the judgment creditor prior to the filing of the petition in bankruptcy, the money passes to the trustee in bankruptcy under §67 of the prior Act. Id. at 488. This holding was based upon the fact that the writ of execution had not been fully executed by payment to the judgment creditor. Id. The Court qualified its holding, stating:

A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution, and that which was done under them, as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations.

Id. at 490.

56. 288 F. 571 (S.D.N.Y. 1916). But for a difference in actual dates, the fact situation in Wodzicki is identical to those in Sims and Beck, except that a trustee had not yet been appointed in Wodzicki. Compare id. at 571 with In re Sims, 176 F. at 646 and In re Beck, 238 F. at 653.

57. Id. at 572. However, the court acknowledged that the creditor was clearly entitled to money withheld prior to the 4-month period preceding bankruptcy, and ordered the stay modified accordingly. Id.

58. Id.


60. Id.

61. Id. at 573. The court did suggest that to allow the debtor to recover the money withheld during the 4-month period would be contrary to the objects of the bankruptcy statute because "the judgment creditor would be deprived of the fruits of his diligence." Id.
The question of when the levy attaches to the bankrupt's wages under an income execution was once again considered in In re Prunotto.\(^6\) Although not resolving the issue,\(^6\) the court expressed a preference for the view first expressed in Beck,\(^6\) that under an income execution, the lien and levy do not attach to wages until the wages are earned.\(^6\)

*In re Tamari*,\(^6\) a more recent decision in this area, gave careful consideration to the operation and effect of the New York income execution statute—section 5231 of the New York Civil Practice Law and Rules.\(^6\) The Tamari court relied upon Beck as representative of the prevailing view that a lien of garnishment is an installment levy which

\(^{62}\) 51 F.2d 602 (W.D.N.Y. 1931).

\(^{63}\) Id. The primary issue in *In re Prunotto* was whether the bankruptcy court had jurisdiction to stay the operation of an income execution against wages earned after adjudication in bankruptcy. *Id.* at 603. The creditor argued that the service of the income execution created a valid and continuing lien and levy on all future wages of the bankrupt, and that where, as here, the income execution was first served more than 4 months prior to bankruptcy, the bankruptcy court was without authority to restrain its operation against the debtor's future wages. *Id.* The *Prunotto* court held that the debtor's wages earned after adjudication in bankruptcy were protected by the debtor's discharge and therefore were not subject to the income execution. *Id.*

\(^{64}\) Id. The income execution statute in effect when *Prunotto* was decided was §684 of the New York Civil Practice Act of 1920. *Beck* was decided under its predecessor—§1391 of the New York Code of Civil Procedure. The language of §684 of the Civil Practice Act is nearly identical to that of §1391 of the Code of Civil Procedure. For a comparative discussion of these statutes, see note 49 *supra*.

\(^{65}\) 51 F.2d at 603. The court relied upon Clarke v. Larremore, 188 U.S. 486 (1903), noting that in *Clarke*, as in *Prunotto*, the lien was created within the critical period. For a discussion of *Clarke v. Larremore*, see note 55 *supra*.

\(^{66}\) 4 BANKR. CT. DEC. (CRR) 1028 (S.D.N.Y. 1978). In *Tamari*, the debtor filed a voluntary petition in bankruptcy on February 3, 1978. *Id.* at 1028. More than four months before that date, a creditor had obtained a judgment against the debtor and an income execution had been issued under §5231 of the New York Civil Practice Law and Rules against the debtor’s wages. *Id.* Installment payments were made to the creditor, totaling $186.19, during the 4-month period prior to the filing of the petition in bankruptcy. *Id.* The trustee sought to recover the money paid during that period, claiming that the money constituted property of the estate, and that the payments were made under a lien of garnishment which had attached during the 4-month critical period. *Id.*

