

WHERE CORPORATIONS ARE: WHY CASUAL VISITS TO NEW
YORK ARE BAD FOR BUSINESS

Jeanne L. Schroeder & David Gray Carlson***

Some time prior to 1881, the president of the Terre Haute Car & Manufacturing Co. was traveling through New York on his way to a seaside resort when he was served with process in a civil suit against his company.¹ The president was “not in his official capacity or upon any business of the defendant.”² The company, “being a foreign corporation, had no place of business, and transacted no business, and had no property within this State.”³

Most lawyers today would say that New York courts could not compel this corporation to stand trial in New York. But, this being the nineteenth century, before the days of *International Shoe v. Washington*,⁴ the New York Court of Appeals in *Pope v. Terre Haute Car & Manufacturing Co.* happily imposed jurisdiction on the corporation.⁵ It never occurred to the *Pope* court that the United States Constitution might constitute the slightest impediment to the imposition of jurisdiction.⁶

After *International Shoe*, such a holding became unthinkable. *International Shoe* involved a tax on businesses employing salesmen within the state.⁷ A corporation had resident salesmen and a showroom in Washington.⁸ The state commenced litigation against the corporation by serving process on its salesmen and mailing notice to International Shoe in St. Louis.⁹ The Supreme

* Professor of Law, Benjamin N. Cardozo School of Law.

** Professor of Law, Benjamin N. Cardozo School of Law. Special thanks to Dan Korff-Korn for excellent research help.

¹ *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137, 139 (1881).

² *Id.*

³ *Id.*

⁴ *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁵ *Pope*, 87 N.Y. at 141.

⁶ *See id.* at 139–41.

⁷ *Int'l Shoe Co.*, 326 U.S. at 321.

⁸ *Id.* at 314–15.

⁹ *Id.* at 312.

Court upheld jurisdiction of the Washington courts because the defendant had “minimum contacts with [Washington] such that the maintenance of the suit [did] not offend ‘traditional notions of fair play and substantial justice.’”¹⁰ In so holding, the Court remarked that “the *casual presence of the corporate agent* or even his conduct of single or isolated items of activities in a state in the corporation’s behalf [would not have been] enough to subject it to suit on causes of action unconnected with the activities there.”¹¹

Many examples—three at the United States Supreme Court level—can be given in which the casual visit by an officer of a corporation that was not otherwise doing business in New York was an insufficient peg on which to hang the hat of New York jurisdiction.¹² The Restatement (Second) of Conflicts of Laws summarizes the matter in the following illustration:

A brings an action in state X against the B corporation which was incorporated in state Y. Process is served in X upon C, the president of the B corporation, who happens to be temporarily in X on his own private business. The court does not thereby acquire jurisdiction over B.¹³

It would appear *Pope* is no longer infallible law in New York. Yet, in 2010, the New York Court of Appeals in *Hotel 71 Mezz Lender LLC v. Falor*¹⁴ revived its holding in *Pope* and once again took the

¹⁰ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (other citations omitted).

¹¹ *Int'l Shoe Co.*, 326 U.S. at 317 (emphasis added) (citing *Old Wayne Life Ass'n v. McDonough*, 204 U.S. 8, 21 (1907); *St. Clair v. Cox*, 106 U.S. 350, 359, 360 (1882); *Frene v. Louisville Cement Co.*, 134 F.2d 511, 515 (D.C. Cir. 1943)).

¹² *Bank of Am. v. Whitney Cent. Nat'l Bank*, 261 U.S. 171, 171, 173 (1923) (serving while present temporarily in New York); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517 (1923); *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 266, 269 (1917) (lacking jurisdiction when the President was present in New York on personal affairs); *Brocia v. Franklin Plan Corp.*, 235 A.D. 421, 422, 423, 257 N.Y.S. 167, 168, 169 (App. Div. 4th Dep't 1932) (visiting city in state does meet threshold for personal jurisdiction); *Seaboard Fruit Distrib., Inc. v. Carlton-Moore Co.*, 199 A.D. 612, 616, 617, 192 N.Y.S. 82, 84, 85 (App. Div. 1st Dep't 1922); *Sunrise Lumber Co. v. Homer D. Biery Lumber Co.*, 195 A.D. 170, 173, 185 N.Y.S. 711, 712–13 (App. Div. 2d Dep't 1921); *Trautman v. Taylor-Adams Co.*, 141 Misc. 500, 501, 503, 252 N.Y.S. 701, 702, 704 (Manhattan Mun. Ct. 1931). The federal cases involving federal question jurisdiction commenced in the Southern District of New York. In modern times, this lawsuit would be governed by Federal Rule of Civil Procedure 4(k)(1)(A), which holds that “[s]erving a summons . . . establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.” FED. R. CIV. P. 4(k)(1)(A). Similar statutes were in effect in the 1920s. Rule 4(k)(1)(A) indicates that any limitation on the supreme court of New York becomes a limitation on the Southern District of New York. See *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1411–12 (Fed. Cir. 2009).

¹³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 42 illus. 1 (1971).

¹⁴ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008).

position that a casual visit to New York by a company officer is quite enough to sustain personal jurisdiction over a foreign company not otherwise doing business in New York.¹⁵ *Pope* lives again, as if *International Shoe* had never happened.

How could the *Falor* court have turned back the clock to the primitive days of 1881, ignoring the minimum contacts requirement for bringing foreign businesses under New York jurisdiction? The answer is that, given the confused facts of *Falor*, it is likely the court failed to appreciate the logical predicates of its own holding.¹⁶ The case involved a pre-judgment order of attachment.¹⁷ It seemed to be an exercise in *quasi in rem* jurisdiction.¹⁸ The *Falor* court therefore viewed the controversy as involving jurisdiction over *things*, not over *persons*.¹⁹ Nevertheless, *Falor* was indeed a holding on *in personam* jurisdiction over a business with no minimum contacts with New York.²⁰ It stands for the proposition that casual visits to New York by company agents can, without anything more, submit the company to New York jurisdiction.²¹ A company officer that flies to New York to take in a Broadway show threatens to put his company at the mercy of the New York courts.

Because the *Falor* decision ignores at least three direct holdings and one dictum of the United States Supreme Court that casual visits by an officer do not, without more, imply jurisdiction over the company, *Falor* must be viewed as bad law.²² It should not be followed or cited in New York or other states. It probably should not even be accorded *res judicata* respect in New York or full faith and credit in other states.²³

But there is more! The *Falor* court re-defines the word “possession” in New York personal property law, so that it

¹⁵ *Id.* at 307, 926 N.E.2d at 1204, 900 N.Y.S.2d at 700.

¹⁶ *See id.*

¹⁷ *Id.* at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 700.

¹⁸ *Id.* at 311, 926 N.E.2d at 1207, 900 N.Y.S.2d at 703.

¹⁹ *Id.* at 310, 926 N.E.2d at 1207, 900 N.Y.S.2d at 702 (emphasis added) (“The provisional remedy of attachment, which is governed by CPLR article 62, operates only against the property of the defendant, not on his/her person.”).

²⁰ *Id.* at 311–12, 926 N.E.2d at 1207–08, 900 N.Y.S.2d at 703.

²¹ *Id.*

²² *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945); *Bank of Am. v. Whitney Cent. Nat’l Bank*, 261 U.S. 171, 173 (1923); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923); *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 268 (1917).

²³ Carter G. Bishop, *LLC Charging Orders: A Jurisdictional and Governing Law Quagmire*, 12 J. BUS. ENTITIES 14, 21 (2010) (“If personal jurisdiction over the LLC is required and does not exist in the state of the judgment where a creditor seeks a charging order, the LLC would presumably be privileged to ignore the order even if it is domesticated in the LLC’s state of formation.”).

encompasses intangible property.²⁴ It does so because it felt compelled by the United States Constitution to so define it.²⁵ We shall show that this is completely erroneous. The Constitution does not require the states to adopt a specific theory of property.²⁶

In short, the *Falor* court violates the Constitution by imposing jurisdiction over a company with no minimum contacts with New York. In addition, it purports to change New York property law based on a non-existent constitutional principle.

To establish these propositions, this article is divided into six parts. First, we review the confusing facts in *Falor*, emphasizing that the source of confusion was the fact that the “proper garnishee” in the case had consented to New York jurisdiction for himself, but not for the entities of which he was agent.²⁷ Second, we review the nature of prejudgment attachment in New York, much humbled since *Shaffer v. Heitner* required that a defendant have minimum contacts with a state before a *quasi in rem* jurisdiction can be asserted against his things.²⁸ Third, we review the little understood law of uncertificated securities and limited liability company (LLC) interests, which is crucial to the case. Fourth, we examine the paradox of one person being both a defendant in a lawsuit and a garnishee under an order of attachment—mutually exclusive categories under New York law. Fifth, we review the new definition of the word “possession” introduced by the *Falor* case and show how this definition supplants the definition in the famous case of *Harris v. Balk*.²⁹ Ironically, having supplanted the old definition of “possession,” the *Falor* court actually uses *Harris v. Balk* to change the New York law of situs of intangible property.³⁰ That is, the *Falor* court simultaneously disregards and relies on this classic old chestnut. Finally, we set forth the theory of *in personam* jurisdiction operable in *Falor* and show that it is unconstitutional. We examine what this means for *res judicata* in the case going

²⁴ *Falor*, 14 N.Y.3d at 310–12, 926 N.E.2d at 1207–08, 900 N.Y.S.2d at 702–04.

²⁵ *Id.* at 311, 926 N.E.2d at 1207, 900 N.Y.S.2d at 703 (pointing out due process restrictions on *quasi in rem* jurisdiction as set out in *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), and discussing how attachment can serve purposes of obtaining *quasi in rem* jurisdiction over a person with intangible property in the state).

²⁶ See U.S. CONST. amend. X (directing that powers not expressly granted to the United States by the Constitution are reserved for the States).

²⁷ *Hotel 71 Mezz Lender LLC v. Falor*, 58 A.D.3d 270, 272, 273, 869 N.Y.S.2d 61, 62, 64, *rev'd*, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698 (2010). “Repayment of this loan was personally guaranteed by appellants.” *Id.* at 273, 869 N.Y.S.2d at 64 (emphasis added).

²⁸ *Shaffer*, 433 U.S. at 212.

²⁹ *Harris v. Balk*, 198 U.S. 215 (1905).

³⁰ *Falor*, 14 N.Y.3d at 314–16, 926 N.E.2d at 1209–11, 900 N.Y.S.2d at 705–07.

2012/2013]

Where Corporations Are

1145

forward and for full faith and credit in other states.

I. THE FACTS IN *FALOR*

The circumstances of *Falor* are so confusing that the Court of Appeals likely did not understand it was asserting *in personam* jurisdiction over a foreign company with no minimum contacts in New York.

Guy T. Mitchell was a real estate developer in Florida and the leader of a group of investors.³¹ Their enterprises were organized via twenty-two limited liability companies chartered in Delaware, Georgia, and Florida.³² Mitchell and the other investors owned the equity interests in these LLCs.³³ In addition, Mitchell was the one-hundred percent shareholder of a regular Florida corporation.³⁴

Some years before, the investors established an additional LLC—not one of the twenty-three garnishees just mentioned—to acquire a hotel in Chicago.³⁵ To finance this enterprise, the Chicago LLC borrowed money from yet another LLC, Mezz Lender LLC, who would be the plaintiff in the ensuing litigation.³⁶ As to this loan, all the investors, including Mitchell, signed a guaranty contract in their individual capacities.³⁷ In the contract, the defendants “submitted to the jurisdiction of any federal or state court in New York City in any suit, action or proceeding arising out of or relating to the guaranty.”³⁸ Significantly, the twenty-three garnishees were *not* parties to this guaranty.³⁹

The meaning of this agreement was that Mitchell was both a private defendant in his own right *and* the president of all the entities in which the defendants—including Mitchell—owned equity interests. Mitchell operated in two capacities, one as private citizen and the other as corporate fiduciary of twenty-three garnishees.⁴⁰ It was this dual capacity that apparently confused the New York

³¹ See *Falor*, 58 A.D.3d at 272, 273, 69 N.Y.S.2d at 62, 64; *id.* at 277, 69 N.Y.S.2d at 66 (Saxe, J., dissenting). Besides Mitchell, the defendants include Robert D. Falor, David Falor, Chris M. Falor, Jennifer Falor and Geoffrey L. Hockman. *Id.* at 277, 69 N.Y.S.2d at 66.

³² *Falor*, 14 N.Y.3d at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

³³ *Id.*

³⁴ *Id.* Eight of the LLCs were chartered in Florida, nine in Georgia, and five in Delaware. *Falor*, 58 A.D.3d at 277, 869 N.Y.S.2d at 67.

³⁵ See *Falor*, 58 A.D.3d at 272, 869 N.Y.S.2d at 62 (majority opinion).

³⁶ *Falor*, 14 N.Y.3d at 307, 926 N.E.2d at 1204, 900 N.Y.S.2d at 700.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Falor*, 58 A.D.3d at 272, 869 N.Y.S.2d at 62.

⁴⁰ See *id.* at 273, 869 N.Y.S.2d at 64.

Court of Appeals as to the impact and significance of *International Shoe*.

The Chicago enterprise soon turned sour and the Chicago LLC was bankrupt.⁴¹ The plaintiff brought suit in Supreme Court, New York County against all of the defendants on their guaranty obligation.⁴²

In this litigation, the plaintiff sought to take the deposition of Mitchell.⁴³ Simultaneously, it sought an order of attachment against property of the defendants.⁴⁴ The plaintiff's idea was to place a lien on the equity interests of all the defendants in the LLCs and in Mitchell's wholly-owned corporation.⁴⁵ In an *ex parte* hearing, the supreme court granted the order of attachment in an *ex parte* proceeding, but the court delayed levy by the sheriff until after a hearing on the merits of the attachment.⁴⁶

Meanwhile, Mitchell came to New York to attend the requested deposition, which was held in the supreme court's Manhattan courthouse.⁴⁷ The deposition was scheduled just before the hearing on the order of attachment.⁴⁸

After the deposition recessed, Mitchell personally attended the attachment hearing.⁴⁹ At the hearing, the court approved the order of attachment.⁵⁰ On the spot, with the court's permission, a sheriff's deputy served Mitchell with the order of attachment.⁵¹

II. ATTACHMENT IN NEW YORK

Once glorious and powerful, *quasi in rem* jurisdiction has become a mediocre backwater. In the golden age of the "power" theory of jurisdiction, a state could render judgment if it had power over a defendant or over a defendant's property.⁵² New York in particular

⁴¹ *Id.* at 272, 869 N.Y.S.2d at 62. The plaintiff sought to recover \$65,149,926. *Id.* at 272–73, 869 N.Y.S.2d at 63. Judgment would eventually be entered at \$52,404,066.54. *Falor*, 14 N.Y.2d at 310, 926 N.E.2d at 1206, 900 N.Y.S.2d at 702.

