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## Execution Liens in Florida: Not a Creditor's Paradise

Elizabeth R. Krentzeman

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## I. INTRODUCTION

In 1848, William Thackeray wrote "how well those live who are comfortably and thoroughly in debt; how they deny themselves nothing; how jolly and easy they are in their minds."<sup>1</sup> Although Thackeray's statement accurately portrays the lifestyle of the debtors in *Vanity Fair*, it certainly does not reflect the legal consequences which attended debtor status in the nineteenth century. Under the common law, debtors could be jailed for nonpayment of their debts.<sup>2</sup>

While imprisonment is now considered inappropriate,<sup>3</sup> the legal system has developed extensive machinery to ensure the payment of debts. Debtor-creditor litigation, which determines the validity of a debt and a creditor's right to payment, represents only one aspect of the collection process. A judgment for the creditor does not in itself guarantee immediate or complete satisfaction of the creditor's claim. In the event the debtor fails to pay, the creditor may execute to collect his judgment. In general, execution creates a lien enabling the sheriff to levy upon and sell the debtor's nonexempt assets.<sup>4</sup>

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1. W. THACKERAY, *VANITY FAIR: A NOVEL WITHOUT A HERO* 214 (Int'l Collectors Library (1950).

2. 8 W. HOLDSWORTH, *A HISTORY OF THE ENGLISH LAW* 230-31 (2d ed. 1966). By obtaining a writ of capias ad satisfaciendum, a creditor could have the debtor put in jail. *Id.* at 231.

3. *See, e.g.*, FLA. STAT. § 56.011 (1983) which eliminates the writ of capias ad satisfaciendum and provides, except in the case of fines imposed by law, a debtor shall not be arrested or confined for the payment of money.

4. *Love v. Williams*, 4 Fla. 126, 134 (1851).

This note examines Florida's practice of dating execution liens on personalty from the time a writ of execution is delivered to the sheriff. This procedure differs from most jurisdictions, where execution liens date from the time of levy. The Florida practice discourages creditor diligence in locating the often mobile non-exempt property of the debtor. Furthermore, since a Florida execution lien exists before levy, purchasers and other creditors are not provided adequate notice of the encumbrance on the debtor's assets. These problems will be examined in the context of priority conflicts where more than one creditor seeks to execute against the same debtor, sheriff liability where a junior creditor's claim is first executed, and priority conflicts where a secured creditor attempts to utilize collateral subject to an execution lien. A consideration of rules relating to the creation of execution liens in other jurisdictions, as well as an analysis of commercial practice and planning, suggest Florida should adopt the prevailing practice of dating execution liens from the time of levy.

## II. THE CREDITOR'S ROLE IN EXECUTION

In Florida, execution is governed largely by statute.<sup>5</sup> A writ of execution, technically known as a writ of fieri facias,<sup>6</sup> enables the judgment creditor to enforce his judgment by execution.<sup>7</sup> A creditor must therefore obtain a final money judgment against the debtor before a writ will be issued.<sup>8</sup> While recordination of the creditor's judgment is necessary to create a judgment lien on the debtor's real property,<sup>9</sup> the delivery of a writ of execution to the sheriff is necessary to establish an execution lien on the debtor's personalty.<sup>10</sup>

Since the execution lien's effectiveness is restricted to the county where the writ has been delivered,<sup>11</sup> creditors play a significant role in the discovery of personalty available for execution. A creditor will deliver his writ after he has located a county where the debtor has enough personal property to satisfy his

5. See, e.g., FLA. STAT. §§ 56.011-.29 (1983) (governing executions generally).

6. H. HERMAN, THE LAW OF EXECUTIONS § 26 (1876).

7. *Raulerson v. Peebles*, 81 Fla. 206, 208, 87 So. 629, 630 (1921) (a writ of execution directs and authorizes the sheriff to effect the final judgment).

8. Florida civil procedure rules provide that, except on special order of the court which may be made at any time after judgment, a writ of execution cannot be issued until the expiration of the time within which a motion for a new trial or rehearing may be made; where a motion for a new trial or rehearing is made, a writ of execution cannot be issued until the motion has been determined. FLA. R. CIV. P. 1.550(a). The rules also state a writ of execution may issue upon judgments providing solely for the payment of money. *Id.* 1.570(a).

9. FLA. STAT. § 55.10 (1983).

10. See, e.g., *Love v. Williams*, 4 Fla. 126, 134 (1851) (where the court observed that Florida follows the common law rule of establishing an execution lien on personalty at the time a writ of execution is delivered to the sheriff).

11. See, e.g., *Smith v. Purdy*, 272 So. 2d 545, 547 (Fla. 3d D.C.A. 1973) (a judgment will operate as a lien on the debtor's personal property in the county in which the writ of execution is delivered to the sheriff). But see *In re Vero Cooling & Heating*, 11 BANKR. 359 (Bankr. S.D. Fla. 1981). In *Vero Cooling*, the bankruptcy court suggested an execution lien attached to property located throughout Florida. *Id.* at 360. The sheriff had, however, seized property in the county where the writ had been delivered. *Id.*

judgment.<sup>12</sup> Before making a final decision, a creditor may examine the sheriff's execution docket, which contains a list of all previously delivered writs of execution, to determine the existence of any prior claims on the debtor's property in that county.<sup>13</sup>

When the creditor delivers his writ, he may direct the sheriff to levy on property which he has discovered.<sup>14</sup> The sheriff is under a statutory duty to levy upon the specific property described in the writ or as otherwise instructed by the creditor.<sup>15</sup> If the sheriff is unable to locate property which will satisfy the judgment, the creditor may utilize proceedings supplementary to execution to discover assets and subject them to his judgment.<sup>16</sup>

After the sheriff has received and docketed the writ, he has a duty to proceed to levy and sale.<sup>17</sup> A valid levy consists of actual or constructive seizure<sup>18</sup> of the debtor's nonexempt property.<sup>19</sup> Once levied upon, the property is considered to be in custody of the law<sup>20</sup> and must be sold at an execution sale.<sup>21</sup> Because

12. Distler & Schublin, *Enforcement Priorities and Liens: The New York Judgment Creditor's Rights in Personal Property*, 60 COLUM. L. REV. 458, 467 (1960). The authors observe that creditors regularly delay executing until they find property which can be seized and sold in satisfaction of their claims.