\(^{67}\) Id. at 1029. For the text of §5231 and a discussion of its predecessors, see note 49 *supra*. The *Tamari* court referred to Ulner v. Doran, 167 A.D. 259, 152 N.Y.S. 655 (1915), which construed the language of §1391 of the New York Code of Civil Procedure. This section is the predecessor to New York's current income execution statute, §5231 of the New York Civil Practice Law and Rules. 4 BANKR. CT. DEC. (CRR) at 1029. Based on the assumption that the effect of each statute was the same, the court in *Tamari* reasoned:

In *Ulner v. Doran* the court stated that the purpose of the statute was "to avoid the necessity of successive levies from time to time whenever an installment of income might become due. It certainly was not intended to create a specific lien upon income or earnings not yet
It attaches only when the payment is deducted from the debtor's wages,\textsuperscript{68} and held that the trustee in bankruptcy was entitled to recover the money representing payments withheld during the critical period preceding bankruptcy.\textsuperscript{69}

The aforesaid cases were decided prior to the revisions introduced by section 547 of the Code.\textsuperscript{70} Under the Code, the critical issue is when the transfer occurred, rather than when the lien attached.\textsuperscript{71} Among other changes, section 547(e)(3) provides that, for purposes of the Code's preference section, a transfer 'is not made until the debtor has acquired rights to the property transferred.'\textsuperscript{72} This provision was specifically added to prevent the transfer date of a security interest in after-acquired property from relating back to when the security agreement was executed and the financing statement filed.\textsuperscript{73} Nonetheless, its application
due." Thus, a garnishment is an installment levy which is executed each time a payment is taken out of the debtor's paycheck.\textsuperscript{74}

\textit{Id.} (citation omitted).

It should be noted that the court in Tamari disregarded that portion of the Ulmer opinion which dealt with the effect of bankruptcy proceedings upon payments made to a judgment creditor pursuant to an income execution. The Ulmer court said that "We think, however, that the execution remained valid and enforceable until modified as contemplated by section 1391 . . . and that any moneys collected under it, even after the date of the defendant's discharge in bankruptcy, are properly payable to the judgment creditor." Ulmer v. Doran, 167 A.D. 259, 262, 152 N.Y.S. 655, 658 (1915) (emphasis added). However, this portion of the Ulmer opinion has been seriously questioned. See, e.g., Friedman v. Gibbons, 101 Misc. 356, 359, 167 N.Y.S. 685, 687 (Sup. Ct. 1917).

68. 4 BANCR. CT. DEC. (CRR) at 1029. The court in Tamari quoted Beck at length, and stated that "[m]ore than six decades have not diminished the continuing vitality of the case nor have changing standards diminished its wisdom and pragmatism." \textit{Id.}

The Tamari court also relied on 4 COLLIER ON BANKRUPTCY §§ 67.10 at n.4 (14th ed. 1967). This treatise states the rule as follows:

Where, however, garnishment issued prior to the four-month period reaches income . . . becoming due and payable within the period, the lien is generally viewed as arising no earlier than the acquisition by the debtor of the right to payment . . .

\textit{Id.} Both Beck and Prunotto are cited by Collier in support of the above proposition, and both Sims and Wodzicki are cited contra. \textit{Id.}

69. 4 BANCR. CT. DEC. at 1029.

70. See note 16 supra.

71. See \textit{In re Cox}, 7 BANCR. CT. DEC. (CRR) 733, 735 (D. Md. 1981). See also note 120 and accompanying text infra.


In Grain Merchants, a bank received a security interest in accounts receivable as collateral for a loan. 408 F.2d at 209. The court was faced with the issue of to whom money deposited in those accounts during the preference period belonged. \textit{Id.} The Seventh Circuit held that the transfer took place when the security interest in the accounts receivable was perfected, i.e., at the
is not expressly limited to such circumstances, and a number of courts have applied section 547(e)(3) to wage garnishments and analogous situations.\textsuperscript{74} For example, in \textit{In re Cox},\textsuperscript{75} a case decided by the United States District Court for the District of Maryland, the court relied on section 547(e)(3) of the Code to support its holding.\textsuperscript{76} The Cox court applied section 547(e)(3) to the wage garnishment situation, and concluded that the transfer of garnished wages took place when the wages were earned by the debtor.\textsuperscript{77} Therefore, the Cox court held that payments made to the time of execution and filing, and not when the debtor received the money in his account. \textit{Id.} at 213.