⁴² *Falor*, 14 N.Y.2d at 307–08, 926 N.E.2d at 1204–05, 900 N.Y.S.2d at 700.

⁴³ *Id.* at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

⁴⁴ *Id.*

⁴⁵ *Id.* at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 700–01.

⁴⁶ *Id.*; see N.Y. C.P.L.R. 6211(a) (McKinney 2013) ("An order of attachment may be granted without notice, before or after service of the summons and at any time prior to judgment.").

⁴⁷ See *Falor*, 14 N.Y.2d at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

⁴⁸ See *id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power . . .") (citing *Mich. Trust Co. v. Ferry*, 228 U.S. 326, 353 (1913)); *Ferry*, 228

raised *quasi in rem* jurisdiction to a high art when it permitted garnishments of national insurance companies, even though the underlying tort against which the insurance company had insured bore no connection with New York.⁵³

The “power” theory soon found competition from the “minimum contacts” theory of *International Shoe v. Washington*, which turned on fairness, rather than on power.⁵⁴ For our purposes, the theory of *International Shoe* may be expressed as follows: if a defendant enjoys the benefit of a state’s legal protection, then it is fair that the defendant suffer the burden of answering claims against it in that state.⁵⁵

These two theories—power and fairness—are at war with each other.⁵⁶ And one casualty of this contradiction was the power of a state to base jurisdiction on the capture of the defendant’s things. In *Shaffer v. Heitner*, the Supreme Court barred *quasi in rem* jurisdiction unless there was also *in personam* jurisdiction over the defendant in the minimum contacts sense.⁵⁷

As a result of *Shaffer*, lawyerly interest in prejudgment attachment has plummeted. With regard to New York’s statutory regime, prejudgment attachment has become a way to obtain collateral for some future judgment.⁵⁸ In effect, it provides a nonconsensual lien to secure the claims of otherwise unsecured

U.S. at 353 (“Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign’s pleasure. But . . . we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute.”); Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 284 (1983) (“[A] power theory could justify the assertion of jurisdiction when a legal order has no present hold over the defendant on the ground that, at some future time, it may acquire power over him or his property.”).

⁵³ This was accomplished in the notorious case of *Seider v. Roth*, where a New York resident sued a Montreal driver for an accident in Vermont by attaching the insurance company’s obligation to defend the driver, where the insurance company was present and doing business in New York. *Seider v. Roth*, 17 N.Y.2d 111, 112, 216 N.E.2d 312, 313, 269 N.Y.S.2d 99, 100 (1966), *overruled by* *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). Though *Seider* was effectively overruled, nevertheless, the case continues to have a strange and lingering effect on New York civil procedure. See David Gray Carlson, *Critique of Money Judgment (Part Two: Liens on New York Personal Property)*, 83 ST. JOHNS L. REV. 43, 91–95, 104–06 (2009).

⁵⁴ *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945).

⁵⁵ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

⁵⁶ See Von Mehren, *supra* note 52, at 285.

⁵⁷ *Shaffer v. Heitner*, 433 U.S. 186, 206, 212 (1977). Incomprehensibly, even though minimum contacts have trumped power over *things*, it has not done so over *persons*, according to a plurality of the Supreme Court. *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (Scalia, J., plurality opinion).

⁵⁸ See Carlson, *supra* note 53, at 63.

creditors.⁵⁹ The *Falor* court thought (erroneously) that collateral—not jurisdiction—was the only thing at stake in the dispute before it.⁶⁰

Having collateral is no small thing, in a nation where the average bankruptcy dividend to non-priority unsecured creditors approaches zero.⁶¹ But New York and federal law combine to reduce the value of prejudgment attachment. First of all—by New York law—a plaintiff must show that the defendant is either a crook⁶² or a foreigner,⁶³ equally loathsome in the eyes of New York CPLR. ‘Honest’ domiciliaries are quite immune from attachment, even if they are broke.⁶⁴ In a case of a crook or a foreigner, a New York court apparently has discretion to deny prejudgment attachment, if it does not think the plaintiff needs collateral.⁶⁵

⁵⁹ *Id.* at 47–48.

⁶⁰ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 312, 926 N.E.2d 1202, 1208, 900 N.Y.S.2d 698, 703 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008) (“This is not a case where attachment was used to confer *quasi in rem* jurisdiction over a nondomiciliary based on his/her in-state property. This attachment only served a security function (to ensure there would be sufficient money to satisfy a judgment if plaintiff prevailed).”).

⁶¹ *See, e.g., Dividend to Unsecured Creditors*, FABRICIOUS L. BANKR., <http://www.eastwakebankruptcy.com/bankruptcy-glossary/dividend-unsecured-creditors> (last visited Feb. 20, 2013).

⁶² On this prong, the plaintiff must show:

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or
3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or
4. the action is brought by the victim or the representative of the victim of a crime

N.Y. C.P.L.R. 6201 (McKinney 2013).

⁶³ Here, the plaintiff must show that

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or . . .
5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

Id. Article 53 is the Uniform Foreign Money-Judgments Recognition Act. *See* N.Y. C.P.L.R. 5301–09 (McKinney 2013).

⁶⁴ *See* C.P.L.R. 6201.

⁶⁵ *See, e.g., Ames v. Clifford*, 863 F. Supp. 175, 177 (S.D.N.Y. 1994) (citations omitted) (“New York courts have required an additional showing that something, whether it is a defendant's financial position or past and present conduct, poses a real risk to the enforceability of a future judgment.”). The *Ames* court went so far as to suggest that, in the absence of such discretion, New York law might violate the constitutional right of nondomiciliaries to equal protection of the laws. *Id.* *See also Thornapple Assocs., Inc. v. Sahagen*, No. 06 Civ. 6412(JFK), 2007 U.S. Dist. LEXIS 17370, at *7 (S.D.N.Y. Mar. 12, 2007) (finding that the court may still deny prejudgment attachment even if the plaintiff meets the statutory requirements of CPLR sections 6201(1) and 6212(a)); *Elliott Assocs., L.P. v. Republic of Peru*, 948 F. Supp. 1203, 1211 (S.D.N.Y. 1996) (explaining that it is up to the

Second, even where a plaintiff manages to wheedle a prejudgment lien from the New York courts, such a lien is void as a preference in a federal bankruptcy if the debtor files a bankruptcy petition shortly after the lien is created.⁶⁶ It is no doubt typically the case that a lawsuit is triggered precisely because a debtor is insolvent and cannot pay.⁶⁷ Under these circumstances, the prejudgment attachment lien may simply serve to provoke a bankruptcy case.⁶⁸

Because the *Falor* court is a prejudgment attachment case, it is tempting to ignore it for the reason that it poles its way through in the foetid, insalubrious backwaters of a law that few people really care about anymore. But appearances are deceiving; there is an important overlap between *quasi in rem* and *in personam* jurisdiction.

The overlap is this: if a defendant's property is an intangible debt owed to the defendant by a garnishee, then *in rem* jurisdiction over this debt depends on New York's *in personam* jurisdiction over the garnishee. As Professor Walter Kennedy long ago observed:

If the garnishee were a foreign corporation, additional proof that the garnishee expressly or impliedly submitted to the laws of [New York] must be furnished before the creditor could validly subject the foreign corporation to the process of this state. These basic ingredients must be satisfied as preliminary conditions in order to reach this same debt by way of attachment; the right of the plaintiff to garnish is a derivative right which he must trace out through the defendant. The garnishee being a non-resident, orthodox principles of the common law and the constitutional mandate of due process will prevent the principal plaintiff from reaching over the head of the defendant and seizing the latter's credits in the hands of a non-resident garnishee.⁶⁹

It is precisely into this overlap that the *Falor* holding fits.

discretion of the courts to deny prejudgment attachments); *Reading & Bates Corp. v. Nat'l Iranian Oil Co.*, 478 F. Supp. 724, 726 (S.D.N.Y. 1979) (discussing that the court has discretion over the remedy of attachment); *Maitrejean v. Levon Props. Corp.*, 45 A.D.2d 1020, 1020–21, 358 N.Y.S.2d 203, 205 (App. Div. 2d Dep't 1974) (reversing supreme court for granting a lien against a foreign corporation, where corporation was highly liquid); *see also* N.Y. C.P.L.R. 6223(a) (McKinney 2013) ("If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment.").

⁶⁶ 11 U.S.C. § 547(b) (2006).

⁶⁷ *See In re Sadler*, 935 F.2d 918, 919 (7th Cir. 1991).

⁶⁸ *Id.*

⁶⁹ Walter B. Kennedy, *Garnishment of Intangible Debts in New York*, 35 YALE L.J. 689, 693 (1926) (footnotes omitted).

Because *Falor* inhabits this intersection between *quasi in rem* and *in personam* jurisdiction, whatever law *Falor* establishes applies fully to any *in personam* claim by any New York plaintiff against any foreign debtor.⁷⁰ In effect, *Falor* stands for the proposition that any state with power over a corporate agent has power over the corporation, even if the agent's presence in New York is completely unrelated to the scope of the agent's authority.⁷¹

III. UNCERTIFICATED SECURITIES

An important fact in *Falor* is that none of the twenty-three garnishees issued certificated securities to the defendants.⁷² Publicly traded corporations almost universally issue certificated securities.⁷³ In the case of such corporations, few shareholders choose to hold certificates, though they have the right to do so.⁷⁴ Rather, publicly held corporations issue a "jumbo certificate" that is held in New York by the Depository Trust Company (DTC).⁷⁵ In its computerized records, the DTC allocates pro rata interests to brokers, who allocate pro rata interests of its customers.⁷⁶ Although investors think they own stock, in fact they are typically many times removed from the certificated securities issued by the corporation.⁷⁷ What investors in securities listed on the New York Stock Exchange typically own are "security entitlements" as defined in Part 5 of Article 8 of the Uniform Commercial Code (UCC).⁷⁸

Closely held corporations often issue certificates, which are indeed physically held by the shareholder or some bailee of the shareholder.⁷⁹ For example, in the recent case of *Koehler v. Bank of*

⁷⁰ See *Doubet, LLC v. Trs. of Columbia Univ.*, 2011 N.Y. Misc. LEXIS 3235, at *35 (Sup. Ct., New York County July 6, 2011).

⁷¹ See *id.* at *37-38.

⁷² *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 308, 926 N.E.2d 1202, 1205, 900 N.Y.S.2d 698, 701 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008).

⁷³ *No More Paper: Information for Public Companies*, DEPOSITORY TRUST & CLEARING CORP., <http://www.dtcc.com/leadership/issues/nomorepaper/companies> (last visited Feb. 20, 2013).

⁷⁴ See U.C.C. § 8-508 cmt. 1 (2005).

⁷⁵ Jeanne L. Schroeder & David Gray Carlson, *Security Interests Under Article 8 of the Uniform Commercial Code*, 12 CARDOZO L. REV. 557, 598-99 (1990).

⁷⁶ *Id.* at 599.

⁷⁷ *Id.* at 599-600, 603.

⁷⁸ U.C.C. § 8-102(a)(17) (2001).

⁷⁹ See generally Lewis D. Lowenfels & Alan R. Bromberg, *What Is a Security Under the Federal Securities Laws?*, 56 ALB. L. REV. 473, 501-02 (1993) (outlining shareholder securities under federal law).

Bermuda Ltd.,⁸⁰ a Maryland defendant pledged actual certificates to the Bank of Bermuda in exchange for a loan.⁸¹ The shares were physically held in Bermuda.⁸² The plaintiff succeeded in obtaining a federal judgment in Maryland, which was domesticated in New York federal court.⁸³ The New York Court of Appeals—responding to a certified question from the Court of Appeals for the Second Circuit—ruled that, since the Bank of Bermuda did business in New York, a New York court would have personal jurisdiction over the bank and therefore could compel the bank to fetch the certificates back from Bermuda, where a federal marshal could sell them.⁸⁴ *Koehler* is an interesting case on its own.⁸⁵ We may expect, for example, that airlines doing business in New York may be compelled to remove the luggage of defendants from flights anywhere in the world, so that the New York sheriff may hold it for eventual sale.⁸⁶ Be that as it may, for our much narrower purpose, in *Koehler* at least the garnishee bank was qualified to do business in New York, and so the court clearly had personal jurisdiction over the bank.⁸⁷ In *Falor*, the twenty-three garnishees were *not* present in New York, and yet the court imposed jurisdiction over them nevertheless.⁸⁸

A. *Levying on Uncertificated Equity Interests*

Where certificates exist, the sheriff can levy them and sell them.⁸⁹

⁸⁰ *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (2009).

⁸¹ *Id.* at 536, 911 N.E.2d at 827, 883 N.Y.S.2d at 765.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 537, 541, 911 N.E.2d at 828, 831, 883 N.Y.S.2d at 766, 769.

⁸⁵ See Michael A. McGarry Jr., Note, *Vestiges of Jurisdiction: On the In Rem Nature of Pre-Judgment Attachment in New York*, 32 CARDOZO L. REV. 1581, 1592–93 (2010); Damien H. Weinstein, Comment, *New York: The Next Mecca for Judgment Creditors? An Analysis of Koehler v. Bank of Bermuda Ltd.*, 78 FORDHAM L. REV. 3161, 3163 (2010).

⁸⁶ In the context of pre-judgment attachment, only the luggage of those defendants with minimum contacts with New York may be removed by the garnished airline. See *supra* note 25 and accompanying text.

⁸⁷ *Koehler*, 12 N.Y.3d at 540, 911 N.E.2d at 830, 883 N.Y.S.2d at 768. *Koehler* involved certificated shares of stock. A rather different issue is where a creditor could garnish a bank account where the bank is doing business in New York, but the bank account is maintained at a branch outside New York. This entails an ancient doctrine according to which every bank branch is a separate entity for purposes of garnishment. The doctrine may or may not still endure. See Geoffrey Sant, *The Rejection of the Separate Entity Rule Validates the Separate Entity Rule*, 65 S.M.U.L. REV. 813 (2012).

⁸⁸ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 314, 926 N.E.2d 1202, 1209, 900 N.Y.S.2d 698, 705 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App Div. 1st Dep't 2008).

⁸⁹ See generally David Gray Carlson & Carlton M. Smith, *New York Tax Warrants: In the*

In *Falor*, however, there were no certificates.⁹⁰ In such a case, how should the sheriff proceed?