13. FLA. STAT. § 30.17 (1983) provides:

(1) The sheriff shall keep an execution docket, which shall contain a list of all executions, orders and decrees directed to him, in relation to the collection of moneys, and a statement of all moneys credited on such orders, executions and decrees, and when and to whom and by whom paid.

(2) Said docket shall be subject to the inspection of all parties interested.

14. See, e.g., *Century Pipe & Supply Co. v. Empire Factors*, 19 Ill. App. 2d 165, 171, 153 N.E.2d 298, 301 (1958) (where the court observed it is uniform practice for the sheriff to act only on the direction of creditors).

15. FLA. STAT. § 30.30(1) (1983). See also *Lawyer's Coop. Pub. Co. v. Bennett*, 34 Fla. 302, 308, 16 So. 185, 187 (1894) (suggesting the creditor's wishes, when made known to the execution officer, should be respected and obeyed). If no specific property is identified, the sheriff must levy on any property assessed against the debtor on the current tax rolls or registered in the debtor's name under any federal or Florida law. FLA. STAT. § 30.30(1) (1983).

16. FLA. STAT. § 56.29 (1983). See generally Note, *Collection Pursuant to Florida's Supplementary Proceedings in Aid of Execution*, 25 U. MIAMI L. REV. 596 (1970-71) (analysis of supplementary proceedings in Florida).

17. FLA. STAT. § 30.15(2) (1983). See also *id.* § 56.29 (providing where the sheriff refuses to act, the plaintiff in execution is entitled to an alternative writ of mandamus requiring the sheriff to levy and sell property).

18. See *Ex parte Fuller*, 99 Fla. 1165, 1168, 125 So. 483, 484 (1930) (the question of actual or constructive seizure is determined by the nature and condition of the property).

19. Property subject to execution is delineated in FLA. STAT. § 56.061 (1983). See generally S. RAKUSIN, *FLORIDA CREDITOR'S RIGHTS MANUAL* ch. 11 (1975) (an examination of constitutional and statutory exemptions to § 56.061).

20. See, e.g., *Early & Daniel Co. v. Brown*, 22 Fla. Supp. 155, 157 (Duval Cty. Cir. Ct. 1961) (where the court defined levy under a writ of execution as "an absolute appropriation in law of the property levied on to the payment of the judgment debt"). See also *Young v. Stoutamire*, 131 Fla. 535, 543, 179 So. 797, 801 (1938) (property received by the sheriff is regarded as in custody of the law and cannot be taken from the sheriff by subsequent execution).

21. FLA. STAT. §§ 56.21-.28 (1983) provides for the sale of the property after it has been seized.

the proceeds from the sale are used to satisfy the creditor's judgment,<sup>22</sup> the sheriff must generally sell the property for cash.<sup>23</sup> A judgment creditor may, however, purchase the property on credit as partial satisfaction of his judgment.<sup>24</sup>

### III. CREATION OF EXECUTION LIENS

Under early English common law, an execution lien arose upon issuance of a writ of fieri facias.<sup>25</sup> The purpose of the rule was to prevent debtors from avoiding execution liens by selling the subject property before it could be seized.<sup>26</sup> The rule was abused by creditors, however, who would encumber a debtor's property by procuring a writ, but then fail to deliver the writ to the sheriff to be executed.<sup>27</sup> Since any transfer of the property was subject to the lien, a frequent victim of the early procedure was the innocent purchaser who bought the debtor's property in the interval between the issuance of the writ and its delivery to the sheriff.<sup>28</sup> The creditor could enforce his lien against the purchased property, and the purchaser's only recourse was against the debtor, who was typically insolvent.<sup>29</sup>

To prevent this inequitable result, the practice of dating execution liens from the issuance of a writ of fieri facias was abrogated by the Statute of Frauds.<sup>30</sup> The new rule provided that an execution lien on personalty would arise on the delivery of a writ of execution to the sheriff.<sup>31</sup>

American jurisdictions have adopted and modified the common law in varying degrees. At present, only Tennessee maintains the early common law practice of dating execution liens from the issuance of a writ of fieri facias.<sup>32</sup> Florida, along with a minority of states, follows the Statute of Frauds' declaration that

22. *Id.* § 56.27.

23. See, e.g., 2 A. FREEMAN, *LAW OF EXECUTIONS* § 301 (3d ed. 1900) (suggesting that under ordinary circumstances, the sheriff should only accept unconditional cash bids).

24. *Flagship State Bank v. Carantaz*, 352 So. 2d 1259, 1262 (1st D.C.A.) (when a sale is made to a judgment creditor, the creditor may credit the amount of his debt on the execution as long as the costs of the sale are paid), *cert. denied*, 361 So. 2d 830 (Fla. 1978). See *West v. Duncan*, 72 Colo. 253, 254, 210 P. 699, 700 (1922) (where the court observes that when the judgment creditor is the purchaser, "[i]t would be a useless thing to require the creditor in execution to hand the money to the sheriff and then have the sheriff hand it back to him").

25. Risenfeld, *Collection of Money Judgments in American Law — A Historical Inventory and Prospectus*, 42 IOWA L. REV. 155, 159 (1956-57).

26. 8 W. HOLDSWORTH, *supra* note 2, at 230.

27. *Id.*

28. *Id.* See also *Love v. Williams*, 4 Fla. 126, 133-34 (1851) (observing that the practice of dating execution liens from the issuance of the writ proved inconvenient and mischievous in practice because the goods remained liable in the hands of bona fide purchasers for value).