\textsuperscript{74} See 11 U.S.C. § 547(e)(3) (Supp. III 1979). Several recent cases have applied § 547(e)(3) to wage garnishments and analogous circumstances for the purpose of determining whether the transfer of the debtor's property took place within the 90-day critical period. \textit{See, e.g., In re Emery}, 13 Bankr. 689, 690 (D. Vt. 1981) (under § 547(e)(3) a transfer is not made until the debtor acquires property rights by \textit{earning} wages); \textit{In re Diversified World Investments, Ltd.}, 12 Bankr. 517, 519 (S.D. Tex. 1981) (§ 547(e)(3) applies to payments made under an assignment of rental payments to determine when transfer took place); \textit{In re Brengle}, 10 Bankr. 360, 361 (D. Del. 1981) (where wages earned by debtor are transferred to creditor pursuant to garnishment at the time of transfer is when the debtor acquires rights in wages by earning them). \textit{But see In re Woodman}, 8 Bankr. 686, 688 (W.D. Wis. 1981) (where wages earned prior to garnishment, and employee/debtor fails to challenge garnishment, the transfer of property of the debtor is complete—later transfers from garnishee to creditor do not involve "property of the debtor").

In \textit{In re Diversified World Investments, Ltd.}, the court compared the instant case to \textit{Grain Merchants} and Cox in applying § 547 to an assignment of rental payments to a creditor by a bankrupt debtor. 12 Bankr. at 519. The assignment was made outside of the 90-day critical period preceding bankruptcy, but the rental payments became due and were actually paid during that 90-day period. \textit{Id.} at 518. The assignee/creditor argued that an assignment of the right to payment is complete when made, and that payments made pursuant to the assignment are not transfers of the property of the debtor. \textit{Id.} at 519. The court disagreed, and, reading § 547(e)(3) together with the Code's broad definition of "transfer," argued that rental payments from the lessee to the creditor were indirect transfers made for the debtor's benefit. \textit{Id.} The court concluded:

The lease that generated the payments to [the creditor] was between [the debtor] and [the lessee]. Had the lease been terminated for any reason [the creditor] would not have been entitled to receive the rental payments. . . . The debtor did not acquire any rights to the rentals except as they became due from [the lessee]. Thus, under § 547(e)(3) the transfer was not made until such time as the rents accrued under the terms of the lease.

\textit{Id.}


\textsuperscript{76} 7 Bankr. Ct. Dec. (CRR) at 735. \textit{See also note 41 supra.}

\textsuperscript{77} 7 Bankr. Ct. Dec. (CRR) at 735.
the judgment creditor under the wage garnishment attributable to wages earned during the ninety-day period constituted preferential payments recoverable by the debtor under section 547.78

Against this background the Second Circuit, in an opinion by Judge Friendly, considered the question of whether payments to a creditor during the bankruptcy ninety-day critical period,79 pursuant to an income execution served upon the debtor's employer prior to that critical period, constituted avoidable preferences under section 547 of the Code.80 The court initially recognized that the issue's resolution depends on applying section 547 to the action taken by the Hospital under the New York income execution statute.81 Focusing on Code section 547(b),82 Judge Friendly outlined the circumstances under which section 547(b) allows the trustee to avoid a "transfer of the property of the debtor," 83 and narrowed the issue by conceding that certain of those circumstances were present in Ridderwold.84

78. Id.

79. For a brief discussion of the critical period under the Code, see note 4 supra.

80. 647 F.2d at 344. For a discussion of § 547 of the Code, see notes 28-41 and accompanying text supra.