Falor involved a New York levy of a prejudgment order of attachment.⁹¹ According to CPLR section 6202, “[a]ny debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment.”⁹² Section 5201 in turn distinguishes between debts and property.⁹³ Debts are statutorily defined as “any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident.”⁹⁴ An LLC owes no debt to its members.⁹⁵ If it authorizes a dividend, however, its obligation to pay the dividend would constitute a debt.⁹⁶ But no corporation (and, by analogy, no limited liability company) has a contractual obligation to issue dividends.⁹⁷ So equity shares, whether certificated or not, are not typically debts, in the New York sense. Rather, equity interests are “any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested.”⁹⁸

CPLR section 5201 goes on to provide different rules for certificated and uncertificated shares of stock.⁹⁹ According to the CPLR, “[w]here property . . . is evidenced by . . . a certificate of stock of an association or corporation . . . the person holding it shall be the garnishee.”¹⁰⁰ In the case of uncertificated securities, CPLR section 5201(c)(1) provides:

Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for

Strange World of Deemed Judgments, 75 ALB. L. REV. 671, 694–95 (2012) (discussing sheriff levy powers created by court documents and warrants). See *Falor*, 14 N.Y.3d at 314, 926 N.E.2d at 1209, 900 N.Y.S.2d at 705.

⁹⁰ *Falor*, 14 N.Y.3d at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

⁹¹ *Id.* at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 700–01.

⁹² N.Y. C.P.L.R. 6202 (McKinney 2013).

⁹³ Compare N.Y. C.P.L.R. 5201(a) (McKinney 2013), with C.P.L.R. 5201(b).

⁹⁴ C.P.L.R. 5201(a).

⁹⁵ See *Joshua Slocum, Ltd. v. Boyle*, 103 B.R. 610, 623 (Bankr. E.D. Pa. 1989).

⁹⁶ *Id.* at 615.

⁹⁷ *Fifth Third Bank v. United States*, 518 F.3d 1368, 1380 (Fed. Cir. 2008).

⁹⁸ C.P.L.R. 5201(b). In the post-judgment context, “property” is divided into property (ii) capable or (iii) not capable of delivery, a distinction not utilized in Article 62. See N.Y. C.P.L.R. 5202(a), 5232 (McKinney 2013).

⁹⁹ Compare C.P.L.R. 5201(c)(1), with C.P.L.R. 5201(c)(4).

¹⁰⁰ C.P.L.R. 5201(c)(4). Delaware has a different situs rule. Even if certificates are outstanding, the situs of shares is in Delaware. *Shaffer v. Heitner*, 433 U.S. 186, 192 (1977) (construing DEL. CODE ANN. tit. 8, § 169 (1975)).

which a certificate of stock . . . is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.¹⁰¹

It was under this statute that the sheriff garnished Mitchell.¹⁰²

Section 5201(c) is unfortunately worded. In *Falor*, Mitchell was president of twenty-three garnishees that had issued uncertificated membership interests which would presumably fall within the meaning of the term “shares of stock.”¹⁰³ According to section 5201(c)(1), Mitchell is the garnishee.¹⁰⁴ Properly, Mitchell is *not* the garnishee. He is the *agent* of *twenty-three different garnishees*.¹⁰⁵ Mitchell is not the garnishee because Mitchell does not owe the defendants any debt, nor does he have custody of their property.¹⁰⁶ The LLCs, not Mitchell, issued uncertificated securities to the defendants.¹⁰⁷ What section 5201(c)(1) should have said is that a company issuing uncertificated securities is effectively garnished when the president or treasurer *as agent* of the company is served with the order of attachment.

B. Article 8

The phrase “uncertificated securities” implies that Article 8 of the UCC applies. According to UCC section 8-103, “[a] share or similar equity interest issued by a corporation . . . is a security.”¹⁰⁸ One of the garnishees in *Falor* was not an LLC but was a Florida corporation that has issued uncertificated *securities*.¹⁰⁹ As to this one garnishee, UCC section 8-112(b) provides: “[t]he interest of a debtor in an uncertificated security may be reached by a creditor *only by legal process upon the issuer at its chief executive office in the United States*, except as otherwise provided in subsection (d).”¹¹⁰

With regard to this one garnishee, the plaintiff was obligated to

¹⁰¹ C.P.L.R. 5201(c)(1).

¹⁰² *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 308, 926 N.E.2d 1202, 1205, 900 N.Y.S.2d 698, 701 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008).

¹⁰³ *Id.*

¹⁰⁴ *See* C.P.L.R. 5201(c)(1).

¹⁰⁵ *See Falor*, 14 N.Y.3d at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

¹⁰⁶ The CPLR requires a garnishee to be “a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest.” N.Y. C.P.L.R. 105(i) (McKinney 2013).

¹⁰⁷ *Falor*, 14 N.Y.3d at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

¹⁰⁸ U.C.C. § 8-103(a) (2012).

¹⁰⁹ *Falor*, 14 N.Y.3d at 309, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

¹¹⁰ U.C.C. § 8-112(b) (2012) (emphasis added). Again, subsection (d) gives advice only as to uncertificated securities encumbered by a security interest under Article 9. *See* U.C.C. § 8-112(d).

travel to Florida and use Florida process only.¹¹¹ In upholding the order of attachment, the *Falor* court seems to have ignored section 8-112(b) entirely.¹¹² Properly, section 8-112(b) should have compelled the supreme court to deny the *Falor* plaintiff an order of attachment with regard to the Florida corporation. The plaintiff's remedy was limited to obtaining Florida legal process.¹¹³

C. LLC Interests

It is not clear, however, that this provision applied to the twenty-two LLC garnishees in *Falor*. The *Falor* court refers to the defendants' "uncertificated ownership interests."¹¹⁴ UCC section 8-112(b) applies to *securities*. According to section 8-103(c), "[a]n interest in a . . . limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, *its terms expressly provide that it is a security governed by this Article*, or it is an investment company security."¹¹⁵ That is, the status of membership interests in LLCs as uncertificated securities is elective. The *Falor* court never says that the defendants' equity interests in the LLCs are *uncertificated securities*.¹¹⁶ If they were, the order of attachment was quite illegitimate, in light of section 8-112(b).¹¹⁷ We will assume, as the *Falor* court did *sub silentio*, that Article 8 does not apply to the LLC garnishees.

In *Falor*, Mitchell, as owner of the LLCs, was the proper garnishee,¹¹⁸ and delivery of the order of attachment to him supposedly constituted a levy.¹¹⁹ What precisely is a levy?

1. Levies in New York

A levy is what section 6214(b) says it is—no more, no less. According to the third sentence of CPLR section 6214(b):

Unless the court orders otherwise, the person served with

¹¹¹ See U.C.C. § 8-112(b).

¹¹² *Falor*, 14 N.Y.3d at 307, 926 N.E.2d at 1204, 900 N.Y.S.2d at 700.

¹¹³ See U.C.C. § 8-112(b).

¹¹⁴ *Falor*, 14 N.Y.3d at 315–16, 926 N.E.2d at 1210, 900 N.Y.S.2d at 706; see also *id.* at 14 N.Y.3d at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701 (“[D]efendants’ ownership/membership interests are intangible and uncertificated.”).

¹¹⁵ U.C.C. § 8-103(c) (2012) (emphasis added).

¹¹⁶ See *Falor*, 14 N.Y.3d at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701 (emphasis added) (describing ownership/membership rights as uncertificated, but not equity interests).

¹¹⁷ See U.C.C. § 8-112(b).

¹¹⁸ *Falor*, 14 N.Y.3d at 308–09, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

¹¹⁹ *Id.* at 309, 926 N.E.2d at 1206, 900 N.Y.S.2d at 702.

the order shall forthwith transfer or deliver all such property, and pay all such debts upon maturity, up to the amount specified in the order of attachment, to the sheriff and execute any document necessary to effect the payment, transfer or delivery.¹²⁰

This sentence, as applied to debts, is perfectly coherent. The garnishee should simply pay the sheriff. If the garnishee does so, the debt is extinguished, and the garnishee cannot be made to pay twice.¹²¹ But with regard to property not capable of delivery, the garnishee is to “transfer all such property” to the sheriff.¹²² What can this mean in the case of an LLC?

2. Charging Orders

In Delaware, Georgia, and Florida, where the *Falor* LLCs were located, LLC interests are assignable, “except as provided in the articles of organization or operating agreement.”¹²³

This language is somewhat misleading, however. The statute clarifies that an “assignee of a member's interest shall have no right to participate in the management of the business and affairs of a limited liability company except as provided in the articles of organization or operating agreement” and then only upon either the approval of other members of the LLC or the satisfaction of other conditions in the agreement.¹²⁴ In other words, without an authorizing provision in the operable LLC agreement, a member can not transfer the full ownership of her LLC interest, only her right “to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned.”¹²⁵

Therefore, in *Falor*, it is possible the garnishment cannot result in the outright sale of the defendants’ equity interests. Or, even if a sale is permitted, management power remains in the member-debtor and does not pass to the buyer, who simply obtains the right

¹²⁰ N.Y. C.P.L.R. 6214(b) (McKinney 2013).

¹²¹ N.Y. C.P.L.R. 6204 (McKinney 2013).

¹²² N.Y. C.P.L.R. 5232(a) (McKinney 2013).

¹²³ FLA. STAT. § 608.432(1) (2007). For similar exceptions, see DEL. CODE ANN. tit. 6, § 18-702(a) (2005); GA. CODE ANN. § 14-11-502(1) (2003).

¹²⁴ FLA. STAT. § 608.432(1) (2007). For similar provisions, see DEL. CODE ANN. tit. 6, § 18-702(a) (2005); GA. CODE ANN. §§ 14-11-502(3), 14-11-505 (2003).

¹²⁵ FLA. STAT. § 608.432(2)(b) (2007). For similar provisions, see DEL. CODE ANN. tit. 6, § 18-702(b)(2) (2005); GA. CODE ANN. § 14-11-502(2) (2003).

to dividends, if the entity ever chooses to issue them.¹²⁶

Even where the operating agreement makes membership interests unassignable, it is still possible for judgment creditors to obtain charging orders.¹²⁷ A charging order—“historically . . . an obscure remedy”—requires the LLC to pay cash distributions (if any) to the judgment creditors who received the charging order.¹²⁸ Accordingly, “the charging order is a weak remedy when the LLC does not generate revenues for distributions or when the LLC’s management determines not to make distributions.”¹²⁹

In Delaware, the charging order is the exclusive creditor remedy.¹³⁰ Georgia law makes the charging order non-exclusive, but it also states that a creditor may not “seek an order of the court requiring a foreclosure sale of the [LLC] interest.”¹³¹ Since a foreclosure sale is the pro-creditor alternative to a charging order, Georgia law in effect does not differ from Delaware law.¹³²

Florida law is more complex. As of May 31, 2011, the relevant statutory authority provides:

(a) On application to a court of competent jurisdiction by any judgment creditor of a member or a member’s assignee, the court may enter a charging order against the limited liability company interest of the judgment debtor or assignee rights for the unsatisfied amount of the judgment plus interest.

(b) A charging order constitutes a lien on the judgment debtor’s limited liability company interest or assignee rights. Under a charging order, the judgment creditor has only the rights of an assignee of a limited liability company interest to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled from the limited liability company, to the extent of the judgment, including interest.¹³³ In the case of a limited liability company having more than one member, the remedy of

¹²⁶ Bishop, *supra* note 23, at 16 (explaining the buyer is not a member unless the other members agree).

¹²⁷ J. William Callison, *Charging Order Exclusivity: A Pragmatic Approach to Olmstead v. Federal Trade Commission*, 66 BUS. LAW. 339, 355 (2011).

¹²⁸ *Id.* at 341–42. The charging order was introduced by the Uniform Partnership Act of 1914. *Id.* at 341.

¹²⁹ *Id.* at 340.

¹³⁰ DEL. CODE ANN. tit. 6, § 18-703(d).

¹³¹ GA. CODE ANN. § 14-11-504(b) (Supp. 2012).

¹³² Compare DEL. CODE ANN. tit. 6, § 18-703(d), with GA. CODE ANN. § 14-11-504(b).

¹³³ FLA. STAT. § 608.433(4)(a), (b) (Supp. 2012).

foreclosure on a judgment debtor's interest in such limited liability company or against rights to distribution from such limited liability company is not available to a judgment creditor attempting to satisfy the judgment and may not be ordered by a court.

Florida's LLC law goes on to make the charging order the exclusive remedy for LLCs with more than one member.¹³⁴ With regard to single member LLCs, upon a showing "that distributions under a charging order will not satisfy the judgment within a reasonable time," a sale of the member's interest can be ordered.¹³⁵ However:

In the case of a limited liability company having more than one member, the remedy of foreclosure on a judgment debtor's interest in such limited liability company or against rights to distribution from such limited liability company is not available to a judgment creditor attempting to satisfy the judgment and may not be ordered by a court.¹³⁶

Florida's recent amendment overrules *Olmstead v. Federal Trade Commission*,¹³⁷ where the Florida Supreme Court held that the charging order was not the exclusive remedy, given the statute in effect in 2010.¹³⁸ Non-exclusivity, however, is thought to interfere with Florida's "pick-your-partner" policy—the policy that non-debtor LLC members cannot be made to share management with a stranger who has bought the encumbered membership interest at a foreclosure sale.¹³⁹ Perhaps for this reason Florida chose to amend its LLC law.

3. New York Levies as Charging Orders Abroad

In *Falor*, only the Florida memberships were foreclosable, assuming the 2011 amendment is not retrospective in application.¹⁴⁰ In the other states, the most that could be achieved is a charging order.¹⁴¹

There is a conflict between the law of New York, on the one hand,

¹³⁴ *Id.* § 608.433(5).

¹³⁵ *Id.* § 608.433(6).

¹³⁶ *Id.* § 608.433(8).

¹³⁷ *Olmstead v. Fed. Trade Comm'n*, 44 So. 3d 76 (Fla. 2010).

¹³⁸ *Id.* at 81–82.

¹³⁹ Callison, *supra* note 127, at 350–51.

¹⁴⁰ See FLA. STAT. § 608.433(4)(a).