29. W. HOLDSWORTH, *supra* note 2 at 231.

30. [1676] 29 Car. II, c. 3, § 16 provided that no writ of fieri facias shall bind the personal property of the debtor until the time such writ shall be delivered to the sheriff.

31. *Id.*

32. *Edwards v. Thompson*, 85 Tenn. 720, 721, 4 S.W. 913, 913 (1887). See generally Rich, *Enforcing Money Judgments in Tennessee*, 4 MEM. ST. U.L. REV. 65, 67-72 (1973) (an examination of execution in Tennessee).

an execution lien arises from the time the writ is delivered to the sheriff.<sup>33</sup> The remaining jurisdictions hold that an execution lien arises only when the sheriff actually levies on the debtor's property.<sup>34</sup>

#### IV. PRIORITY AMONG EXECUTION LIENHOLDERS

Rules relating to the creation of execution liens determine the quintessential issue of priority where two or more creditors proceed to execute against the same debtor.<sup>35</sup> A creditor's priority establishes which claim should first be satisfied from the proceeds of the subsequent execution sale.<sup>36</sup> Priority among competing execution lienholders is governed by the first in time principle.<sup>37</sup> The policy of the law is to favor the more diligent creditor whose lien is first created.<sup>38</sup> The law's interest in encouraging creditor diligence is twofold. Creditor diligence aids in the ultimate collection of the debt, which in turn minimizes the risk that other persons might subsequently extend credit without adequate knowledge of the debtor's financial condition.<sup>39</sup> Under the appropriate jurisdictional rule, therefore, one creditor obtains priority over another by virtue of an earlier delivery, levy, or issuance of a writ of fieri facias.

##### A. *The Florida Rule*

In Florida, priority follows the sequence in which writs of execution are delivered to the sheriff.<sup>40</sup> The first creditor to deliver his writ gains priority.<sup>41</sup>

33. See, e.g., *Love v. Williams*, 4 Fla. 126 (1851). A number of states have statutes providing that an execution lien on personalty arises upon delivery of a writ of execution to the sheriff. See, e.g., ARK. STAT. ANN. § 30-116 (1982); COLO. REV. STAT. § 13-52-111 (1983); KY. REV. STAT. ANN. § 426.120 (1983); N.Y. CIV. PRAC. LAW § 5202 (Consol. 1983).

34. H. HERMAN, *supra* note 6, § 182 (the general rule in this country is that execution liens on personal property arise at the time of seizure). For a consideration of the jurisdictions which date execution liens from the time of levy, see *infra* notes 91-102 and accompanying text.

35. See, e.g., *Partch v. Adams*, 55 Cal. App. 2d 1, 10, 130 P.2d 244, 250 (1942) (the priority of successive executions depends upon the order of levies); *Smith v. Purdy*, 272 So. 2d 545, 547 (Fla. 3d D.C.A. 1973) (priority of liens follows the sequence of delivery of the writs of execution to the sheriff; "the first delivered being first in priority and the last delivered being last").

(1) When one creditor seeks to execute, frequently other creditors will execute as well.

One author observes [i]t is a matter of frequent and almost constant occurrence that more than one execution issues against the same party. Generally, when a party owes one debt, he owes more, and when one creditor commences proceedings against him, others do; and as a matter of course, several writs are liable to reach the same officer's hands.

H. HERMAN, *supra* note 6, § 174, at 249.

36. A. FREEMAN, *supra* note 23, § 196.

37. See *supra* note 35. See also H. HERMAN, *supra* note 6, § 181 (discussing the significance of the maxim "[h]e who is prior in time has the better right" in the determination of priorities between competing execution creditors).

38. Distler & Schubert, *supra* note 12, at 506.

39. *Id.*

40. *Smith v. Purdy*, 272 So. 2d 545, 547 (Fla. 3d D.C.A. 1973). In *Smith* the court noted that the time and order of delivery of the writ of execution to the sheriff, rather than the time of docketing, establishes the lien and fixes priority. *Id.* at 548.

41. *Id.* A creditor may lose his priority if he temporarily withdraws an unsatisfied writ from the sheriff for the purpose of seeking execution in another county. *Id.* at 547-48.

Although levy is irrelevant to the priority determination, levy is a necessary step in the attachment of the lien which finalizes the creditor's right to the execution sale proceeds.<sup>42</sup> Where the sheriff levies under a senior writ, the senior lien has attached and the senior creditor is entitled to the proceeds.<sup>43</sup>

When the sheriff levies under a junior writ, the rule of *Love v. Williams*<sup>44</sup> controls and the proceeds are distributed to the junior lienholder. In *Love*, the senior creditor obtained a judgment against the debtor and two years later delivered a writ of execution to the sheriff.<sup>45</sup> The sheriff who received the writ was subsequently replaced by a new sheriff.<sup>46</sup> Several days after the new sheriff took office, the courthouse containing the sheriff's records was destroyed by fire.<sup>47</sup> Two days later, a second creditor obtained a judgment against the debtor and delivered his writ of execution to the sheriff.<sup>48</sup> The sheriff then levied upon and sold the debtor's property under the junior writ.<sup>49</sup> Following the execution sale, the senior creditor proceeded against the sheriff to show cause why the sheriff should not pay him the proceeds from the sale.<sup>50</sup> The sheriff responded he did not know whether he had received the senior creditor's writ, but even if he had, the writ was destroyed by the fire.<sup>51</sup>

The Florida Supreme Court held that where two writs are delivered to a sheriff on different days, the sheriff has a duty to execute the writ which is first delivered.<sup>52</sup> If, however, the sheriff levies upon and sells the property under the junior writ, the junior lienholder is entitled to the proceeds.<sup>53</sup> The court noted that an execution lien does not constitute a per se right in the property itself, but rather a right to levy upon and sell the property in satisfaction of

42. See, e.g., *Reese, Inc. v. United States*, 75 F.2d 9, 9 (5th Cir. 1935) (levy does not create the lien but is a step in the enforcement of it). The writ in the sheriff's possession may be characterized as an inchoate lien which becomes definite once the sheriff levies on the debtor's property. After levy, the date of the lien "relates back" to the date the writ was delivered to the sheriff. *Illi, Inc. v. Margolis*, 267 Md. 30, 35 296 A.2d 412, 415 (1972).