Initially, the court addressed the propriety of the court's appellate jurisdiction. Id. at 343. The parties relied upon § 1298(b) which was added to title 28 of the United States Code by title II, § 236 of the 1978 Act, and provides for direct appellate jurisdiction of the court of appeals from "a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals." Id. See also Act of Nov. 6, 1978, Pub. L. No. 95-598, title II, § 236, 92 Stat. 2667 (1978). As Judge Friendly noted, if § 1298(b) were presently effective, the court would not have jurisdiction because the statute provides for a direct appeal from a final order, while the order appealed from was an interlocutory order as the first cause of action remained pending. 647 F.2d at 343-44. In addition, the court noted, the bankruptcy judge had not certified the order as proper for immediate appeal under Federal Rule of Civil Procedure 54(b), made applicable to adversary proceedings in bankruptcy by Bankruptcy Rule 754. Id. at 344. However, the amendment adding § 1298 to title 28 does not become effective until April 1, 1984. Id. See Act of Nov. 6, 1978, Pub. L. No. 95-598, title IV, § 402(b), 92 Stat. 2682 (1978). Until that time, § 405(C)(1) of the 1978 Act controls such direct appeals, and § 405(C)(1) does not require that the order appealed be a final order. 647 F.2d at 344. See Act of Nov. 6, 1978, Pub. L. No. 95-598, title IV, § 405(C)(1), 92 Stat. 2685 (1978). Therefore, the Ridderwold court concluded that it had jurisdiction in this case under § 405(C)(1) of the 1978 Act. 647 F.2d at 344.

81. 647 F.2d at 344.

82. Id. For a discussion of § 547(b), see notes 28-41 and accompanying text supra.

83. 647 F.2d at 344.

84. Id. The court noted that there is a presumption of insolvency of the debtor during the 90-day period preceding bankruptcy. Id. n.3. The court also acknowledged that the requirements of the greater percentage test set forth in § 547(b)(5) were met in this case. Id. at 344. For a discussion of § 547(b)(6), see note 28 supra.

Judge Friendly noted the right of the debtor to challenge the payments to the hospital in this circumstance under § 522(b) of the Code. Id. at 345. For
Turning then to the pre-Code cases which the court thought relevant to its analysis, the court noted the conflict between the continuing levy theory of In re Sims, and the holding of In re Beck that the date of the levy is coincident with the date of the accruing wage. The court proceeded to comment unfavorably upon In re Beck, describing the case's reliance upon Clarke v. Larremore as "misplaced," and noting the absence of a reference in Beck to Sims. Further, Judge Friendly stated that the Beck decision had "scant appeal" to the court in In re Wodzicki, noting that court's expression of approval for the continuing levy theory. The Riddevold court interpreted Wodzicki as confirming In re Beck "to the decision that only the trustee and not the bankrupt could obtain the money" withheld under the income execution, thereby upholding the rights of the judgment creditor. Finally, the court made quick reference to In re Prunotto as a case which followed Sims only insofar as it "denied the validity of the execution against post-adjudication wages."-

Following this survey of precedent, the court concluded that in principle, the State's payment of $227 to the hospital during the ninety-day period did not constitute a transfer of the property of the debtor.

a discussion of the debtor's right to avoid preferences not challenged by the trustee, see note 92 supra. Judge Friendly commented that "it is not clear why the 1978 Code extended the power to avoid preferences to bankrupts." 647 F.2d at 345 n.5.

85. 647 F.2d at 345. The relevant case law under the prior Act dealt with § 67 lien avoidance as opposed to § 60 recovery of preferences. See notes 21-27 and accompanying text supra.

86. 647 F.2d at 346. For a discussion of In re Sims and the "continuing levy" theory upon which it was decided, see notes 47-50 and accompanying text supra.

87. 647 F.2d at 346. For a discussion of In re Beck, see notes 51-55 and accompanying text supra.