¹⁴¹ See DEL. CODE ANN. tit. 6, § 18-703(a) (2012); GA. CODE ANN. § 14-11-504(a) (Supp. 2012).

and the law of Delaware, Georgia, and (as of May 31, 2011,) Florida, on the other.¹⁴² The third sentence of New York CPLR section 6214(b) provides “the person served with the order shall forthwith transfer or deliver all such property . . . to the sheriff and execute any document necessary to effect the . . . transfer or delivery.”¹⁴³ The law of the other states directly countermands this language and limits any “judgment creditor” to a charging order.¹⁴⁴

Two issues arise, however. The first is whether a New York order of attachment would be recognized in the other states as a “charging order.”¹⁴⁵ The matter is clear in Georgia that the New York attachment would be upheld, whether it constitutes a charging order or not.¹⁴⁶ According to Georgia Code section 14-11-504(b):

The [charging order] remedy . . . shall not be deemed exclusive of others which may exist, including, without limitation, the right of a judgment creditor to reach the limited liability company interest of the member by process of garnishment served on the limited liability company, provided that, except as otherwise provided in the articles of organization or a written operating agreement, a judgment creditor shall have no right under this chapter or any other state law to interfere with the management of force dissolution of a limited liability company or to seek an order of the court requiring a foreclosure sale of the limited liability company interest.¹⁴⁷

This section and the comparable statutes from Delaware and Florida refer to “judgment creditors,” not to plaintiffs seeking pre-judgment attachment.¹⁴⁸ We presume that the phrase “judgment creditors” would be interpreted by courts to include plaintiffs, who aspire to become judgment creditors and who, in the meantime, seek prejudgment attachment.

¹⁴² Compare DEL. CODE ANN. tit. 6, § 18-703, FLA. STAT. § 608.433, and GA. CODE ANN. § 14-11-504, with N.Y. C.P.L.R. 6214 (McKinney 2013).

¹⁴³ C.P.L.R. 6214(b).

¹⁴⁴ See DEL. CODE ANN. tit. 6, § 18-703(a); GA. CODE ANN. § 14-11-504(a); FLA. STAT. § 608.433(4)(b). All three statutes refer to judgment creditors, rather than plaintiffs who do not yet have judgments. See DEL. CODE ANN. tit. 6, § 18-703(a); FLA. STAT. § 608.433(4)(b); GA. CODE ANN. § 14-11-504(a). Presumably, the courts of these states would extend the exclusivity rule to prejudgment attachment, though the matter is not absolutely certain.

¹⁴⁵ DEL. CODE ANN. tit. 6, § 18-703; FLA. STAT. § 608.433 (failing by both statutes to state whether the remedy provided is exclusive of all other jurisdictions).

¹⁴⁶ GA. CODE ANN. § 14-11-504(b).

¹⁴⁷ *Id.* (citations omitted).

¹⁴⁸ See DEL. CODE ANN. tit. 6, § 18-703(a); FLA. STAT. § 608.433(4)(a); GA. CODE ANN. § 14-11-504(b).

Georgia Code section 14-11-504(b) clearly indicates that court orders that are not styled “charging orders” will nevertheless be competent to oblige the LLC to pay actually voted to the sheriff all dividends that it may choose to authorize.¹⁴⁹ This is less clear in Delaware or Florida. Given that the charging order requirement is based on vindicating the “pick-your-partner” principle, courts in these states would be well justified in upholding the New York order of attachment as charging orders encumbering the defendants’ right to receive dividends actually authorized by the LLC.¹⁵⁰ The precise statutory language that justifies this conclusion comes from the second and third sentences of section 6214(b):

[A]ll debts of [the defendant], including any specified in the notice, then due and thereafter coming due to the defendant, shall be subject to the levy. Unless the court orders otherwise, the person served with the order shall forthwith . . . pay all such debts upon maturity, up to the amount specified in the order of attachment, to the sheriff . . .¹⁵¹

4. Full Faith and Credit

Assuming that the order of attachment qualifies as a charging order under the law of Delaware and Florida, a second issue is posed. New York law commands the garnishee to transfer the shares in their entirety to the sheriff.¹⁵² The laws of Delaware, Georgia, and Florida prohibit this remedy.¹⁵³ Given that New York (supposedly) has obtained jurisdiction over the person of the LLCs, is New York’s order of attachment entitled to full faith and credit in these other states?

Here the answer seems to be no, under the “the enforcement exception” to the Full Faith and Credit Clause.¹⁵⁴ A governing precedent on this exception is *Baker v. General Motors Corp.*, where a Michigan court issued an injunction against a former employee of a defendant from giving testimony against the defendant.¹⁵⁵ The

¹⁴⁹ See GA. CODE ANN. § 14-11-504(b).

¹⁵⁰ See N.Y. C.P.L.R. 6214(b) (McKinney 2013).

¹⁵¹ C.P.L.R. 6214(b).

¹⁵² C.P.L.R. 6214(c).

¹⁵³ See DEL. CODE ANN. tit. 6, § 18-703(a); FLA. STAT. § 608.433(4)(a); GA. CODE ANN. § 14-11-504(b).

¹⁵⁴ See *Baker v. Gen. Motors*, 522 U.S. 222, 235 (1998) (citations omitted) (“Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.”).

¹⁵⁵ *Id.* at 226.

employee was subpoenaed in Missouri, which refused to give full faith and credit to the Michigan injunction.¹⁵⁶

Since the New York order of attachment is basically “injunctive in nature,”¹⁵⁷ *Baker* establishes that Delaware, Georgia, and Florida need not give full faith and credit to the New York remedy of attachment, though they would be obligated to provide *some* remedy, assuming that New York had proper jurisdiction over the LLCs.¹⁵⁸ And, of course, a local charging order would be a remedy, though one that is less adequate than what New York would supply.¹⁵⁹

5. Summary

To summarize, the meaning of the order of attachment in *Falor* (in its pre-judgment life) was that, in Delaware and Georgia, if all went well, the plaintiff would have charging orders against the twenty-three LLC garnishees—a rather second-rate remedy.¹⁶⁰ In Florida, provided the 2011 amendment to the LLC law is prospective only, the order of attachment could have effectuated a foreclosure of all the defendants’ membership interests.¹⁶¹ But all this presumes that the New York court had personal jurisdiction over the LLCs.¹⁶²

IV. GARNISHEES AND DEFENDANTS

The key to the *Falor* case is the mode of the sheriff’s levy. According to CPLR section 6214(a), “[t]he sheriff shall levy upon any interest of the defendant in personal property . . . by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant’s possession or custody.”¹⁶³ To be noted is that the sheriff must personally serve a *garnishee* or a *defendant*.¹⁶⁴ Furthermore, the order of attachment must “direct the sheriff to levy within his

¹⁵⁶ *Id.* at 230.

¹⁵⁷ McGarry, *supra* note 85, at 1582.

¹⁵⁸ *Baker*, 522 U.S. at 235–36.

¹⁵⁹ *See, e.g.*, FLA. STAT. § 608.433(4)(b) (2012).

¹⁶⁰ *See* Hotel 71 Mezz Lender LLC v. Falor, 14 N.Y.3d 303, 308, 926 N.E.2d 1202, 1205, 900 N.Y.S.2d 698, 701 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008).

¹⁶¹ *See* FLA. STAT. § 608.433(4).

¹⁶² *Id.* § 608.433(4)(a) (“On application to a court of *competent jurisdiction*” (emphasis added)).

¹⁶³ N.Y. C.P.L.R. 6214(a) (McKinney 2013).

¹⁶⁴ C.P.L.R. 6214(a)

jurisdiction.”¹⁶⁵ This is one of the very few times that the CPLR makes explicit that the sheriff is indeed limited to his “jurisdiction,”¹⁶⁶ which presumably means the county of the supreme court for which the sheriff serves.

We must also register another important conceptual point. “Garnishee” is a term expressly defined by the CPLR section 105(i) as “a person *other than the judgment debtor* who has property in his possession or custody in which a judgment debtor has an interest.”¹⁶⁷ Section 105(i) establishes “garnishee” and “judgment debtor” are mutually exclusive categories. One cannot be *both* a judgment debtor and a garnishee at the same time.¹⁶⁸ The CPLR invokes the law of the excluded middle.

Falor, however, is a prejudgment attachment case. At the time of the order of attachment, there were *no* judgment debtors yet.¹⁶⁹ There were only *defendants* who would indeed become *judgment debtors* in the future.¹⁷⁰ CPLR section 6202, however, makes clear that “for the purpose of applying the provisions to attachment, references to a ‘judgment debtor’ in section 5201 and in subdivision (i) of section shall be construed to mean ‘defendant.’”¹⁷¹ Accordingly, in attachment cases, the legislature intended to draw a mutually exclusive distinction between garnishees and *defendants*.¹⁷²

We come now to the heart of darkness that blinded the *Falor* court. Mitchell was a defendant.¹⁷³ As a defendant, he had agreed in the guaranty contract to submit to a New York forum.¹⁷⁴ As a defendant, Mitchell was subject to levy by the sheriff of property “in the defendant’s possession or custody.”¹⁷⁵

In addition, Mitchell was the garnishee (or, to be more accurate, the agent of twenty-three different garnishees).¹⁷⁶ As “garnishee,” he could not be a defendant, given the definition (as we have interpreted it) in CPLR section 105(i).¹⁷⁷

¹⁶⁵ N.Y. C.P.L.R. 6211(a) (McKinney 2013).

¹⁶⁶ Carlson, *supra* note 53, at 79–80.

¹⁶⁷ N.Y. C.P.L.R. 105(i) (McKinney 2013) (emphasis added).

¹⁶⁸ See *Michelsen v. Brush*, 233 F. Supp. 868, 870 (E.D.N.Y. 1964).

¹⁶⁹ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 307–08, 926 N.E.2d 1202, 1204–05, 900 N.Y.S.2d 698, 700–01 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008).

¹⁷⁰ See *id.*

¹⁷¹ N.Y. C.P.L.R. 6202 (McKinney 2013).

¹⁷² See C.P.L.R. 6202.

¹⁷³ *Falor*, 14 N.Y.3d at 307, 926 N.E.2d at 1204, 900 N.Y.S.2d at 700.

¹⁷⁴ *Id.*

¹⁷⁵ N.Y. C.P.L.R. 6214(a) (McKinney 2013).

¹⁷⁶ *Falor*, 14 N.Y.3d at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

¹⁷⁷ See N.Y. C.P.L.R. 105(i) (McKinney 2013).

Could Mitchell be both? It is possible to develop a theory whereby Mitchell the fiduciary is a person separate and apart from Mitchell the private citizen. If so, Mitchell the fiduciary has a duty to the court to assure that the LLC garnishees pay all distributions to the sheriff. Such a theory imposes a split personality on Mitchell. This theory would naturally follow, if CPLR section 5201(c)(1) had referred to the president of an LLC as an *agent* of a garnishee. Then clearly Mitchell as agent is different from Mitchell as defendant.

Even if our Jekyll-and-Hyde theory is rejected, we may still observe that Mitchell was served with the order of attachment as garnishee for the *other defendants* (but not for himself).¹⁷⁸ He was also served *as a defendant* on the theory that Mitchell was in possession or custody of his own property.¹⁷⁹

V. MITCHELL AS “POSSESSOR OF INTANGIBLE PROPERTY”

Mitchell, then, wore twenty-four hats. He was a fiduciary for twenty-three garnishees, and he wore one hat as a defendant supposedly in possession of his own personal property. In this section, we examine the private hat of Mitchell as a defendant allegedly in possession of his own property.

The *Falor* court ruled that the garnishment of Mitchell as private citizen *and* as garnishee was valid.¹⁸⁰ According to the court:

a court with personal jurisdiction over a nondomiciliary present in New York has jurisdiction over that individual's tangible or intangible property, even if the situs of the property is outside New York. Because personal jurisdiction was properly asserted over . . . Mitchell, Supreme Court had the authority to order pre-judgment attachment of the property defendant Mitchell *owned and/or controlled*, and service of the order upon him while he was in New York was appropriate.¹⁸¹

Notice, in this passage, that the court blurs private Mitchell with fiduciary Mitchell. As a private citizen, Mitchell “owned” his own equity interests in the twenty-three garnishees.¹⁸² As a fiduciary

¹⁷⁸ *Falor*, 14 N.Y.3d at 307, 926 N.E.2d at 1204, 900 N.Y.S.2d at 700.

¹⁷⁹ *See id.* at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

¹⁸⁰ *Id.* at 314–15, 318, 926 N.E.2d at 1210, 1212, 900 N.Y.S.2d at 705–06, 708 (citing *Harris v. Balk*, 198 U.S. 215, 222–23 (1905)).

¹⁸¹ *Falor*, 14 N.Y.3d at 312, 926 N.E.2d at 1208, 900 N.Y.S.2d at 704 (emphasis added).

¹⁸² *Id.* at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

agent of the twenty-two LLCs, he “controlled” the distribution of dividends issued by the LLCs.¹⁸³ In addition, if we buy into the schizophrenic solution suggested earlier,¹⁸⁴ Mitchell was the proper garnishee for himself and could transfer his own equity interests over to the sheriff.¹⁸⁵ But we put aside fiduciary Mitchell, for the moment, and consider only the private Mitchell.

We have seen that a sheriff may levy property directly from a “defendant if property to be levied upon is in the defendant’s possession or custody.”¹⁸⁶ So without question, the sheriff’s delivery of the order of attachment was a levy of at least Mitchell’s own equity interests in the LLCs—if and only if Mitchell was in possession or custody of them. “Custody” is not a defined term. We may define it, however, as “control.”¹⁸⁷

One of the odd lapses in the CPLR is that it does not define what a levy from a defendant *is*. To be sure, in eight long and complex sentences, we learn about what a levy is for a *garnishee*.¹⁸⁸ But none of these rules apply to a *non-garnishee*. There are simply no rules at all for levying directly from a defendant.¹⁸⁹ In one respect, there is a positive aspect to this for the plaintiff. A levy of a *garnishee* lasts for only ninety days, unless some further action is taken.¹⁹⁰ This ninety-day rule does not expressly apply to defendants.¹⁹¹

So then, what must private Mitchell do by virtue of having received the order of attachment? Private Mitchell has no access to the books of the LLCs. Only fiduciary Mitchell does. By way of comparison, suppose Robert Falor, one of Mitchell’s codefendants, had been in the courtroom instead of Mitchell, and suppose the sheriff delivered the order of attachment to Falor. Suppose further that Falor had no direct or indirect power to write checks on behalf of the LLCs. On this assumption, there was nothing that Falor could have done to effectuate the payment of a distribution. Service

¹⁸³ *See id.*

¹⁸⁴ *See supra* text accompanying note 40.

¹⁸⁵ *Falor*, 14 N.Y.3d at 308–09, 926 N.E.2d 1205, 900 N.Y.S.2d at 701.

¹⁸⁶ N.Y. C.P.L.R. 6214(a) (McKinney 2013).

¹⁸⁷ *See S. Carbon Co. v. State*, 171 Misc. 566, 568, 13 N.Y.S.2d 7, 9 (Ct. Cl. 1939), *aff’d*, 258 A.D. 1004, 16 N.Y.S.2d 719 (App. Div. 3d Dep’t 1940) (noting that the word “custody” “carries with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected”).