43. See *Krauth v. First Continental Dev-Con, Inc.*, 351 So. 2d 1106, 1108 (Fla. 4th D.C.A. 1977) (where more than one judgment has been obtained against a debtor, the first writ delivered should be the first satisfied). After the senior creditor's judgment has been satisfied, any remaining proceeds may be applied to an unsatisfied junior writ in the sheriff's possession. *Link-Belt Co. v. Hanner*, 12 F.2d 453, 454 (S.D. Fla. 1926).

44. 4 Fla. 126 (1851).

45. *Id.* at 126-27.

46. *Id.* at 127.

47. *Id.*

48. *Id.*

49. *Id.* at 127-28.

50. *Id.* at 129. The senior creditor based his right to the proceeds on the ground that his writ of execution was delivered first and had priority. *Id.* at 133. The senior creditor asserted that it was irrelevant that levy and sale had been made under the junior writ. *Id.*

51. *Id.* The sheriff also asserted a "manifest want of diligence" on the part of the senior creditor who had not acted to enforce his execution before the junior creditor obtained his judgment. *Id.* at 131.

52. *Id.* at 135.

53. *Id.* at 137.

a debt.<sup>54</sup> While delivery of a writ gives rise to the lien, the lien's attachment depends on subsequent levy and sale.<sup>55</sup> Since the sheriff had levied and sold the property under the junior writ, the junior lien had attached and the junior creditor was entitled to the proceeds.<sup>56</sup> The majority held that the senior lienholder, whose writ had not been executed, had no right to the property or its proceeds.<sup>57</sup> The execution sale purchaser was entitled to take the property free of the senior lien,<sup>58</sup> and the senior creditor's only remedy was against the sheriff for failure to execute the first delivered writ.<sup>59</sup>

The dissent agreed with the majority insofar as its holding permitted the purchaser to take the property free of the senior lien.<sup>60</sup> Justice Semmes asserted, however, that the only effect of the sale was to divest the senior lienholder of any right to the property and vest full title in the purchaser.<sup>61</sup> Although the levy and sale had been made under the junior writ, it did not defeat or affect the priority rights between the two creditors.<sup>62</sup> The proceeds belonged to the senior creditor by virtue of his earlier delivery.<sup>63</sup> Questioning the appropriateness of compelling the senior creditor to resort to an action against the sheriff, the dissent concluded that the sheriff's duty was to obtain and distribute the proceeds to the senior lienholder.<sup>64</sup> The dissent suggested that under the majority rule an execution sale, intended to represent the completion of litigation, would now mark the beginning of a lawsuit.<sup>65</sup>

In cases where the sheriff levies under a junior writ, the majority's approach has generally been followed.<sup>66</sup> The First District Court of Appeal in *Flagship State Bank v. Carantzas*,<sup>67</sup> however, distinguished *Love* when a junior creditor purchased execution sale property on credit as partial satisfaction of his judgment.<sup>68</sup> In *Carantzas*, the sheriff levied upon and sold the debtor's property

54. *Id.* at 134.

55. *Id.* at 136. *See supra* note 42 and accompanying text.

56. *Love*, 4 Fla. at 136-37.

57. *Id.*

58. *Id.* at 136. *See also* *Nason v. Polo Water Co.*, 166 So. 2d 691, 693 (Fla. 2d D.C.A. 1964) (a sale of personal property under an execution lien discharges any prior liens on that property).

59. 4 Fla. at 137-38.

60. *Id.* at 141 (Semmes, J., dissenting).

61. *Id.*

62. *Id.* at 140-42.

63. *Id.*

64. *Id.* at 140-43. Since the proceeds should be paid according to priority, the dissent suggested the junior lienholder would not have a cause of action against the sheriff for distributing the proceeds to the senior creditor. *Id.* at 140-41.

65. *Id.* at 143.

66. *See, e.g.*, *Flagship State Bank v. Carantzas*, 352 So. 2d 1259, 1263 (1st D.C.A. 1977), *cert. denied*, 361 So. 2d 830 (Fla. 1978); *Zimmer v. Kellenberger*, 27 Fla. Supp. 75, 75-76 (Palm Beach Cty. Cir. Ct. 1966).

67. 352 So. 2d 1259 (1st D.C.A. 1977), *cert. denied*, 361 So. 2d 830 (Fla. 1978).

68. *Id.*



under the junior writ.<sup>69</sup> The published notice of the execution sale stated that the debtor's property would be sold subject to all prior liens and specifically noted the senior creditor's claim.<sup>70</sup> Rather than examining the junior creditor's right to the property and its proceeds by virtue of levy and sale under the junior writ,<sup>71</sup> the court decided the case based on its characterization of the junior creditor as an execution sale purchaser.<sup>72</sup> While recognizing that *Love* permitted the junior creditor, as purchaser, to take the property free of prior liens, the court held that the junior creditor took the property subject to the senior lienholder's claim.<sup>73</sup> In support of its holding, the court emphasized the junior creditor's knowledge of the senior lien. The court observed that the junior creditor was placed on notice of the senior lien not only by the published notification prior to the sale, but also by virtue of the senior creditor's priority as evidenced by the sheriff's execution docket.<sup>74</sup>

The Third District Court of Appeal also declined to apply *Love* when a junior creditor utilized proceedings supplementary to execution in an effort to collect his judgment. In *Salina Manufacturing Co. v. Diner's Club, Inc.*,<sup>75</sup> the junior creditor obtained a judgment and delivered his writ to the sheriff a year after the senior creditor had established his lien.<sup>76</sup> Through the use of supplementary proceedings, the junior creditor discovered property and subjected it to his judgment.<sup>77</sup> Before the property's sale, the senior lienholder sought to establish his priority over the junior creditor.<sup>78</sup> While recognizing priority is determined by the order in which writs are delivered, the court ruled in favor of the junior creditor.<sup>79</sup> The court did not, however, apply *Love* on the basis that levy had been made under the junior writ.<sup>80</sup> Instead, the court relied on the statute governing supplementary proceedings which provides that the property should

69. *Id.* at 1260. The senior creditor obtained two judgments against the debtor and subsequently delivered his writs of execution to the sheriff. Two years later, the junior creditor obtained judgment and delivered his writ of execution to the sheriff. *Id.*

70. *Id.*

71. Compare *id.* with *supra* notes 53-56 and accompanying text.

72. 352 So. 2d at 1261-63.