88. 188 U.S. 486 (1903). For a discussion of Clarke v. Larremore, see note 55 supra.

89. 647 F.2d at 346.

90. Id.

91. Id. For a discussion of In re Wodzicki, see notes 56-61 and accompanying text supra.

92. 647 F.2d at 346.

93. Id. In re Wodzicki was decided on this basis in reliance upon In re Beck. See notes 56-61 and accompanying text supra. However, the Code now vests the debtor with the trustee's avoidance power. See 11 U.S.C. § 522(h) (Supp. III 1979); note 32 supra.

94. 647 F.2d at 346.

95. Id. For a discussion of In re Prunotto, see notes 62-65 and accompanying text supra.

96. 647 F.2d at 346.

97. Id. Judge Friendly noted that this is not because the debtor did not voluntarily cause the payments, as he conceded that "transfer" under the Code is defined to include involuntary transfers. Id. See 11 U.S.C. § 101(40) (Supp. III 1979).
In drawing this conclusion, the Riddervold court reasoned that the debtor has no property interest in wages which are subject to an income execution, because service of the income execution on the employer has the effect of a novation such that the employer owes a portion of the wages to the judgment creditor directly, rather than to the employee/debtor.98 Emphasizing the fact that the payments were made pursuant to an income execution which has been served prior to the ninety-day critical period,99 Judge Friendly suggested that the court's decision followed the "continuing levy" principle announced by Judge Learned Hand in In re Sims and adopted by Judge Mayer in In re Wodzicki under the prior Act.100 Recognizing that the cases on which it relied were decided under the prior Act, the court justified its reliance upon them by noting that nothing in the language or the policy of the 1978 Code precludes their continued application.101

It is submitted that Judge Friendly's opinion in Riddervold represents a significant departure from both prior law and the new provisions of the Code which is not justifiable in light of the applicable Code provisions,102 the policies of the Code as expressed in the legislative

98. 647 F.2d at 346. Judge Friendly relied upon the language of § 5231(e) of the New York Civil Practice Law and Rules which provides that the garnishee becomes principally liable to the judgment creditor for accrued installments under the income execution, such that the judgment creditor has a right to sue the garnishee for any unpaid installments. *Id.* For a discussion of § 5231, see note 49 supra. Judge Friendly responded to the In re Beck position in a footnote, stating simply "we prefer the reasoning of Judge L. Hand [in Sims] and Mayer [in Wodzicki]." *Id.* n.7.

99. 647 F.2d at 347. While it is not clear, Judge Friendly seems to conclude that, at least so far as the judgment creditor vis-à-vis the debtor is concerned, the income execution is fully executed by the transfer of the debtor's right to compensation for future earnings to the judgment creditor at the time the income execution is served upon the garnishee. See note 100 infra.

100. 647 F.2d at 347. Judge Friendly further supported this position by commenting that his decision conforms to the "intimations" of Clarke v. Larremore that a bankruptcy does not affect the creditor's rights when a writ of execution under a valid lien has been fully executed by payment to the execution creditor. *Id.* For a discussion of Clarke v. Larremore, see note 55 supra.

101. 647 F.2d at 347.

102. In this regard, it is submitted that § 522(h), which extends the power to recover preferences to the debtor and permits the debtor to exempt the property recovered, reveals a strong legislative interest in preserving the debtor's exemptions to allow the debtor to make a fresh start following bankruptcy. See 11 U.S.C. § 522(h) (Supp. III 1979). This view is supported by the position taken by the Commission on the Bankruptcy Laws of the United States regarding transfers of exempt property as subject to preferential recovery. See REPORT ON BANKRUPTCY LAWS, supra note 18, at 204.

