

# SURVEY OF ILLINOIS LAW: ENFORCEMENT OF JUDGMENTS

Robert G. Markoff\*

## I. INTRODUCTION

As we celebrate the 200th anniversary of Abraham Lincoln's birth, law publications are filled with Lincoln stories. Though it is widely known that Lincoln was an attorney, very few people are aware that the majority of Abraham Lincoln's known court cases involved debt collection.<sup>1</sup> Yes, before becoming the sixteenth President of the United States, Abraham Lincoln was a collection attorney. Even before becoming a collection attorney, Mr. Lincoln was a judgment debtor.<sup>2</sup> At least three known judgments were entered against a young Abraham Lincoln.<sup>3</sup> The first judgment was paid off in six installments. The other two resulted in a Sheriff's sale of his personal property including his horse, saddle, bridle and surveying equipment.<sup>4</sup>

Although Lincoln litigated criminal, common law and chancery matters over the years, he relied on debt collection as the backbone of his practice.<sup>5</sup> Shortly before his election as President, Lincoln wrote, regarding enforcement of judgments, "My mind is made up. I will have no more to do with this class

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\* Robert G. Markoff is a partner in the firm of Markoff & Krasny, Chicago, Illinois. Bob is the President of the National Association of Retail Collection Attorneys, a member of the Illinois State Bar Association and the Chicago Bar Association. Bob is the Past Chair of the ISBA Section Council for Commercial, Banking and Bankruptcy Law. He was the founding President of the Illinois Creditors' Bar Association. He is Vice Chair of the Illinois Institute for Continuing Legal Education and frequently lectures throughout the State of Illinois on subjects relating to the Enforcement of Judgments. He is the General Editor of the IICLE publication *Creditors' Rights in Illinois* and also an author of several of its chapters. He was also the primary author of the Revival of Judgment Act in Illinois. Bob would like to thank a frequent collaborator, Christopher McGeehan, as well as Judges Thomas More Donnelly, Sanjay T. Tailor and Michael B. Hyman who have sparked thoughtful and scholarly discussions related to the development of enforcement law.

1. John A. Lupton, *The Law Practice of Abraham Lincoln: A Narrative Overview*, available at [www.papersofabrahamlincoln.org/narrative\\_overview.htm](http://www.papersofabrahamlincoln.org/narrative_overview.htm) (last visited Mar. 19, 2009).
2. Robert Markoff, *Collection Industry Has Duty To Treat Consumers Equitably*, USA Today (April 1, 2008) available at <http://www.insidearm.com/go/arm-news/collections-industry-has-duty-to-treat-consumers-equitably>.
3. *Id.*
4. *Id.*
5. Honorable Sanjay T. Tailor and Honorable Thomas More Donnelly, *Survey of Illinois Law: Enforcement of Judgment*, 31 S. ILL. U. L.J. 819 (2007).

of business. I can do business in Court, but I can not, and will not, follow executions all over the world.”<sup>6</sup>

Much has changed since 1858<sup>7</sup> when Lincoln expressed his frustration with the practice of enforcing judgments. Complexities in the law with which Lincoln never had to deal are commonplace today, yet much of the law regarding enforcement of judgments still has deep roots dating back to the days of Lincoln. With few statutes and rules governing the enforcements of judgments and even fewer appellate court opinions issued in this area each year, one can only image what Abraham Lincoln would have to say regarding the practice today.<sup>8</sup>

With a strong historical grasp of the roots of collection law and over thirty years of experience as an attorney practicing in the field, the author of this article was of the opinion that changes had to be made to bring the law regarding enforcement of judgments more in sync with the twenty-first century. This was his goal as principal author of Public Act 95-0661.<sup>9</sup>

As of January 1, 2008, Senate Bill 229, now Public Act 95-0661, became law in Illinois.<sup>10</sup> This Act, supported by the Commercial, Banking and Bankruptcy Section Council of the Illinois State Bar Association and the Illinois Creditors’ Bar Association, represents major clarifications of Illinois law relating to Judgment Enforcement. The Act has benefits for both creditors and debtors. Together, the changes represent a significant advance in the development and administration of post judgment law.

Besides the statutory impact of these amendments to the Code of Procedure, the amendments as a whole set the stage for a major review of Illinois enforcement of judgments law. In effect, almost everything that was once done by way of garnishment, wage deduction order and sheriff’s levy sales of real estate and personal property may now be done by use of a citation to discover assets. In addition, the impact of these changes may be one of the final steps in removing enforcement procedures from the office of the Sheriff (non-court supervised) and into judicial supervision of the entire enforcement process. When the Illinois Supreme Court addresses changes to Supreme Court Rule 277, the process should be complete.

This article will provide a brief history of enforcement of judgment law in Illinois, followed by a discussion of some of the major amendments contained in Public Act 95-0661 which directly affect the law regarding

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6. Roger D. Billings, Jr., *A. Lincoln, Debtor-Creditor Lawyer*, 8 J. OF ILL. HIST. 82, 102 (2005).

7. *Id.*

8. Tailor & Donnelly, *supra* note 5.

9. Public Act 95-0661 (Oct. 17, 2007), formerly S.B. 229.

10. *Id.*

citations to discover assets and garnishments. The article will conclude with suggestions for amending Illinois Supreme Court Rule 277.

## II. BACKGROUND

The legal historian Frederick W. Maitland responded to the argument that an understanding of obsolete legal procedures is “profitable to no man” by arguing that “the forms of action we have buried, but they still rule us from the grave.”<sup>11</sup> Nowhere is this more true than in the area of enforcement of judgments, where modern postjudgment procedures still bear the characteristics of their common law ancestors.