73. *Id.* at 1261-63. The junior creditor stated in his brief that the property had been subsequently sold. The court observed that if this were true, *Love* would apply and the purchaser was entitled to take the property free of the senior creditor's lien. The court noted that the senior creditor's remedy would then be restricted to a cause of action against the sheriff for failure to execute the writ which was first delivered to him. *Id.* at 1263.

74. *Id.* at 1262.

75. 382 So. 2d 1309 (Fla. 3d D.C.A. 1980).

76. *Id.* at 1310.

77. *Id.* In the course of discovery in aid of execution, the creditor learned that the debtor had purchased a boat. *Id.* See FLA. STAT. § 56.29 (1983). Since the debtor and his wife owned the boat in tenancy by the entireties, the junior creditor instituted supplementary proceedings to subject the property to his judgment against the debtor individually. 382 So. 2d at 1310. See *supra* note 16 and accompanying text regarding proceedings supplementary to execution.

78. 382 So. 2d at 1310.

79. *Id.* at 1310-11.

80. See *id.* at 1310.

be sold in favor of the creditor whose judgment had formed the basis of the proceedings.<sup>81</sup> The court recognized the junior creditor's diligence was solely responsible for the property's availability for execution.<sup>82</sup> Moreover, the court suggested inequity would result if the senior creditor reaped the benefits of the junior creditor's labor.<sup>83</sup>

#### B. Sheriff Liability Where the Junior Writ is Executed First

As foreseen by Judge Semmes in his dissent, the rule established in *Love* has in fact generated litigation between senior lienholders and sheriffs.<sup>84</sup> In *Zimmer v. Kellenberg*,<sup>85</sup> for example, a judgment creditor delivered a writ of execution to the sheriff without instructions regarding any specific property available for levy.<sup>86</sup> Seven months later, another creditor obtained a judgment against the same debtor and delivered a writ which directed the sheriff to levy on certain stock certificates.<sup>87</sup> The sheriff subsequently sold the stocks under the junior writ.<sup>88</sup> Citing *Love*, the court ruled that the sheriff's duty to levy and sell under the senior writ does not terminate when no property appears to be available at the time the first writ is received.<sup>89</sup> Because the sheriff had breached his duty to the senior lienholder, the sheriff was liable in damages for the amount of the execution sale proceeds.<sup>90</sup>

#### C. Priority in Other Jurisdictions: Dating Execution Liens From the Time of Levy

In a majority of jurisdictions an execution lien does not arise until the time of actual levy.<sup>91</sup> Between competing judgment creditors, the first creditor to have his writ levied under has priority and is entitled to the execution sale

81. 382 So. 2d at 1311. See FLA. STAT. § 56.29(6)(b) (1983).

82. 382 So. 2d at 1311. The court noted the senior creditor had done nothing in over six years to enforce his judgment. *Id.* at 1310.

83. *Id.* at 1311.

84. See, e.g., *McKeown v. Coogler*, 18 Fla. 866, 870 (1882) (where the Florida Supreme Court reiterated the sheriff acts "at his peril" in selling property under a junior levy); *Flagship State Bank v. Carantzas*, 352 So. 2d 1259 (2d D.C.A. 1977), *cert. denied*, 361 So. 2d 830 (Fla. 1978).

85. 27 Fla. Supp. 74 (Palm Beach Cty. Cir. Ct. 1966).

86. *Id.* at 75.

87. *Id.* The junior creditor's attorney delivered the stock certificates to the sheriff at the same time he delivered the writ of execution. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 75-76. The stocks sold for \$1,600. The court also assessed interest on this amount from the time of the execution sale. *Id.*

91. See, e.g., CAL. CIV. PROC. CODE § 697.710 (West 1983) (providing "[a] levy on property under a writ of execution creates an execution lien on the property from the time of levy until the expiration of two years after the date of issuance of the writ unless the judgment is satisfied sooner"). See also LA. CODE CIV. PROC. ANN. § 600.6012 (West 1984); MINN. STAT. ANN. § 550.10 (West 1984); OKLA. STAT. ANN. tit. 12, § 734 (West 1959); OR. REV. STAT. § 23.410 (5) (1983); VA. CODE § 8.01-478 (1984).

proceeds.<sup>92</sup> Since the writ's delivery is irrelevant to the priority determination, a lien established by levy under a junior writ will be superior to a senior writ that has not been executed.<sup>93</sup> In support of this rule, courts emphasize the importance of levy in giving notice of the lien's existence and as a means of promoting creditor diligence.<sup>94</sup> Because personalty has great mobility, levy provides effective notice that the debtor's property is subject to a lien. Once levied upon, property is in custody of the law and ceases to be an article of commerce which can be sold, pledged, or used by another creditor.<sup>95</sup> Levy therefore provides unequivocal notice to both purchasers and potential creditors that the property is subject to a prior claim. Establishing the lien at the time of levy also encourages creditor diligence. The sheriff will levy in favor of the creditor whose own efforts in discovering property have made execution possible.<sup>96</sup>