¹⁸⁸ C.P.L.R. 6214(b).

¹⁸⁹ *Id.*

¹⁹⁰ C.P.L.R. 6214(e).

¹⁹¹ *See supra* text accompanying notes 186–87 (detailing the lack of rules for levying from a defendant).

on Falor would have been a useless act. To be sure, if Falor were enjoined to do something, he could be held in contempt for not doing it. But where in the CPLR is any non-garnishee defendant enjoined to do anything?

Falor undoubtedly has rights against the LLCs if they do elect to issue dividends. In such a case the LLCs would be what Article 9 of the UCC calls “account debtors.”¹⁹² Suppose Falor receives a dividend. Must he hand it over to the sheriff? Or, if the LLC refuses to pay Falor, must Falor bring suit against the LLC in order to obtain the funds, which then could be handed to the sheriff? Nothing in the CPLR expressly requires Falor to do this.¹⁹³

Suppose Falor refuses to hand over the dividend. In the case of a garnishee, the CPLR is clear that the sheriff will not lift a finger to enforce the order of attachment.¹⁹⁴ Rather, the plaintiff is expected to bring a turnover proceeding against the garnishee.¹⁹⁵ If the action is actually commenced, the levy of a *garnishee* extends beyond its ordinary ninety-day life.¹⁹⁶ But the CPLR does not seem to authorize a turnover action against *defendants*. According to CPLR section 6214(d): “Where property . . . ha[s] been levied upon by service of an order of attachment, the plaintiff may commence a special proceeding against *the garnishee* served with the order to compel the payment, delivery or transfer to the sheriff of such property”¹⁹⁷ *Ex hypothesi*, Falor is not a garnishee but rather is a defendant. So such a proceeding does not seem to be authorized. In comparison, the CPLR in the post-judgment context *does* permit turnover proceedings directly against judgment debtors.¹⁹⁸

Of course, it was Mitchell, not Falor, who was served.¹⁹⁹ Mitchell as president could no doubt cause the LLCs to pay, but private Mitchell could not do this. The *Falor* court, however, ruled that

¹⁹² N.Y. U.C.C. LAW § 9-102(a)(3) (McKinney 2013) (“‘Account debtor’ means a person obligated on an account, chattel paper, or general intangible.”).

¹⁹³ See *supra* text accompanying notes 186–87 (detailing the lack of rules for levying from a defendant).

¹⁹⁴ See *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 65 (2d Cir. 1965) (“[H]aving served the levy and demanded possession, the sheriff had, in a sense, done all he was ordered or entitled to do under the warrant of attachment. It was up to [the plaintiff] to seek to compel the garnishee to turn over the assets.” (citations omitted)).

¹⁹⁵ C.P.L.R. 6214(d).

¹⁹⁶ See C.P.L.R. 6214(e).

¹⁹⁷ C.P.L.R. 6214(d).

¹⁹⁸ N.Y. C.P.L.R. 5225(a) (McKinney 2013).

¹⁹⁹ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 309, 926 N.E.2d 1202, 1205, 900 N.Y.S.2d 698, 701 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008).

private Mitchell had possession of his own equity interests.²⁰⁰ On the basis of “possession,” the levy of private Mitchell could go forward.²⁰¹ Can one “possess” intangible property?

The Second Circuit, in *Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo S.A.*,²⁰² “Erie-guessed” that the answer is yes.²⁰³ In *Grupo Mexicano*, a judgment creditor sought an order directing the judgment debtor to transfer a receivable owed by the Mexican government to the sheriff.²⁰⁴ A turnover order pursuant to CPLR section 5225(a) against a judgment debtor is appropriate only if “the judgment debtor is in possession or custody of money or other personal property.”²⁰⁵ Ultimately, the case was remanded to determine whether the receivable “could be assigned or transferred”²⁰⁶ within the meaning of CPLR section 5201(b).²⁰⁷ Nevertheless the *Grupo Mexicano* court also announced that it would “decline the invitation to hold that an asset characterized as property for the purposes of § 5201 is necessarily characterizable as property for purposes of §§ 5225 and 5227 as well.”²⁰⁸ Rather, the court ruled: “A judgment creditor seeking a turnover order therefore must show: First, that the asset it seeks to collect has been made available to judgment creditors by § 5201; and second, *that the party against which the creditor has chosen to proceed has the ability to produce the asset.*”²⁰⁹

This second requirement seems merely to be a restatement of section 5225(a)’s requirement that “the judgment debtor [be] in possession or custody of money or other personal property.”²¹⁰ And so the *Grupo Mexicano* court seemed to believe that intangible property is *capable of possession*.²¹¹ On such a view, possession means the *legal ability to exclude others*, not manucaption of something tangible.²¹² This is a definition with which philosophers

²⁰⁰ *See id.* at 312, 926 N.E.2d at 1207–08, 900 N.Y.S.2d at 703–04.

²⁰¹ *Id.* at 312, 926 N.E.2d at 1208, 900 N.Y.S.2d at 704.

²⁰² *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 190 F.3d 16 (2d Cir. 1999).

²⁰³ *Id.* at 25 n.9. The *Falor* case cites *Grupo Mexicano* favorably, but for a different proposition than what the text describes. *Falor*, 14 N.Y.3d at 313, 926 N.E.2d at 1209, 900 N.Y.S.2d at 705.

²⁰⁴ *Grupo Mexicano*, 190 F.3d at 19; *see* N.Y. C.P.L.R. 5225(a) (McKinney 2013).

²⁰⁵ C.P.L.R. 5225(a).

²⁰⁶ N.Y. C.P.L.R. 5201 (McKinney 2013).

²⁰⁷ *Grupo Mexicano*, 190 F.3d at 26.

²⁰⁸ *Id.* at 25.

²⁰⁹ *Id.* at 21 (emphasis added).

²¹⁰ C.P.L.R. 5225(a).

²¹¹ *See Grupo Mexicano*, 190 F.3d at 25 n.9.

²¹² *See id.*

are most comfortable.²¹³

The *Falor* court confirms the accuracy of the Second Circuit's *Erie* guess.²¹⁴ If indeed the *Falor* court viewed Mitchell as *not* the proper garnishee for his own interests in the LLCs, then it must have believed that "possession" is a term that can apply to intangible property.²¹⁵ And indeed the *Falor* court refers to the "defendants' uncertificated ownership interests, which defendant Mitchell possesses or has custody over."²¹⁶

Here we see confusion afoot in the *Falor* opinion. Mitchell is said to possess or have custody over all the equity interests of all the defendants.²¹⁷ But is the court thinking of private Mitchell or Mitchell the fiduciary? We will assume for the moment that the court has private Mitchell in mind.

With regard to private Mitchell, the *Falor* court declares that Mitchell "possesses" his intangible property.²¹⁸ In this regard the *Falor* court puts itself at odds with the United States Supreme Court in *Harris v. Balk*.²¹⁹

In this once-seminal case, sometimes thought to have been overruled,²²⁰ Harris owed Balk and Balk owed Epstein.²²¹ Harris traveled from North Carolina to Maryland, where, on behalf of Epstein, a sheriff garnished Harris.²²² Harris paid up and went home to North Carolina, where he was promptly sued by Balk, who had never been paid.²²³ Harris suggested that his payment of the Maryland sheriff constituted payment of Balk, but the North Carolina courts disagreed and passed judgment against Harris who thereby faced having to pay twice.²²⁴ Harris appealed to the United States Supreme Court, which ruled that North Carolina was obliged

²¹³ See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."); see JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* 239–40 (1998) (discussing the philosophy of property issues, including possession).

²¹⁴ See *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 314, 926 N.E.2d 1202, 1209, 900 N.Y.S.2d 698, 705 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008).

²¹⁵ See *id.*

²¹⁶ *Id.* at 315–16, 926 N.E.2d at 1210, 900 N.Y.S.2d at 706.

²¹⁷ *Id.*

²¹⁸ See *id.* at 314, 926 N.E.2d at 1209, 900 N.Y.S.2d at 705.

²¹⁹ *Harris v. Balk*, 198 U.S. 215, 223 (1905).

²²⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980) ("We recently abandoned the outworn rule of *Harris v. Balk* . . .").

²²¹ *Balk v. Harris*, 30 S.E. 318, 318 (N.C. 1898).

²²² See *id.*

²²³ *Id.*

²²⁴ *Id.* at 319.

2012/2013]

Where Corporations Are

1167

to recognize the official acts of Maryland under the Full Faith and Credit Clause of the United States Constitution.²²⁵ Lucky Harris did not have to pay twice.²²⁶

In so ruling, the Supreme Court observed, “[t]he obligation of the debtor to pay his debt clings to and accompanies him wherever he goes.”²²⁷ That is to say, the situs of Harris’s obligation to pay is the situs of Harris himself.²²⁸ Since Harris was in Maryland, so was the debt, and so Maryland had jurisdiction of the debt by virtue of having jurisdiction of Harris.²²⁹ As the *Harris* Court remarked:

If there be a law of the State providing for the attachment of the debt, then if the garnishee [Harris] be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish [on behalf of Epstein] the debt due from [Harris] to the debtor of [Balk] and condemn it, provided the garnishee [Harris] could himself be sued by [Balk’s] creditor in that State.²³⁰

In *Harris*, the Supreme Court rejected the notion that debts have a location separate from the debtor.²³¹ Rather, wherever a debtor is, there too is his debt. This view was driven by the alleged impossibility of “possessing” intangible property: “It is not a question of possession in the foreign State, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of.”²³² In short, the *Harris* Court denied that general intangibles could ever be “possessed.”²³³ If that view were followed in New York, the *Falor* result would have come out quite differently. Serving Mitchell in New York would not succeed in attaching Mitchell’s LLC interests. Rather, per *Harris*, the *locus* of the intangible property is where the garnishee is, which is to say *not* in *New York*, but rather in Delaware, Georgia, and Florida.²³⁴

²²⁵ *Harris v. Balk*, 198 U.S. 215, 226 (1905).

²²⁶ *Id.*

²²⁷ *Id.* at 222.

²²⁸ *Id.*

²²⁹ *Id.* at 226 (“[T]he judgment against Harris in Maryland, condemning the \$180 which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the State of Maryland.”).

²³⁰ *Id.* at 222.

²³¹ *Id.* (“The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes.”).

²³² *Id.* at 223.

²³³ *Id.*

²³⁴ *Id.* at 222; see *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 308, 926 N.E.2d 1202, 1205, 900 N.Y.S.2d 698, 701 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st

Falor, then, contradicts *Harris v. Balk*. Ordinarily, it is *mauvais goût* for state courts to snub United States Supreme Court opinions. But was the *Harris* Court speaking constitutionally when it divorced possession from intangible property? In *Harris*, Maryland authorized the attachment of a debt by serving the order of attachment on the garnishee.²³⁵ This authorization, and the actual historic garnishment, was held to be within the power of the State of Maryland.²³⁶ For this reason, Maryland's garnishment was entitled to full faith and credit in North Carolina.²³⁷ The Supreme Court's comments on possession can, however, be understood as an interpretation of Maryland law. On this interpretation, Maryland itself defines "possession" in such a way that it cannot apply to intangible property. Given that definition, it was possible for Maryland to conflate the debt with the personhood of the garnishee, so that the sheriff's levy of the garnishee constituted control of the defendant's property. On this reading, Maryland was not constitutionally required to adopt such a rule of location. New York could—and did, prior to *Falor*—follow a different rule.²³⁸ New York could constitutionally deem the situs of the debt as the garnishee's domicile,²³⁹ not where the garnishee physically happened to be.²⁴⁰

To the extent that Mitchell was not a garnishee in *Falor* but rather a defendant in possession of his own intangible property, the

Dep't 2008) ("The property at issue consisted of defendants' interests in 22 limited liability companies formed in Delaware, Georgia and Florida . . ."). Of course, *Harris* involved debt. CPLR section 5201(a) defines "debt" as that "which is past due or which is yet to become due, certainly or upon demand . . ." N.Y. C.P.L.R. 5201(a) (McKinney 2013). The LLCs did not owe Mitchell or the others "debt," on this definition. Rather, Mitchell and company owned membership interests in the garnishees. Nevertheless, it is easy to see that *Harris* reasoning applies to LLCs just as much as it applies to account debtors. But for the particular CPLR definition of debt, one could easily view the LLCs as *contingent* account debtors, pending an LLC decision to issue dividends.

²³⁵ *Harris*, 198 U.S. at 226.

²³⁶ *Id.*

²³⁷ *Id.* at 221.

²³⁸ *Nat'l Broadway Bank v. Sampson*, 179 N.Y. 213, 223, 71 N.E. 766, 769 (1904), *abrogated by Falor*, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698 ("The general rule is well settled that the situs of debts and obligations is at the domicile of the creditor.").

²³⁹ Kennedy, *supra* note 69, at 702.

²⁴⁰ See *Severnoe Sec. Corp. v. London & Lancashire Ins. Co.*, 255 N.Y. 120, 123–24, 174 N.E. 299, 300 (1931). Oft quoted is Chief Justice Cardozo's dictum on situs of intangibles:

The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found. At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions.

Id. (citations omitted).

Falor court disagreed with Maryland's definition of "possession" (as the *Harris* Court interpreted it).²⁴¹ In New York, one *can* possess intangible property, even though the garnishee is not present in New York.²⁴² And this rule of location can be constitutionally legislated in New York, because *Harris v. Balk* did not constitutionalize the definition of "possession."²⁴³ If the *Falor* definition of "possession" had been operative in Maryland in 1896 (the year of the fateful *Harris* garnishment), there never would have been a garnishment, because Maryland (and New York as of 1905) would have located the garnishee's obligation in North Carolina.

Ironically, the *Falor* court did not see itself as departing from *Harris v. Balk*.²⁴⁴ It thought it was actually *following* the case.²⁴⁵ But in its reliance on *Harris*, the *Falor* court turned *Harris* on its head, much as Marx did to Hegel.²⁴⁶ *Harris* stands for the proposition that where the garnishee is, that's where his obligation is.²⁴⁷ But, insofar as Mitchell (as private defendant) was served with the order of attachment, Mitchell was no garnishee. Rather, Mitchell was a creditor (after a fashion) of the garnishee.²⁴⁸ In effect, the *Falor* court applied the *Harris v. Balk* holding about garnishees to a defendant directly.²⁴⁹ In so doing, the *Falor* court was guilty of a serious category mistake. True, we may say that a defendant "possesses" his intangible property, and where Mitchell is, there is his property. This *contradicts Harris v. Balk*, to the extent the *Harris* Court held that possession of intangible property was an impossibility.²⁵⁰ In fact, *Harris v. Balk* stands *against* the *Falor* court, though the *Falor* court would have done well to ignore

²⁴¹ Compare *Falor*, 14 N.Y.3d at 311, 926 N.E.2d at 1207, 900 N.Y.S.2d at 703 (finding that intangible property located in the state may be attached despite the possessor not being present in the state), with *Harris*, 198 U.S. at 222 (finding that intangible property may only be attached when the debtor is present in the state).