Section 522(h) of the Code represents a significant change in the bankruptcy law, a fact which Judge Friendly recognized in his opinion. See 647 F.2d at 345 n.5. However, Judge Friendly did not speculate as to the policy behind this new provision in his opinion. *Id.* See also note 84 supra.
history. Two of the Code’s fundamental policies, those of equality of distribution among creditors and providing the debtor with adequate exempt property with which to make a fresh start, are thwarted by the Riddervold court’s decision. It is suggested that these policies deserved greater recognition in the court’s opinion, particularly in the absence of any articulated countervailing policies.

It is further submitted that the Riddervold court’s reliance upon the “continuing levy” theory of In re Sims to determine when the levy is effective against the debtor’s earnings is strained. First, a close reading of In re Wodziński and In re Prunotto, two cases cited by the Riddervold court as supporting Sims, reveals that neither case actually addressed the issue of Sims. Furthermore, a large majority

103. For a discussion of the policies behind the preference section of the Code set forth in the legislative history, see note 18 supra.
104. See Chicago, Burlington and Quincy Railroad Co. v. Hall, 229 U.S. 511 (1913); note 18 supra.
105. See note 20 supra. See also text following note 124 infra.
106. It has been said that any interpretation of the bankruptcy statute should be made consistent with the express policies of the bankruptcy law whenever possible. See note 45 and accompanying text supra.
107. For a discussion of In re Sims, see notes 47-50 and accompanying text supra. The Riddervold court relied upon Sims to determine when the levy created by the income execution lien attaches to the debtor’s future earnings, and concluded that the levy attaches to all future earnings at the time the execution is served upon the debtor’s employer. See 647 F.2d at 347. The lower court denied the preferential nature of the payments made to the hospital during the 90-day period by reference to the “time of transfer” test established by Code §547(e)(3). Riddervold v. Saratoga Hosp. (In re Riddervold), No. 79-10135, slip op. at 2-3 (N.D.N.Y. Oct. 20, 1980). The Second Circuit, however, avoided a direct confrontation with the “time of transfer” test in its analysis. See note 12 and accompanying text supra. Based on its conclusion concerning the effective date of the income execution levy against future wages, and by focusing only on the payments made to the hospital, the Riddervold court resolved the issue by reference to the threshold “transfer of the property of the debtor” requirement expressed in Code section 547(b). Id.
108. See notes 109-17 and accompanying text infra. See also note 121 and accompanying text infra.
110. 51 F.2d 602 (W.D.N.Y. 1931). For a discussion of In re Prunotto, see notes 62-65 and accompanying text supra.
111. 647 F.2d at 346.
112. But see note 61 supra. To the extent that the dicta in Wodziński supports the policy argument behind the Sims decision, the validity of that argument has been diminished by the bankruptcy law’s growing policy interest in preserving the debtor’s exemptions. See note 18 supra.

It is true, as Judge Friendly notes, that Prunotto endorsed that portion of the Sims decision which invalidates the income execution as to the debtor’s post-adjudication wages. 647 F.2d at 346. As to that point of law there has never been a dispute. See In re Parten, 3 BANKR. CT. DEC. (CRR) 402, 405 (N.D. Ala. 1977); In re Wodziński, 238 F. at 571. Nonetheless, it is important to note that in regard to that portion of the Sims opinion that bears directly
of the courts which have considered the question, both under the prior Act and the Code, have endorsed the *In re Beck* theory that "the date of the levy is coincident with the date of accruing wage." 113

In addition, the theory of *In re Beck* conforms more closely with the design of section 5231 of the New York Civil Practice Law and Rules.114 The purpose of this income execution statute was "to avoid the necessity of successive levies from time to time whenever an installment of income might become due [rather than] to create a specific lien upon income or earnings not yet due." 115 Furthermore, the language upon which the "continuing levy" theory of *Sims* was based has been removed from the statute.116 Therefore, it is suggested that Judge Friendly's reliance upon *In re Sims* is unjustified, particularly in view of the considerable and well-reasoned authority to the contrary.117