In *Century Pipe & Supply Co. v. Empire Factors Corp.*,<sup>97</sup> an Illinois court emphasized these characteristics of levy to rule in favor of the junior creditor. There, the senior creditor had delivered a writ of execution to the sheriff, but made no request for levy.<sup>98</sup> Another judgment creditor subsequently delivered a writ of execution to the sheriff and ordered him to proceed with levy and sale.<sup>99</sup> Although the senior creditor notified the junior creditor of his claim, the court held that the junior creditor was entitled to the execution sale proceeds.<sup>100</sup> Noting that personalty can be easily moved and transferred, the court concluded that levy is the only effective method of notice that the debtor's property is subject to a creditor's claim.<sup>101</sup> Because the senior creditor had failed to enforce his claim promptly, the court ruled in favor of the more diligent junior creditor who made his claim effective through levy.<sup>102</sup>

#### V. PRIORITY BETWEEN EXECUTION LIENHOLDERS AND OTHER CLAIMS

Paralleling the rule governing priority between competing execution liens, priority between an execution lien and other claims on the debtor's property

92. See, e.g., *Bordon v. MaRae*, 46 Tex. 396, 400 (1877) (the plaintiff in execution acquires an execution lien from the time of levy which entitles him to satisfaction of his judgment). See also *supra* note 90.

93. See, e.g., *Johnson v. Gorham*, 6 Cal. 195, 196 (1856) (plaintiff's execution was levied first and therefore should be first satisfied, notwithstanding an older execution against the same debtor in the hands of the sheriff).

94. See, e.g., *Century Pipe & Supply Co. v. Empire Factors Corp.*, 19 Ill. App. 2d 165, 153 N.E.2d 298 (1958).

95. See *supra* note 20 and accompanying text. See also A. FREEMAN, *supra* note 23, § 274 (concluding "[t]he interests of strangers, who might deal in the property upon their faith in the defendant's title, and in ignorance of the plaintiff's lien, require that by some notorious act the period terminating the defendant's right to pledge and sell shall be clearly indicated").

96. See *Distler & Schubert*, *supra* note 12, at 468.

97. 19 Ill. App. 2d 165, 153 N.E.2d 298 (1958).

98. *Id.* at 167, 153 N.E.2d at 299. The senior creditor and debtor had entered into an agreement whereby the debtor made installment payments on the judgment and the senior creditor deferred enforcing his writ of execution through levy. *Id.* at 168, 153 N.E.2d at 300.

99. *Id.* at 167, 153 N.E.2d at 299.

100. *Id.* at 171-72, 153 N.E.2d at 301-02.

101. *Id.* at 170, 153 N.E.2d at 301.

102. *Id.* at 172, 153 N.E.2d at 302.

is also governed by priority in time.<sup>103</sup> In Florida, an execution lien takes priority over all claims arising after delivery of the writ.<sup>104</sup> Similarly, an execution lien is subordinate to prior liens and claims against the debtor's property.<sup>105</sup>

#### A. *Priority Where the Competing Claim is a Security Interest*

Where the competing claim is a security interest, priority is governed by The Uniform Commercial Code.<sup>106</sup> Florida Statute section 679.301(1)(b) provides that an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected.<sup>107</sup> The statute defines a "lien creditor" as one acquiring a lien on property by attachment, levy, or the like.<sup>108</sup> A judgment creditor who creates a lien on the debtor's property by delivering a writ of execution to the sheriff is included within this definition.<sup>109</sup> To obtain priority over a competing execution lien, the negative implication of Florida statute section 679.301(1)(b) is that the secured party must perfect his security interest before the judgment creditor delivers his writ to the sheriff.<sup>110</sup> Perfection typically requires compliance with a statutory notice requirement and the attachment of the security interest.<sup>111</sup>

*Bank of Hawthorne v. Shepherd*<sup>112</sup> illustrates the interaction between the practice of dating execution liens from the time of the writ's delivery and Florida Statute section 679.301(1)(b), which governs priority contests between execution liens

103. See H.HERMAN, *supra* note 6, § 180.

104. See, e.g., *Black v. Miller*, 219 So. 2d 106 (3d D.C.A.), *cert.denied*, 225 So. 2d 920 (Fla. 1969); *Nason v. Polo Water Co.*, 166 So. 2d 691 (Fla. 2d D.C.A. 1964).

105. See, e.g., *Bronson v. Willis*, 142 Fla. 64, 194 So. 245 (1940); *Wildwood Crate & Ice Co. v. Citizens Bank*, 98 Fla. 186, 123 So. 699 (1929).

106. See FLA. STAT. §§ 679.101-507 (1983) (statutory provisions representing Florida's version of article nine of the Uniform Commercial Code). See also *Automatic Truck & Trailer Wash Centers, Inc. v. Eastamp, Inc.*, 320 So. 2d 7, 7 (Fla. 2d D.C.A. 1975) (observing that article nine is designed to protect the secured creditor against the destruction of his security interest by a third person). For an excellent analysis of priority conflicts between security interests and execution liens, see generally 2 W. WILLIAMS, *FLORIDA LAW ON SECURED TRANSACTIONS* 15-23 (1980).

107. FLA. STAT. § 679.301(1)(b) (1983) provides: "Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected." The statute also governs priority contests between lien creditors and secured creditors who have a purchase money security interest. *Id.* § 679.301(2). For a consideration of the priority of a purchase money security interest over a pre-existing execution lien, see *Gilmore, The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963).

108. FLA. STAT. § 679.301(3) (1983) provides:

A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy, or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

109. *Id.* The drafters of article nine used the phrase "lien obtained by legal proceeding" in referring to the priority contest governed by U.C.C. § 9-301(1)(b). U.C.C. § 9-301 official comment 3 (1972).