²⁴² *Falor*, 14 N.Y.3d at 311, 926 N.E.2d at 1207, 900 N.Y.S.2d at 703.

²⁴³ See generally *Harris*, 198 U.S. at 221–23 (failing to provide a definition of "possession").

²⁴⁴ *Falor*, 14 N.Y.3d at 315, 926 N.E.2d at 1210, 900 N.Y.S.2d at 706 ("[D]efendant Mitchell's status supports application of *Harris* to the case at bar.").

²⁴⁵ *Id.*

²⁴⁶ KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 20 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., International Publishers 1967) (1867) ("With [Hegel] it is standing on its head. It must be turned right side up again, if you would discover the rational kernel within the mystical shell.").

²⁴⁷ *Harris*, 198 U.S. at 222.

²⁴⁸ *Falor*, 14 N.Y.3d at 307, 926 N.E.2d at 1204, 900 N.Y.S.2d at 700. Actually, this would be literally true only if the garnishees elected to vote their interest holders a dividend.

²⁴⁹ See *id.* at 311, 926 N.E.2d at 1207, 900 N.Y.S.2d at 703 (holding that attachment of intangible property within a state may be used to obtain jurisdiction over a defendant).

²⁵⁰ See *Harris*, 198 U.S. at 223.

Harris as a pre-*Erie* guess about Maryland law which has no relevance to a case governed by New York law.

The *Falor* court actually contradicts *Harris v. Balk*. Oddly, the *Falor* court used *Harris* to justify overruling its own precedent in *National Broadway Bank v. Sampson*.²⁵¹ In *National Broadway Bank*, the defendant was a Massachusetts corporation.²⁵² The garnishee was a Massachusetts partnership.²⁵³ Charles Sampson, a Massachusetts resident, was a partner in the garnishee and therefore was himself a garnishee, as partners are liable for all partnership debts.²⁵⁴ Sampson was in New York casually when he was served with an order of attachment on behalf of the plaintiff.²⁵⁵ The court quashed the attachment because the situs of Sampson's obligation to the defendant was in Massachusetts, where Sampson lived.²⁵⁶ "If his debt had an actual situs," the *National Broadway Bank* court said, "it certainly was not migratory, and, therefore, as to him, it might not be attached in any state or jurisdiction where he might sojourn temporarily or in which one of his partners might reside."²⁵⁷

In effect, the *National Broadway Bank* court disagreed with *Harris v. Balk* as to the situs of the payment intangible. Debts may migrate in and out of Maryland, but not in New York. New York is permitted to do this, as the *Harris* Court was not speaking *ex cathedra* when it confounded the situs of the garnishee's debt with the garnishee's person. In *Harris*, the situs was wherever the garnishee was.²⁵⁸ But in *National Broadway Bank*, the situs was where the garnishee was domiciled, not where the garnishee physically was.²⁵⁹

The *National Broadway Bank* rule may in fact be a bad rule. In following it, the pre-*Falor* courts were giving up jurisdiction it could constitutionally assert over casual visitors. Under *National*

²⁵¹ See *Nat'l Broadway Bank v. Sampson*, 179 N.Y. 213, 226, 71 N.E. 766, 769 (1904), abrogated by *Falor*, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698.

²⁵² *Id.* at 219–20, 71 N.E. at 767.

²⁵³ See *id.*

²⁵⁴ See *id.* at 224, 71 N.E. at 769.

²⁵⁵ *Id.* at 221, 71 N.E. at 768.

²⁵⁶ *Id.* at 226, 71 N.E. 770.

²⁵⁷ *Id.* at 225, 71 N.E. at 770. This domicile rule has been traced back to *M'Queen v. Middletown Mfg Co.* *M'Queen v. Middleton Mfg. Co.*, 16 Johns. 5, 7 (N.Y. Sup. Ct. 1819); Kennedy, *supra* note 69, at 700.

²⁵⁸ *Harris v. Balk*, 198 U.S. 215, 222 (1905).

²⁵⁹ *Nat'l Broadway Bank*, 179 N.Y. at 223, 71 N.E. at 767. Eugene H. Sampson was also a partner in the Massachusetts entity and also an account debtor. *Id.* at 219–20, 71 N.E. at 767. But Eugene was domiciled in New York and therefore the order of attachment as to Eugene was upheld. *Id.* at 222, 71 N.E. at 768.

Broadway Bank, a garnishee could take in a Broadway show *sans peur* of garnishment.²⁶⁰ Under *Harris*, the garnishee could be garnished.²⁶¹ But the *Falor* court was wrong to think that *National Broadway Bank* is an unconstitutional rule. To the contrary, the *National Broadway Bank* rule is every bit as constitutional as the *Harris* rule. In this respect, the *Falor* court wrongly constitutionalized the *Harris* situs rule and used this false principle to overrule *National Broadway Bank*.²⁶²

New York may temporarily have conformed to *Harris v. Balk* years ago—on nonconstitutional grounds. In *Morris Plan Industrial Bank of New York v. Gunning*, a sheriff levied a garnishee in New York for wages the garnishee owed defendant for work in Pennsylvania.²⁶³ The garnishee was a Pennsylvania domiciliary, having been incorporated there.²⁶⁴ The Court of Appeals, however, allowed the garnishment, even though the garnishment would have been forbidden under *National Broadway Bank*.²⁶⁵ The *Gunning* court admitted that, prior to 1936, the situs of the wage debt was in Pennsylvania, where the garnishee was domiciled.²⁶⁶ That is, New York did *not* conform to *Harris v. Balk*.²⁶⁷ But 1936 saw the enactment of the following provision of the attachment statute: “Within the meaning of this section there shall be included any indebtedness due or to become due from a non-resident or foreign corporation, upon whom or which service of process may be made within this state, to any person whether a non-resident or foreign corporation.”²⁶⁸

Thus, in 1936 the New York legislature overruled *National*

²⁶⁰ *Id.* at 224, 71 N.E. at 769.

²⁶¹ *Harris*, 198 U.S. at 222.

²⁶² See *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 316, 926 N.E.2d 1202, 1211, 900 N.Y.S.2d 698, 706–07 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008) (“*National Broadway Bank*’s restrictive view regarding the situs of intangible property, as evidenced by its holding that the debtor’s domicile serves as the jurisdictional predicate to support an attachment, was overruled in *Harris v. Balk*, and should no longer be cited as authority for determining the situs of intangible property” (citing *Morris Plan Indus. Bank of N.Y. v. Gunning*, 295 N.Y. 324, 329–30, 67 N.E.2d 510, 512 (1946))).

²⁶³ *Gunning*, 295 N.Y. at 327–28, 67 N.E.2d at 511.

²⁶⁴ See *id.*

²⁶⁵ *Id.* at 330, 67 N.E.2d at 512.

²⁶⁶ *Id.* at 329, 67 N.E.2d at 512.

²⁶⁷ *Harris v. Balk*, 198 U.S. 215, 222 (1905); *Gunning*, 295 N.Y.2d at 329, 67 N.E.2d at 512.

²⁶⁸ *Gunning*, 295 N.Y.2d at 329, 67 N.E.2d at 512 (quoting 1936 N.Y. Laws 1718). In 1940, this language was rewritten to state that attachment can reach any debt “to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county.” *Gunning*, 295 N.Y. at 329–30, 67 N.E.2d at 512 (quoting 1940 N.Y. Laws 1776) (internal quotation marks omitted).

Broadway and opted for the *Harris v. Balk* rule.²⁶⁹

The *Falor* court cites *Gunning*²⁷⁰ and immediately thereafter remarks, “[i]n any event, *National Broadway Bank*, which was decided over 50 years before the CPLR was enacted, is simply not consonant with CPLR article 62.”²⁷¹ This remark, however, is contradicted by yet another remark: “At the outset, we acknowledge that [t]he CPLR contains no provision as to the situs of [intangible] property for attachment purposes.”²⁷²

So the court hints at the subconstitutional repeal of *National Broadway* but never quite articulates it and instead relies on a bad constitutional reading of *Harris v. Balk*. Why did the *Falor* court not rely on *Gunning*’s nonconstitutional holding?

Perhaps, the CPLR in fact overrules *Gunning*. First, CPLR article sixty-two prohibits the prejudgment attachment of wages.²⁷³ Second, in the post-judgment context, the CPLR requires that an income execution be served on the sheriff of the county where the judgment debtor resides.²⁷⁴ Or, where the debtor is not a resident of the state, the judgment creditor must deliver the income execution to the sheriff of the county where the debtor is employed.²⁷⁵ Under the modern CPLR, wages earned in Pennsylvania by a Pennsylvania worker could never be garnished in New York.

These points do not exactly go to the legislative intent in 1936 to overrule *National Broadway Bank*, but we must also observe that

²⁶⁹ *Gunning*, 295 N.Y. at 330, 67 N.E.2d at 512.

²⁷⁰ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 316, 926 N.E.2d 1202, 1211, 900 N.Y.S.2d 698, 707 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008).

²⁷¹ *Id.*

²⁷² *Id.* at 314, 926 N.E.2d at 1209, 900 N.Y.S.2d at 705 (alteration in original) (quoting *ABKCO Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 675, 350 N.E.2d 899, 902, 385 N.Y.S.2d 511, 513 (1976)).

²⁷³ See *Gulf Int’l Bank B.S.C. v. Othman*, No. 93 Civ. 3161 (CSH), 1993 U.S. Dist. LEXIS 17508, at *6, *8 (S.D.N.Y. Dec. 13, 1993) (citing *Glassman v. Hyder*, 23 N.Y.2d 354, 360, 244 N.E.2d 259, 262, 296 N.Y.S.2d 783, 787 (1968)) (emphasizing that this issue has been left open in the New York Court of Appeals).

²⁷⁴ N.Y. C.P.L.R. 5231(b) (McKinney 2013).

²⁷⁵ *Id.* The effect of CPLR section 5231(b) is to immunize debtors who work outside the state for an employer who is present in New York. See *id.* In *Brown v. Arabian American Oil Co.*, a judgment debtor worked in Saudi Arabia and *AD* was properly served by registered mail. *Brown v. Arabian Am. Oil Co.*, 53 Misc. 2d 182, 184, 278 N.Y.S.2d 256, 258–59 (Sup. Ct. Suffolk County 1967). Since the judgment debtor neither lived nor was employed in New York, the creditor could not comply with the above requirements. *Id.* at 183, 185, 278 N.Y.S.2d at 257, 259. Accordingly, the levy was quashed. *Id.* at 185, 278 N.Y.S.2d at 259. See also *Kaplan v. Supak & Sons Mfg. Co.*, 46 Misc. 2d 574, 575, 580, 260 N.Y.S.2d 374, 374, 379 (Civ. Ct. N.Y. County 1965) (concluding a Minnesota corporation was not obligated to honor a New York income execution seeking to reach the wages of one of its employees, a resident of Massachusetts, where it was served at its New York office, but had its principal place of business in another state).

the 1936 language cited in *Gunning* as overruling *Harris v. Balk* no longer appears in article sixty-two.²⁷⁶ This absence suggests that perhaps the legislature had reversed itself on this question. As the *Falor* court recognized, the CPLR has *no* rule on the situs of the debt.²⁷⁷ Because of these difficulties, the *Falor* court evidently felt it could not push too hard on legislative intent. Better to rely on a bad interpretation of constitutional law!

Still, the court might have borrowed a page from its recent opinion in *Rondack Construction Services, Inc. v. Kaatsbaan International Dance Center, Inc.*²⁷⁸ In that case, a judgment debtor tendered a cashier's check to a sheriff preparing to sell the debtor's real estate pursuant to an execution sale.²⁷⁹ The sheriff refused to call off the sale,²⁸⁰ reasoning that the CPLR had repealed the concept of "redemption" with regard to execution sales.²⁸¹ The Court of Appeals ruled that the CPLR was intended to repeal the concept of *post-sale* redemption,²⁸² because such a right suppresses bidding at execution sales.²⁸³ "The enactment of CPLR 5236, however, did not alter a debtor's right to recover property *before* a judicial sale."²⁸⁴ The case arguably stands for the proposition that, unless the badly drafted CPLR expressly states otherwise, salubrious pre-CPLR practices continue to be the law in New York. On this basis, a nonconstitutional pre-CPLR overruling of *National Broadway* could have been upheld.

In any case, the *Broadway National Bank* rule has little to recommend it. According to Professor Kennedy:

It seems rather fantastic to hold to a fiction that a debt is lodged at the domicile of the debtor, when the fact is that he does not leave his obligations behind him. . . .

. . . .

²⁷⁶ See *Morris Plan Indus. Bank of N.Y. v. Gunning*, 295 N.Y. 324, 329–30, 67 N.E.2d 510, 512 (1946).

²⁷⁷ *Falor*, 14 N.Y.3d at 314, 926 N.E.2d at 1209, 900 N.Y.S.2d at 705.

²⁷⁸ *Rondack Constr. Servs., Inc. v. Kaatsbaan Int'l Dance Ctr., Inc.*, 13 N.Y.3d 580, 923 N.E.2d 561, 896 N.Y.S.2d 278 (2009).

²⁷⁹ *Id.* at 583, 923 N.E.2d at 562, 896 N.Y.S.2d at 279.

²⁸⁰ *Id.*

²⁸¹ See *id.* at 584, 923 N.E.2d at 562, 896 N.Y.S.2d at 279 (relying potentially on similar reasoning used by a sheriff in the case of *Tiffany v. St. John*, 65 N.Y. 314 (1875)).

²⁸² *Rondack Constr. Servs., Inc.*, 13 N.Y.3d at 584, 923 N.E.2d at 562, 896 N.Y.S.2d at 279 (citing *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 520, 392 N.E.2d 1240, 1243, 419 N.Y.S.2d 56, 59, 60 (1979)).

²⁸³ *Guardian*, 47 N.Y.2d at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 60.

²⁸⁴ *Rondack Constr. Servs., Inc.*, 13 N.Y.3d at 584, 923 N.E.2d at 562–63, 896 N.Y.S.2d at 279–80.