Finally, it is submitted that the *Riddervold* court failed to consider Code section 547(e)(3).118 A consideration of this section is necessary to a satisfactory determination of whether payments made pursuant to an income execution levy are properly recoverable as preferences.119 As the *Cox* court pointed out, the avoidance powers embodied in Code section 547(b) extend to reach all transfers within the critical period, regardless of when the lien or levy upon which the transfer is based was created.120 While the *Riddervold* court avoided a direct reference to the time of transfer in its opinion,121 it seems undeniable that, at some point during the operation of the income execution against the debtor's wages or future wages, a transfer must be deemed to have taken place.122

on the question presented in *Riddervold*, Judge Knight, the author of *Prunotto*, twice rejected the *Sims* continuing levy theory and cited *Beck* on each occasion to uphold the trustee's rights against the judgment creditor to wages of the debtor withheld under an income execution during the initial period. See *In re Duffy*, 34 F. Supp. 894 (W.D.N.Y. 1940); *In re Smith*, 8 F. Supp. 49 (W.D.N.Y. 1940).

113. See notes 42, 68 & 74 supra.
114. For a discussion of § 5281 of the New York Civil Practice Law and Rules and its predecessors, see note 49 supra.
116. See note 49 supra.
120. See *In re Cox*, 7 Bankr. Ct. Dec. (CRR) at 735. While state law determines the character of liens in these circumstances, federal bankruptcy law controls the determination of when a transfer takes place under an income execution. See 11 U.S.C. § 547(e) (Supp. III 1979). See also note 44 supra.
121. See note 105 supra.
122. It is submitted that the *Riddervold* court's assertion that payment to the judgment creditor by the garnishee employer did not constitute a transfer...
Code section 547(e)(3) clearly states that a transfer is not made until the debtor acquires rights in the property transferred.\textsuperscript{123} Therefore, as the court in \textit{Cox} stated, "the transfer of wages garnished pursuant to a writ of garnishment \textit{cannot} occur until the judgment debtor has earned the wages garnished."\textsuperscript{124} Even if this proposition is simplistic,\textsuperscript{125} it is submitted that the \textit{Riddervold} court's highly technical holding that a novation occurs and that the debtor has no property interest in future wages which are subject to an income execution is a strained analysis\textsuperscript{126} for

of the debtor's property implies that the transfer occurred prior to the actual payment. The \textit{Riddervold} court suggests that the transfer of the debtor's property was complete upon service of the income execution on the employer. \textit{See} 647 F.2d at 346. \textit{See} notes 98-100 and accompanying text \textit{supra}. If, in fact, the \textit{Riddervold} court is suggesting that the debtor simply had no property to transfer prior to the wages being earned, and that the income execution effectively prevents the debtor from ever acquiring an interest in his wages thereafter, the court failed to sufficiently justify this proposition. \textit{See} notes 125-26 \textit{infra}.


\textsuperscript{124} 7 Bankr. Ct. Dec. at 785 (emphasis added). A number of courts have followed essentially this same line of reasoning when applying § 547(e)(3) to both wage garnishment payments and other analogous payments to a judgment creditor during the ninety-day period. \textit{See} note 74 \textit{supra}.

The \textit{Riddervold} court's analysis seems to equate the creation of the lien and levy to a transfer of the property, or of an interest in property. Yet the two are not functionally equivalent under bankruptcy law, and the clear language of § 547(e)(3) seems to require a result contrary to that in \textit{Riddervold}.

\textsuperscript{125} This assumes for purposes of analysis, that the court in \textit{Riddervold} simply argued that: 1) § 547 requires a transfer of the debtor's property; 2) by virtue of the income execution served outside the ninety-day period, the debtor never had or will have any interest in the portion of his wages at issue, and therefore; 3) the inquiry simply never reaches § 547 because there was no transfer of the property of the debtor. \textit{See} notes 97-100 and accompanying text \textit{supra}.