110. FLA. STAT. § 679.301(1)(b) (1983).

111. See *id.* § 679.303.

112. 330 So. 2d 75 (Fla. 1st D.C.A. 1976).

and security interests. In *Bank of Hawthorne*, two execution creditors and a secured party sought to obtain priority in the debtor's automobile.<sup>113</sup> On March 18, the senior creditor delivered a writ of execution to the sheriff in Alachua County, Florida.<sup>114</sup> On April 7, the secured party mailed notice of his security interest to the Department of Motor Vehicles,<sup>115</sup> pursuant to section 319.27 (2) of the Florida Statutes.<sup>116</sup> On April 10, the title certificate was issued noting that the security interest had been filed.<sup>117</sup> In the interim, on April 8, a second judgment creditor also delivered his writ of execution to the sheriff in Alachua County.<sup>118</sup>

Recognizing that a security interest in an automobile is perfected on the date it is filed with the Department of Motor Vehicles,<sup>119</sup> the district court held that the security interest was perfected on April 10.<sup>120</sup> Because the first execution creditor established his lien on March 18, the court ruled that the senior judgment creditor was entitled to priority.<sup>121</sup> While the second judgment creditor had established his lien during the period in which the secured party took steps to perfect his interest, the second lien, arising at the time of the writ's delivery on April 8, also had priority over the subsequently perfected security interest.<sup>122</sup>

## VI. A CONSIDERATION OF THE FLORIDA RULE

In view of the policy favoring creditor diligence and the commercial significance of notice of prior claims on the debtor's property, the Florida procedure of establishing execution liens at the time of the writ's delivery is unsatisfactory. From the standpoint of diligence, the Florida rule implies that by delivering his writ to the sheriff, a creditor has done all that is within his power to enforce his judgment. Diligence is thereby confined to delivery. The Florida rule does not address the law's continuing interest in encouraging further efforts from creditors<sup>123</sup> and fundamentally disregards the important role creditors play in the discovery of assets available for execution.<sup>124</sup>

113. *Id.* at 75-76.

114. *Id.* at 75. The writ was recorded on the sheriff's execution docket on the same day. *Id.*

115. FLA. STAT. § 319.27(2) (1983) provides that a security interest in a motor vehicle will not be enforceable against third parties until it has been filed in the Department of Highway Safety and Motor Vehicles and noted on the vehicle's certificate of title.

116. 330 So. 2d at 76.

117. *Id.*

118. *Id.* The writ was recorded on the sheriff's execution docket on the same day. *Id.*

119. *Id.* See FLA. STAT. § 319.27(2) (1983).

120. 330 So. 2d at 76.

121. *Id.*

122. *Id.*

123. See *supra* notes 38-39 and accompanying text.

124. See *supra* notes 11-12 and accompanying text. See also Distler & Schubert, *supra* note 12, at 467. The authors observe that wealth is often concentrated in securities and other complex property interests and that public records may offer only limited assistance in ascertaining the nature and location of the debtor's property. Sheriffs, therefore, are unable to cope with the problems of discovering property. *Id.*

In the collection process, creditor diligence is rewarded by priority which establishes the creditor's right to have his judgment satisfied first. Yet, by virtue of *Love*, a creditor's priority, and his right to the execution sale proceeds, can be undermined when the sheriff executes a junior writ. In Florida, a creditor's priority may merely represent the right to proceed against the sheriff for breach of duty.<sup>125</sup>

While a judgment creditor's action against a sheriff is undoubtedly warranted when the sheriff has been delinquent in his duties,<sup>126</sup> a creditor's action against a sheriff in circumstances such as those presented in *Love* and *Zimmer* appears inappropriate. In the normal course of execution, the sheriff acts as an official extension or instrument of the creditor in satisfying his judgment.<sup>127</sup> The effect of *Love* and *Zimmer* is to put the sheriff in tenuous opposition to the creditor where two or more creditors obtain judgment against the same debtor.<sup>128</sup> Additionally, the extenuating circumstances in these cases suggest the sheriff is often not especially blame-worthy in executing the junior writ. Nevertheless, faced with a diligent junior lienholder, these courts did not penalize the less attentive senior lienholder but instead imposed liability on the sheriff.

Although *Carantzas* could represent a retreat from *Love*, it is more likely the holding is restricted to situations where junior creditors purchase execution sale property on credit in satisfaction of their judgments. Due to the court's characterization of the junior creditor as a credit purchaser, it is unlikely that the *Carantzas* approach would be adopted when cash proceeds are generated from the sale. In instances where cash proceeds result from levy and sale under a junior writ, *Love* governs, and the senior creditor's remedy would be restricted to a cause of action against the sheriff rather than a right to the property or its proceeds.<sup>129</sup>

On the other hand, the court's emphasis on the junior creditor's knowledge of the senior claim could be utilized to preclude junior creditors from obtaining execution sale proceeds. While in *Carantzas* the junior creditor had actual knowledge of the senior lien, constructive notice of a senior claim could always be inferred by virtue of the sheriff's execution docket.<sup>130</sup> By relying on the junior creditor's knowledge of a senior lien as a basis for denying the junior creditor's right to the proceeds, the result would reflect the reasoning of the *Love* dissent. Priority would still be established by delivery of the writ, yet the sheriff's liability

125. See *supra* note 65 and accompanying text.

126. See FLA. STAT. § 30.19 (1983) (regarding sheriff liability for failure to execute a writ without sufficient cause); *id.* § 30.20 (providing for sheriff liability where the sheriff returns an unsatisfied writ when property was available for execution).

127. See *supra* notes 11-17 and accompanying text.

128. The sheriff's position is especially awkward where he levies in favor of a junior creditor who provides instructions regarding property available for execution and is then sued by an inattentive senior creditor. See, e.g., *Zimmer v. Kellenberger*, 27 Fla. Supp. 74 (Palm Beach Cty. Cir. Ct. 1966). See also *supra* notes 84-90 and accompanying text.

129. See *supra* note 73.

130. See FLA. STAT. § 30.17 (1983); *supra* note 13 and accompanying text.

where a junior writ had been executed would be eliminated.<sup>131</sup> The senior creditor would receive the execution sale proceeds to which his priority had entitled him.

The fundamental problem with such an analysis, however, is that the senior lien has not attached. As illustrated in *Love*, levy is an essential step in the lien's attachment. In the absence of levy, the senior lienholder has no rights in the property or its proceeds.