. . . [I]t is submitted that New York should remove this remaining “bit of archaic form” which links and restricts the garnishment of intangible debts to the domicile of creditor or debtor. This fiction is not demanded by the constitutional provisions of due process, nor is it imposed upon the courts by legislative mandate. Tested in the scales of justice—which is the sole warrant for the continuance of its fictitious existence—it is arbitrary and unfair to plaintiffs, generally New York citizens or domestic corporations, and unduly mindful of the interests of non-resident defendants and garnishees. Tested in terms of the emergencies and tendencies of the time, this static idea of domicile as a sort of safe-deposit vault for intangible debts is a curious relic in the midst of the fluidity of modern business²⁸⁵

Repeal by the *Falor* court of the domicile rule may be a good thing. The domicile rule was judicially created, so it presumably could be judicially destroyed as well.²⁸⁶ But repeal cannot be justified on the grounds of *constitutional* compulsion.

None of this yet suggests that the *Falor* court acted unconstitutionally when it subjected Mitchell’s interests in the LLCs to the order of attachment. New York could constitutionally declare that a defendant’s intangible property is located where a defendant is. Still there is the further question of whether New York’s holding is worthy of full faith and credit in other states. Suppose, prior to entry of a final judgment in New York, an agent of plaintiff were to travel to Florida to compel a garnishee domiciled there to honor the New York attachment lien.²⁸⁷ Must Florida give

²⁸⁵ Kennedy, *supra* note 69, at 696, 703–04; *see also id.* at 699 (“[I]nsistent adherence to domicile as a jurisdictional test of garnishment is purely judicial in origin. . . . [I]t is hardly conceivable . . . that the legal fiction that a debt is only attachable or garnishable at the domicile of the debtor-garnishee can permanently endure.”).

²⁸⁶ *See id.* at 696, 697.

²⁸⁷ In *Falor*, the trial court had appointed a receiver to take charge of the property encumbered by the attachment lien. *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 307, 926 N.E.2d 1202, 1204, 900 N.Y.S.2d 698, 700 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008). This too is a rather surprising development. Article 62 (which governs orders of attachment) nowhere mentions receivers. CPLR section 5228 permits the appointment of a receiver when a *judgment creditor* so moves. N.Y. C.P.L.R. 5228(a) (McKinney 2013). But, prior to the entry of a money judgment, there is no “judgment creditor.” The CPLR defines a judgment creditor as “a person in whose favor a money judgment is entered or a person who becomes entitled to enforce it.” N.Y. C.P.L.R. 105(l) (McKinney 2013). Article 62 gives rights to *plaintiffs*, not to judgment creditors. Significantly, the supreme court order appointing the receiver was “conditioned upon the entry of judgment.” *Falor*, 14 N.Y.3d at 309, 926 N.E.2d at 1206, 900 N.Y.S.2d at 702 (internal quotation marks omitted) (quoting *Hotel 71 Mezz Lender LLC v. Falor*, 58 A.D.3d 270, 273, 869 N.Y.S.2d 61, 63 (App. Div. 1st Dep’t 2008), *rev’d*, 14 N.Y.3d 303, 926 N.E.2d

full faith and credit to the New York proceedings? The answer would seem to be yes. Florida might adopt the *Harris v. Balk* location rule and hold that Mitchell's intangible rights are located in Florida, where the garnishee is. But New York constitutionally locates that same property where defendant is.²⁸⁸ Each location rule is constitutional and therefore entitled to full faith and credit. So long as the New York courts act first, Florida must bow in awe and respect, under the principle of "first in time is first in right."²⁸⁹

The matter might be different if the property were tangible. Suppose Mitchell's equity interests were represented by certificated securities, and these certificates were located in Florida. A Florida sheriff pursuant to a Florida execution against Mitchell might levy those shares in total disregard of the New York attachment lien. This is the implication of another ancient Supreme Court case, *Fall v. Eastin*,²⁹⁰ decided only four years after *Harris v. Balk*.²⁹¹ In *Fall*, a Washington divorce court ordered a husband to convey Nebraska land to his wife.²⁹² When he refused, the Washington court issued a decree declaring the wife to be the owner of the Nebraska land.²⁹³ Subsequently, the husband conveyed the Nebraska land to X.²⁹⁴ In Nebraska, the wife tried to quiet title against X, but the Nebraska court snubbed the Washington decree and held for X.²⁹⁵ On appeal, the United States Supreme Court upheld and thereby compounded the insult.²⁹⁶

1202, 900 N.Y.S.2d 698). Presumably, this meant that the receiver had no power to do anything until the judgment was actually entered. See *Falor*, 14 N.Y.3d at 309, 926 N.E.2d at 1206, 900 N.Y.S.2d at 702.

²⁸⁸ See *Falor*, 14 N.Y.3d at 312, 926 N.E.2d at 1208, 900 N.Y.S.2d at 704.

²⁸⁹ *In re Marshall*, 600 F.3d 1037, 1064–65 (9th Cir.), cert. granted in part, 131 S. Ct. 63 (2010), aff'd sub nom. Stern v. Marshall, 131 S. Ct. 2594, reh'g denied, 132 S.Ct. 56 (2011) (holding federal district court in California owed full faith and credit to a Texas probate court, because the probate court ruled first).

²⁹⁰ *Fall v. Eastin*, 215 U.S. 1 (1909); see also David P. Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889–1910*, 52 U. CHI. L. REV. 867, 889 n.134 (1985) ("[I]n an obscure and turgid . . . opinion, the Court over . . . unexplained dissents . . . held that Nebraska need not respect a deed to Nebraska land executed by an officer of the state of Washington pursuant to a Washington decree respecting the division of the property of Washington spouses incident to a divorce."). Brainerd Currie writes the classic deconstruction. See Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 621 (1954) [hereinafter Currie, *Full Faith and Credit to Foreign Land Decrees*].

²⁹¹ *Harris v. Balk*, 198 U.S. 215 (1905).

²⁹² *Fall*, 215 U.S. at 14.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 4, 5, 14.

²⁹⁶ *Id.* at 14. The matter would have been different if the wife had sought confirmation from a Nebraska court. In such a case, the Nebraska court would have been obliged to

Fall, by its terms, applies equally well to judicial liens on tangible personal property,²⁹⁷ though some seek to cabin it to real property only.²⁹⁸ Accordingly, if Mitchell's certificated shares were located in Florida, the Florida sheriff could levy the shares in question pursuant to a Florida judgment (where a creditor had a judgment against Mitchell). In short, *Fall* suggests a disjunction between liens on intangible property and liens on tangible property not located in New York.²⁹⁹

VI. AN LLC IS WHERE ITS PRESIDENT IS

The past few pages have emphasized that, in *Falor*, the sheriff validly levied against Mitchell as defendant, but only after the court displaced *Harris v. Balk*, while contradictorily relying on *Harris v. Balk* to negate an arguably governing New York precedent. But Mitchell was also the agent of twenty-three garnishees.³⁰⁰

Enough has been said to establish that, for the order of attachment in *Falor* to be successful, the plaintiff must establish *in personam* jurisdiction over the twenty-three garnishees. Yet the only jurisdictional fact in favor of the plaintiffs is service on Mitchell, who was making a casual visit to New York, outside the scope of his agency as fiduciary for the LLCs.³⁰¹ The United States Supreme Court has three times decreed that a casual visit is not enough, by itself, to ground New York jurisdiction over the garnishees.³⁰² Any implication that the New York courts had

recognize the judgment of the Washington court. *Id.* at 12. Any subsequent conveyance by the husband to *X* would have been void. But where *X* was already the owner by the time the wife sought enforcement, the Nebraska court was apparently within its rights to deny recognition of the wife's title. *See id.* at 14.

²⁹⁷ *Id.* at 12 (“[Full faith and credit] does not extend the jurisdiction of the courts of one State to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit. . . . Plaintiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply.”).

²⁹⁸ *See Currie, Full Faith and Credit to Foreign Land Degrees, supra* note 291, at 639, 640, 648.

²⁹⁹ *Fall*, 215 U.S. at 9–10, 11–12.

³⁰⁰ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 308, 926 N.E.2d 1202, 1205, 900 N.Y.S.2d 698, 701 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008).

³⁰¹ *Id.* at 310, 926 N.E.2d at 1206, 900 N.Y.S.2d at 702.

³⁰² *See supra* text accompanying note 14 (stating that three U.S. Supreme Court cases held that a visit by an officer of a corporation not otherwise doing business in that state is not sufficient for the state to exercise jurisdiction over that corporation). These cases held that an officer's casual presence in the state did not suffice to confer personal jurisdiction over the corporation. *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923); *Bank of Am. v. Whitney Cent. Nat'l Bank*, 261 U.S. 171, 171, 173 (1923); *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 266, 268–69 (1917).

2012/2013]

Where Corporations Are

1177

jurisdiction over the garnishees solely by the garnishment of Mitchell must be viewed as unconstitutional and barred by *International Shoe* principles.³⁰³

It is familiar law that, where no minimum contacts exist over a defendant, the defendant may nevertheless waive jurisdiction by making a personal appearance. According to CPLR section 320(b): “Subject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, *unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211.*”³⁰⁴ CPLR section 3211(a)(8) governs motions to dismiss, *inter alia*, on the ground that “the court has not [sic] jurisdiction of the person of the defendant.”³⁰⁵ This provision, however, has no relevance. The garnishees in *Falor* were not defendants. So they did not have to make what New York law used to call a “general” or even a “special appearance.”³⁰⁶

Did the garnishees do anything else that constituted consent to jurisdiction in New York? They certainly were not parties to the guaranty contract, in which the defendants consented to jurisdiction.³⁰⁷ They did, however, comply with CPLR section 6219,³⁰⁸ as garnishees are supposed to do. According to section 6219:

Within ten days after service upon a garnishee of an order of attachment, . . . the garnishee shall serve upon the sheriff a statement specifying all debts of the garnishee to the defendant, when the debts are due, all property in the possession or custody of the garnishee in which the defendant has an interest, and the amounts and value of the debts and property specified.³⁰⁹

The question arises whether submission of section 6219 amounts to consent by the twenty-three garnishees to the jurisdiction of the New York court.

³⁰³ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (stating that the presence of an agent in a state, or even the performance of an isolated activity on the behalf of the corporation, is insufficient to exercise personal jurisdiction over the corporation).

³⁰⁴ N.Y. C.P.L.R. 320(b) (McKinney 2013) (emphasis added).

³⁰⁵ N.Y. C.P.L.R. 3211(a)(8) (McKinney 2013).

³⁰⁶ *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 224, 792 N.E.2d 155, 161, 762 N.Y.S.2d 5, 11 (2003) (“New York no longer distinguishes between a general and special appearance . . .” (citing C.P.L.R. 320)).

³⁰⁷ *Hotel 77 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 307, 926 N.E.2d 1202, 1204, 900 N.Y.S.2d 698, 700 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008).

³⁰⁸ *Id.* at 308–09, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

³⁰⁹ N.Y. C.P.L.R. 6219 (McKinney 2013).

There is some statutory evidence that submission of a 6219 statement by a garnishee does not constitute consent to *in personam* jurisdiction over the garnishee. CPLR section 6211(b) governs the hearing to confirm an order of attachment that has been issued *ex parte*.³¹⁰ The first sentence of section 6211(b) does not expressly apply when the grounds of attachment is that the defendant is a nondomiciliary.³¹¹ According to the second sentence of this provision:

Where an order of attachment without notice is granted on the ground specified in subdivision one of section 6201, the court shall direct that the statement required by section 6219 be served within five days, that a copy thereof be served upon the plaintiff, and the plaintiff shall move within ten days after levy for an order confirming the order of attachment.³¹²

Confusingly, this provision assumes that the confirmation hearing will be held *after* the garnishee submits its section 6219 statement. In *Falor*, the section 6219 statements were submitted long after the hearing had concluded.³¹³ This, however, does not appear to be a problem insofar as the defendants are concerned. In fact, the Supreme Court, New York County had ordered that the levy should not occur until after the confirmation hearing.³¹⁴ The garnishees, however, have every right to complain about the section 6211 hearing.³¹⁵ The plaintiff must *move* to confirm.³¹⁶ Motions require service of the motion.³¹⁷ This means service on the garnishee.³¹⁸ Service on the defendants after the hearing is over is not service on the garnishee.³¹⁹

Be that as it may, Mitchell (as *defendant*) appeared personally and through attorneys (for the defendants) at the CPLR section 6211(b) hearing to oppose confirmation of the order of attachment.³²⁰ But suppose we say that he was also there as an

³¹⁰ N.Y. C.P.L.R. 6211(b) (McKinney 2013).

³¹¹ *Id.*; N.Y. C.P.L.R. 6201(1) (McKinney 2013).

³¹² C.P.L.R. 6211(b).

³¹³ *Falor*, at 308–09, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701 (stating that it was not until the supreme court had sealed off the record following oral arguments on October 23, 2007 that Mitchell provided CPLR section 6219 statements to the plaintiff).

³¹⁴ *See id.* at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

³¹⁵ *See* C.P.L.R. 6211(b).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *See id.*

³¹⁹ *See id.*

³²⁰ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 308–09, 926 N.E.2d 1202, 1205, 900

agent of the garnishees (who had already submitted CPLR section 6219 statements). As an alternative to simply opposing confirmation, fiduciary Mitchell, pursuant to CPLR section 6223(a), could have moved on behalf of the garnishees to vacate the order of attachment (which was outstanding even if not yet confirmed).³²¹ According to the last sentence of section 6223(a), “[s]uch a motion shall not of itself constitute an appearance in the action.”³²² Here we have some evidence that the CPLR section 6219 statement, upon which the CPLR section 6211(b) hearing is predicated, cannot constitute consent of the garnishees to New York jurisdiction. If moving to vacate is not an appearance, then opposing confirmation of the order of attachment is not an appearance either.

Still, if Mitchell appeared for the *garnishees*, the court determined against the garnishees in the end.³²³ As is well understood, a special appearance to contest jurisdiction that results in a finding of jurisdiction is entitled to full faith and credit,³²⁴ even if it is based on the erroneous proposition that service of process on a corporate officer casually in New York is enough, without more, to justify jurisdiction.³²⁵ But this would turn on Mitchell’s intent to protest the order of attachment as a fiduciary for the garnishees, rather than *as a defendant*.³²⁶ If Mitchell was there *only as a defendant* and the garnishees made no special appearance, any ruling against the garnishees is not entitled to full faith and credit.³²⁷

It is most unlikely that fiduciary Mitchell intended to compromise the rights of the garnishees by appearing for them. Rather, it is more plausible that Mitchell appeared *for himself*, or that his attorneys appeared for the defendants, but not for the garnishees. We learn from the *Falor* court that:

[D]efendant Mitchell, pursuant to CPLR 6219, provided

N.Y.S.2d 698, 701 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008).