\textsuperscript{126} \textit{See In re Ransford}, 194 F. 658 (6th Cir. 1912); note 46 \textit{supra}. While the \textit{Riddervold} case can be distinguished from \textit{Ransford}, the rationale behind the \textit{Ransford} decision seems applicable. If, as the \textit{Riddervold} court suggests, the income execution upon the debtor's wages operates as a novation, then, by analogy to novation, the debtor is thereafter exonerated from liability to the judgment creditor. \textit{See} 194 F. at 633. The judgment creditor must look to the garnishee alone for satisfaction of his debt. \textit{Id}. If the garnishee should thereafter fail to pay and, in fact, be unable to pay the judgment creditor, the judgment creditor's debt would go unsatisfied, regardless of the means of the original debtor. \textit{Id}. It is submitted that this scenario creates an anomalous result to which the \textit{Riddervold} court would not subscribe.

In practice, as the \textit{Ransford} court pointed out, the debtor is not absolved of liability on the debt until the garnishee has satisfied his obligation to pay the judgment creditor the amount due under the income execution. \textit{Id}. at 662-63. In addition, the debtor has the right to satisfy the claim of the judgment creditor prior to payment by the garnishee, in which case the judgment creditor's claim to the garnisheed fund is void, and the debtor's legal right to the fund is unequivocal. \textit{Id}. at 663.

With these considerations in mind, it is submitted that the debtor's property interest in wages earned subject to an income execution, continues until such wages are actually paid to the judgment creditor. \textit{See id}. Therefore, it
which too little justification has been offered.\textsuperscript{127}

In considering the impact of \textit{Riddervold}, it is submitted that judgment creditors within the Second Circuit’s jurisdiction will make increasing use of income execution to secure payment of debts from wage-earning debtors. This will be felt primarily by wage-earners bordering on insolvency because their judgment creditors will no longer be discouraged from seeking an income execution by the knowledge that payments they receive immediately prior to the debtor’s bankruptcy will have to be returned to the debtor or his trustee in bankruptcy. Theoretically, the \textit{Riddervold} decision could precipitate bankruptcy of marginally solvent wage-earning debtors by lessening the creditors’ incentive to cooperate with the debtor in arranging a workable repayment plan in order to avoid bankruptcy.

Furthermore, the \textit{Riddervold} analysis may be applied by the courts in the Second Circuit to situations analogous to income execution to prevent the operation of the preference section of the Code on transfers of money or property received by a judgment creditor during the ninety-day period. It is submitted that the \textit{Riddervold} court’s analysis might be applied to a debtor’s assignment of future wages to a creditor, or to any situation where a creditor acquires the right to a debtor’s contingent future interest in money or property.\textsuperscript{128} In each of these situations where the creditor receives the property during the ninety-day period, it is submitted that, according to \textit{Riddervold}, the Code’s preference section will not operate because the debtor could be said to have no interest in the property transferred.

In conclusion, it is submitted that the \textit{Riddervold} analysis should be rejected by courts presented with similar issues arising under other state wage garnishment statutes.\textsuperscript{129} Furthermore, while \textit{Riddervold} could be applied broadly to analogous situations, it is submitted that the responses of the \textit{Cox} court\textsuperscript{130} and other courts to identical or similar

\textsuperscript{127} In view of the novelty of the \textit{Riddervold} court’s conclusion on this issue, it is submitted that some authority or a compelling rationale should have been offered to support it.

\textsuperscript{128} See, e.g., \textit{In re Diversified World Investments, Ltd.}, 12 Bankr. 517 (S.D. Tex. 1981). \textit{Diversified} involved a rent assignment to a creditor. There is no reason that the \textit{Riddervold} analysis could not be applied to the situation posed in \textit{Diversified}. For a discussion of \textit{Diversified}, see note 74 \textit{supra}.


\textsuperscript{130} See notes 70-76 \textit{supra}. 
issues \(^{131}\) are more appropriate in view of the clear language of Code section 547(e)(3). \(^{132}\)

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131. *See* note 74 *supra.*
132. *See* notes 41 & 115-20 and accompanying text *supra.*