Like *Carantzas*, *Salina* could be interpreted as a departure from *Love*. However, since the cases' outcomes were largely determined by statute, *Salina* is also likely to be limited to its facts. Although supplementary proceedings might appear as a means for diligent creditors to secure priority, the remedy may only be pursued where property is initially unavailable for levy.<sup>132</sup> In many executions, the remedy may not be available.

Significantly, however, the court in *Salina* recognized the junior creditor's diligence in securing property for execution. A court could extend this reasoning in cases where a junior creditor provides specific instructions regarding property available for levy.<sup>133</sup> In such circumstances, a court could rule that the junior creditor is entitled to priority over a senior creditor who has done nothing to enforce his lien.<sup>134</sup> This approach, however, has not been adopted.<sup>135</sup>

Even if Florida courts were to recognize creditor diligence as a factor in establishing priority, the issue of notice of the lien's existence would remain. From the creditor's perspective, an examination of the facts of *Bank of Hawthorne* illustrates the inadequacy of notice provided by the practice of dating execution liens at the time of the writ's delivery. In *Bank of Hawthorne*, the first writ of execution was delivered to the sheriff before the secured party mailed notice of his security interest to the Department of Motor Vehicles.<sup>136</sup> A search of the sheriff's execution docket in Alachua County, therefore, would have revealed the existence of the execution lien and put the secured creditor on notice of a prior claim on the property.<sup>137</sup> It is likely, however, the security interest was obtained in another county where the secured party maintained his place of business.<sup>138</sup> Since the senior writ was delivered to the sheriff in Alachua County, the secured party would have notice of the lien only if he examined execution dockets outside the county in which the transaction took place.<sup>139</sup>

131. See *supra* note 64.

132. FLA. STAT. § 56.29 (1) (1983). See also *supra* note 16 and accompanying text.

133. See *supra* notes 14-15 and accompanying text.

134. See *supra* notes 82-83 and accompanying text.

135. See *Zimmer v. Kellenberger*, 27 Fla. Supp. 74 (Palm Beach Cty. Cir. Ct. 1966); *supra* notes 85-90 and accompanying text.

136. See *supra* notes 114, 116 and accompanying text.

137. See FLA. STAT. § 30.17 (1983); *supra* note 13 and accompanying text.

138. See 2 W. WILLIAMS, FLORIDA LAW ON SECURED TRANSACTIONS 19-20 (1980). Professor Williams suggests it is reasonable to assume that the vehicle was present in Clay County in the unfettered possession of the debtor on the day the security interest was obtained. *Id.* at 20.

139. See *supra* notes 137-38 and accompanying text.

The court did not suggest that it was the secured party's responsibility to inspect execution dockets throughout the state. Nevertheless, because mobile property may accumulate execution liens throughout Florida's sixty-seven counties, it can be inferred from the court's holding that a statewide docket search is necessary for a secured party to protect his interest. Such action, however, is not only time consuming but in many cases also prohibitively expensive.<sup>140</sup> Yet, as *Bank of Hawthorne* suggests, failure to examine the execution dockets of each county may prove disastrous to a prospective creditor.<sup>141</sup>

Assuming the secured party did in fact make a statewide docket search, it is doubtful he had any adequate method of safeguarding priority with respect to the second execution lien.<sup>142</sup> The second lien was based on a writ delivered to the sheriff the day after the secured party mailed notice of his security interest.<sup>143</sup> Thus, if the secured party had examined the sheriff's execution docket on the day he took steps to perfect his interest, he would not have discovered the existence of the second lien.<sup>144</sup> Yet, because the lien, arising at the time of the writ's delivery, came into existence before the security interest was perfected, the secured party's claim was subordinate to that of the second execution creditor.

## VII. CONCLUSION

The policy of encouraging creditor diligence, the commercial significance of notice of prior claims on property, and the mobility of personalty suggest Florida should adopt the prevailing practice of establishing execution liens from the time of levy. In addition to eliminating sheriff liability where a junior writ has been executed, the practice of dating execution liens at levy encourages creditor diligence beyond the mere formality of delivering a writ. Levy also serves as undisputed notice of a creditor's claim. Once levied upon, property cannot travel from one county to another appearing unencumbered.<sup>145</sup>

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140. See W. WILLIAMS, *supra* note 138, at 20 (suggesting a statewide docket search is an unlikely practice in most cases considering the cost of such a search).

141. See *In re Cone*, 11 Bankr. 925 (Bankr. M.D. Fla. 1981). In *Cone*, the bankruptcy court held federal law which requires seizure to obtain a lien on aircraft pre-empted the Florida procedure of establishing execution liens at the time of the writ's delivery to the sheriff. *Id.* at 929-30. In support of its holding, the court noted airplanes are uniquely mobile goods. *Id.* at 929. The court observed that to protect himself under the Florida procedure, the secured party would have to examine the execution docket of every sheriff in the state where the plane might be located. *Id.*

142. According to FLA. STAT. § 679.305 (1983), the secured party could have automatically perfected his interest by taking possession of the automobile on the day he acquired the security interest. Since his interest would in this way be perfected before the second execution lien came into existence, the secured party would have priority. See FLA. STAT. § 679.301(1)(b) (1983); *supra* notes 107-11 and accompanying text. But see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 23-10 (2d ed. 1980) (suggesting possession of the collateral involves storage problems and may be impractical where the debtor has legitimate need to retain possession).

143. See *supra* notes 116 & 118 and accompanying text.

144. See FLA. STAT. § 30.17 (1983); *supra* note 13 and accompanying text.

145. See *supra* note 20 and accompanying text.



An examination of Florida case law suggests judicial departure from *Love* is unlikely. For the most part, Florida courts have not acknowledged the significance of creditor diligence in the discovery of assets or the lack of adequate notice inherent in the current procedure. In view of the importance of these issues, the Florida legislature should adopt the levy rule. Since statutory provisions govern nearly every aspect of execution, the legislature should establish levy as the time of the execution lien's creation.

ELIZABETH R. KRENTZMAN