³²¹ N.Y. C.P.L.R. 6223(a) (McKinney 2013).

³²² *Id.*

³²³ *Falor*, 14 N.Y.3d at 308, 309, 926 N.E.2d at 1205, 1206, 900 N.Y.S.2d at 701–02.

³²⁴ *See Vander v. Casperson*, 12 N.Y.2d 56, 58–59, 61, 187 N.E.2d 109, 109–10, 111, 236 N.Y.S.2d 33, 34, 36 (1962) (holding when New York defendants made a special appearance in a Florida court to challenge jurisdiction, the defendants are bound by the Florida court’s jurisdictional determination).

³²⁵ *See* discussion *supra* Part II (arguing that the *Falor* court was in error when it held that jurisdiction over the corporate fiduciary extends to jurisdiction over the corporation when the fiduciary’s presence in the state is unrelated to its’ corporate duties).

³²⁶ *See* discussion *supra* Part I (relating to Mitchell’s dual role of a private citizen defendant and corporate fiduciary defendant).

³²⁷ *See generally Vander*, 12 N.Y.2d at 59, 187 N.E.2d at 110, 236 N.Y.S.2d at 35 (“[A] judgment rendered in another State is not conclusive where the person against whom judgment entered was not served . . .”).

plaintiff with garnishee statements for the 23 entities. Defendant Mitchell does not dispute that he is the “proper garnishee” (within CPLR 5201 [c] [1]) for defendants’ ownership/membership interests. Nor does defendant Mitchell argue that he was improperly served. Defendant Mitchell, through counsel, stated in a letter to Supreme Court dated January 28, 2008, “[w]e are prepared to waive any argument that the proper garnishee was not served with the order of attachment or the related levies in this case.”³²⁸

But Mitchell also proceeded (as a *defendant*) to state that the order of attachment was improper because the situs of the defendants’ property was in Delaware, Georgia, and Florida, not New York.³²⁹ This seems to have been an inarticulate way of protesting that the New York courts had no jurisdiction over the persons of the garnishees. Thus, the appellate division, which had ruled against the order of attachment, remarked:

The mere fact that the order of attachment in this case was served upon defendant Mitchell, a resident and domiciliary of Florida, who was in New York temporarily solely to attend his deposition and does not dispute that he is the proper garnishee within the meaning of CPLR 5201 (c) (1), does not establish the situs of the res, i.e., the defendants’ ownership and/or management interests, if any, in 23 entities . . . in New York.³³⁰

We read the appellate division as responding to Mitchell’s protest *as a defendant* to jurisdiction over the garnishees. We do not read this as meaning that the attorneys for Mitchell meant to act as the attorneys for the garnishees. If this is the case, the order of attachment, to this day, has not yet been established as valid as against the garnishees. All we know is that, insofar as the private defendants are concerned, the order of attachment was properly issued.³³¹

Further puzzles arise. For the purpose of this discussion, we ignore the fact that, between confirmation of the order of attachment and the resolution of the appeal, the supreme court issued judgments against the defendants.³³² Recall that a levy

³²⁸ *Falor*, 14 N.Y.3d at 308–09, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

³²⁹ *Id.* at 308, 310, 926 N.E.2d at 1205, 1207, 900 N.Y.S.2d at 701, 702.

³³⁰ *Hotel 71 Mezz Lender LLC v. Falor*, 58 A.D.3d 270, 273, 869 N.Y.S.2d 61, 64 (App. Div. 1st Dep’t 2008), *rev’d*, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698 (2010).

³³¹ *Falor*, 14 N.Y.3d at 312, 926 N.E.2d at 1208, 900 N.Y.S.2d at 704.

³³² *Id.* at 309, 310, 926 N.E.2d at 1206, 900 N.Y.S.2d at 701–02. The plaintiff’s motion to

pursuant to an order of attachment lasts ninety days, after which they lapse.³³³ If the order of attachment in *Falor* were to lapse, the plaintiffs would be required to revive it with a motion *nunc pro tunc*.³³⁴ In response to this motion, it should be open for the garnishees to make a “special appearance” to protest a lack of *in personam* jurisdiction. Or the garnishees could say nothing, and any New York ruling would be disentitled to full faith and credit in other states.³³⁵

Alternatively, it is open, prior to the ninety-day lapse or after a *nunc pro tunc* revival, for the plaintiff to perpetuate the levy by commencing a turnover proceeding pursuant to CPLR section 6214(d).³³⁶ According to CPLR section 6214(e):

At the expiration of ninety days after a levy is made by service of the order of attachment, or of such further time as the court, upon motion of the plaintiff on notice to the parties to the action, has provided, the levy shall be void except as to property or debts which the sheriff has taken into his actual custody, collected or received *or as to which a proceeding under subdivision (d) has been commenced*.³³⁷

CPLR section 6214(d) requires the plaintiff to “commence a *special proceeding* against the garnishee served with the order to compel the . . . transfer to the sheriff.”³³⁸ A “special proceeding” is governed by Article 4 of the CPLR.³³⁹ There we learn that “a notice of petition shall be served in the same manner as a summons in an action.”³⁴⁰ Service of the order of attachment on Mitchell was certainly not the commencement of a special proceeding against the garnishees.³⁴¹ Service would have to be accomplished anew.³⁴²

confirm the order of attachment was granted on February 8, 2009 and judgment was entered against six defendants on April 21, 2008. *Id.* at 310, 926 N.E.2d at 1206, 900 N.Y.S.2d at 702.

³³³ N.Y. C.P.L.R. 6214(e) (McKinney 2013).

³³⁴ See *Kitson & Kitson v. City of Yonkers*, 10 A.D.3d 21, 26, 778 N.Y.S.2d 503, 507–08 (App. Div. 2d Dep’t 2004) (prohibiting second levies and requiring such motions, in the context of post-judgment enforcement).

³³⁵ See *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 705 (1982).

³³⁶ C.P.L.R. 6214(d).

³³⁷ C.P.L.R. 6214(e) (emphasis added).

³³⁸ C.P.L.R. 6214(d) (emphasis added).

³³⁹ N.Y. C.P.L.R. 401–11 (McKinney 2013).

³⁴⁰ N.Y. C.P.L.R. 403(c) (McKinney 2013).

³⁴¹ See C.P.L.R. 403(a). “A notice of petition shall specify the time and place of the hearing on the petition . . .” *Id.* The order of attachment would not have met these criteria and therefore would not be considered to have instituted a special proceeding. See *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 308, 926 N.E.2d 1202, 1205, 900 N.Y.S.2d 698, 701 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008).

Since we are dealing largely with LLCs, CPLR section 311-a(a) applies:

Service of process on any domestic or foreign [LLC] shall be made by delivering a copy personally to (i) any member of the limited liability company *in this state*, if the management of the [LLC] is vested in its members, (ii) any manager of the [LLC] *in this state*, if the management of the [LLC] is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the [LLC] to receive process³⁴³

The words “in this state” in CPLR section 311-a(a) should be read to mean that the LLC (and not merely its member or manager) must be “in this state” for jurisdictional purposes, not that the agent is in the state.³⁴⁴ Otherwise, the casual visit of an LLC agent would subject the LLC (not otherwise present) to New York jurisdiction. Such interpretation, we argue, would render section 311-1(a) unconstitutional. Such interpretation should be avoided if possible.³⁴⁵

Suppose the members of the LLCs in question never again come to New York, even on casual visits. In that case, the plaintiff would have to proceed under section 311-a(b) where it states “[i]f service is impracticable under subdivision (a) of this section, it may be made in such manner as the court, upon motion without notice, directs.”³⁴⁶

Assuming service is accomplished under CPLR section 311-a(b), in the special proceeding that results, the garnishees would again have the opportunity to protest lack of *in personam* jurisdiction.³⁴⁷ Or they could simply default, confident that any ruling against them would be entitled to no full faith and credit.³⁴⁸

Judgments, however, were issued in the meantime, so that, by the time the Court of Appeals reversed and upheld the order of

³⁴² See C.P.L.R. 403(a).

³⁴³ N.Y. C.P.L.R. 311-a(a) (McKinney 2013) (emphasis added). Further rules on serving process on LLCs appear in Article III of the New York Limited Liability Company Law. N.Y. LTD. LIAB. CO. LAW §§ 301–05 (McKinney 2013).

³⁴⁴ See C.P.L.R. 311-a(a).

³⁴⁵ *E.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012).

³⁴⁶ C.P.L.R. 311-a(b).

³⁴⁷ See N.Y. C.P.L.R. 404(a) (McKinney 2013).

³⁴⁸ See Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n, 455 U.S. 691, 705 (1982) (“[B]efore a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court’s decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.” (citing Nevada v. Hall, 440 U.S. 410, 421 (1979))).

2012/2013]

Where Corporations Are

1183

attachment, the parties in *Falor* were in a post-judgment mode.³⁴⁹ This circumstance in no way changes the analysis. According to CPLR section 6226: “Where an execution is issued upon a judgment entered against the defendant, the sheriff’s duty with respect to custody and disposition of property or debt levied upon pursuant to an order of attachment is the same as if he had levied upon it pursuant to the execution.”³⁵⁰

Were the plaintiff in *Falor* to issue an execution to the sheriff, the plaintiff would find that the levy under CPLR section 6214(b) had lapsed.³⁵¹ The plaintiff would still be required to revive the levy *nunc pro tunc* and commence a special proceeding against the garnishees.³⁵² In the post-judgment context, all of the jurisdictional issues could be raised by the garnishees, if the garnishees did not appear in the original section 6211(b) hearing on the order of attachment.³⁵³

To summarize, the *Falor* court’s opinion actually decided very little. Even if service on Mitchell of the order of attachment was a proper levy, the levy must still be enforced. If, as is apparently the case, fiduciary Mitchell never intended to subject the LLCs to New York jurisdiction, it is still open for the garnishees to challenge jurisdiction in a motion to revive the lapsed levy or in the required special proceeding to make the levy perpetual.³⁵⁴ Nothing that happened in the section 6211(b) hearing or the subsequent appeals estops the garnishees from protesting the lack of personal jurisdiction.³⁵⁵

VII. CONCLUSION

In *Hotel 71 Mezz Lender LLC v. Falor*, a plaintiff obtained jurisdiction over corporate account debtors—the debtors of various debtors—by grabbing the person of the corporations’ president, even though the president was “casually” in New York—that is, present for reasons unconnected with the corporations of which the

³⁴⁹ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 309–10, 926 N.E.2d 1202, 1206, 900 N.Y.S.2d 698, 702 (2010), *rev’g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep’t 2008). “On September 25, 2007, Supreme Court granted the order of attachment in the sum of \$65,149,926 (the amount secured by the order).” *Id.* at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 701.

³⁵⁰ N.Y. C.P.L.R. 6226 (McKinney 2013).

³⁵¹ N.Y. C.P.L.R. 6214(e) (McKinney 2013) (“[E]xpiration of ninety days after a levy is made by service of the order of attachment . . .”).

³⁵² N.Y. C.P.L.R. 5225(b) (McKinney 2013); N.Y. C.P.L.R. 5227 (McKinney 2013).

³⁵³ *See* N.Y. C.P.L.R. 6211(b) (McKinney 2013); N.Y. C.P.L.R. 6223(a) (McKinney 2013).

³⁵⁴ C.P.L.R. 6223(a); N.Y. C.P.L.R. 6221 (McKinney 2013).

³⁵⁵ C.P.L.R. 6223(a); C.P.L.R. 6211(b).

garnishee was president.³⁵⁶ Such jurisdiction directly contradicts the holdings of multiple Supreme Court cases,³⁵⁷ not to mention a dictum in the famous case of *International Shoe v. Washington*.³⁵⁸ In the course of so doing, the *Falor* court turned *Harris v. Balk* on its head. *Harris* involved the location of intangible property.³⁵⁹ It stands for the sub-constitutional proposition that, at least in Maryland, a debt is located where the account debtor is, and jurisdiction over the account debtor establishes *quasi in rem* jurisdiction over the debt.³⁶⁰ Although *Harris* is about *account debtors*, the *Falor* court applied its learning to *creditors* of the account debtor—that is, to defendants.³⁶¹ According to the *Falor* court, where defendants are, that is where their intangible property is.³⁶² This is the dead opposite of what *Harris* stands for. *Harris* locates the debt were the *garnishee* is.³⁶³

Meanwhile, the *Falor* court used the sub-constitutional proposition of *Harris* to overrule a governing New York precedent—on constitutional grounds!³⁶⁴ Granted, the old rule from *National Broadway Bank v. Sampson*—a debt is located where the account debtor is *domiciled*—limits the constitutional reach of New York courts.³⁶⁵ It is probably not a very good rule. But there is no *constitutional* reason why New York courts should maximize their reach. The overruling of *National Broadway Bank* therefore must be understood as judicial legislation—permissible but not constitutionally required.

So the *Falor* opinion violates the Constitution and, in addition, changes New York law on *faux* constitutional grounds. It is doubtful that any of this was intended. Rather, the facts in *Falor* were so confusing that the matters simply got mixed up. Nevertheless, once the facts get untangled, the unconstitutionality of *Falor* becomes apparent. Corporations and LLCs are *not* located

³⁵⁶ *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 307, 308, 926 N.E.2d 1202, 1204, 1205, 900 N.Y.S.2d 698, 700, 701 (2010), *rev'g* 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008).

³⁵⁷ *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923); *Bank of Am. v. Whitney Cent. Nat'l Bank*, 261 U.S. 171, 171, 173 (1923); *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 266, 268–69 (1917).

³⁵⁸ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

³⁵⁹ *Harris v. Balk*, 198 U.S. 215, 221 (1905).

³⁶⁰ *Id.* at 221, 222.

³⁶¹ *Falor*, 14 N.Y.3d at 307, 926 N.E.2d at 1204, 900 N.Y.S.2d at 700.

³⁶² *Id.* at 310, 926 N.E.2d at 1206, 900 N.Y.S.2d at 702.

³⁶³ *Harris*, 198 U.S. at 221, 222–23.

³⁶⁴ *Falor*, 14 N.Y.3d at 310, 926 N.E.2d at 1206, 900 N.Y.S.2d at 702.

³⁶⁵ *Nat'l Broadway Bank v. Sampson*, 179 N.Y. 213, 223, 71 N.E. 766, 769 (1904), *abrogated by Falor*, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698 (2010).

2012/2013]

Where Corporations Are

1185

where their agents are casually, outside the scope of their agency. A corporation is not in New York just because an agent flies to New York to take in a Broadway show. Any attempt by the New York Court of Appeals to claim otherwise transcends the bounds of the United States Constitution.