The mere idea of postjudgment judicial procedures was alien to the common law.<sup>12</sup> At common law, there was little judicial supervision of collection procedures, which were primarily the responsibility of the local sheriff. The creditor would place a writ of execution, or *feri facias*, in the hands of the sheriff. This writ commanded the sheriff to “cause to be made the sum of \$\_\_\_\_\_.”<sup>13</sup> It further commanded the sheriff to “render to the plaintiff and make due return of this writ in 90 days.”<sup>14</sup> The trial court had no further role in collection of judgment.

Early statutory procedures then evolved to address the situation when the debtor had no assets subject to execution. One of the earliest statutory responses was to make real property subject to execution.<sup>15</sup> At common law, real property had not been subject to execution.<sup>16</sup> The nineteenth century Illinois legislature did not merely abolish this limitation but went further and enacted a statutory preference for execution against real property.<sup>17</sup> This preference required that the sheriff first attempt to locate and execute against the real property of the debtor prior to executing against personal property.

The second response was the creation of the garnishment. The garnishment was designed to enable the judgment creditor to step into the shoes of a judgment debtor and collect debts owed to the judgment debtor. The garnishment procedure was strictly construed and only allowed for the collection of debts owed to the judgment debtor and property belonging to the judgment debtor held by others.<sup>18</sup>

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11. Frederick W. Maitland, *The Forms of Action at Common Law: A Course of Lectures*, 1–2 (1936).

12. Robert G. Markoff, et al., *Creditor's Rights in Illinois*, § 2.2 (IICLE, 2004).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Swiggart v. Harber*, 5 Ill. 364 (1843).

17. Markoff, *supra* note 12.

18. *Id.*

The third response was the creditor's bill. The creditor's bill was an equitable procedure that allowed the creditor to summon the debtor into court for questions regarding the debtor's finances.<sup>19</sup> However, as it was an equitable procedure, the creditor was first required to exhaust remedies at law. This meant that the creditor had to attempt execution and have it returned unsatisfied.<sup>20</sup>

Fifty years ago, an Illinois commentator surveyed these procedures and noted:

Looking back over the Illinois laws on collection of judgments, it is apparent that they are rather closely attuned to the Illinois of young Abe Lincoln—an Illinois of farms and cattle, and land at \$5 an acre, and they are attuned also to the procedure of that era, a procedure when a few common law writs were sufficient to cover most of the types of situations which repeated themselves year after year.<sup>21</sup>

Since that article was written in 1951, the law governing collection of judgments has changed dramatically, but not in the way anticipated by the commentator. While the commentator could have foreseen that the common law writs would be abolished, as has the old requirement that creditors first proceed against real property before personal property, it would be unlikely that the commentators would have foreseen the new due process protections for debtors, unknown at common law and early statutory law, that have been mandated by the United States and Illinois Supreme Courts. Rather than a plethora of specialized procedures for different situations as anticipated, the law has been moving toward a small number of procedures that can be adapted to different situations of the modern era. Indeed, the dominant procedure of the modern day, the citation to discover assets, was something of a curiosity fifty years ago, primarily practiced in the municipal courts of Chicago.<sup>22</sup>

However, an understanding of the older procedures is helpful to understand older legal opinions, which are frequently still relevant to modern practice. It has been the author's experience that "old" cases are frequently directly germane on issues. While some issues may be decided based on the current language of the statutes, other issues such as the obligations of third parties, have remained largely unchanged for 100 years.

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19. *Id.*

20. *Id.*

21. Alfred F. Conard, *An Appraisal of Illinois Law on the Enforcement of Judgments*, 1951 U. ILL. L. F. 96, 119 (1951).

22. Markoff, *supra* note 12.

### III. HISTORY OF NON-WAGE GARNISHMENT

The non-wage garnishment is a procedure that enables the creditor to stand in the debtor's shoes and recover the assets of the debtor in the hands of others or indebtedness to the debtor owed by others. The creditor, the "garnishor," serves the garnishment on the person or entity that is believed to be holding assets or property of, or is indebted to, the judgment debtor. This person or entity is called the "garnishee." A garnishment statute has existed in Illinois since 1839 when the garnishment was created as one of the first statutory remedies in derogation of the common law.<sup>23</sup>

The primary mechanism for enforcing judgments at common law was the execution.<sup>24</sup> If the judgment debtor was concealing assets or had assets in the custody of others, the creditor had few remedies.<sup>25</sup> The primary remedy a creditor did have in such a case was imprisonment for debt.<sup>26</sup> Contrary to the misrepresentations fostered by Dickens and others, this was not a mechanism where the poor were summarily thrown into prison. Rather, this was a mechanism for persuading a debtor who was hiding assets to reveal them. The creditor paid a per diem sum for the incarceration of the debtor, and this amount was deducted from the judgment each day.<sup>27</sup> The premise was that the debtor would reveal the assets and pay the judgment to avoid continued imprisonment.<sup>28</sup> This procedure had mixed effectiveness and was generally an inefficient remedy for creditors.<sup>29</sup>

The garnishment was created as a means of addressing this problem. Garnishment was a statutory proceeding unknown at common law. The garnishment was designed to reach those assets of the judgment debtor that could not be reached by execution.<sup>30</sup> The garnishment was a procedure designed to enable the judgment creditor to step into the shoes of the judgment debtor and to collect debts that others owed to the judgment debtor.<sup>31</sup> The garnishment operated as an assignment of such claims from the debtor to the garnishor/creditor.<sup>32</sup> The standard caption of such proceedings is "[Debtor

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23. Robert G. Markoff, et al., *Creditor's Rights in Illinois*, § 2.32 (IICLE, 2004).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Zimek v. Ill. Nat'l Cas. Co.*, 370 Ill. 572, 19 N.E.2d 620 (1939); *Harris v. Valen Constr. Co.*, 49 Ill. App. 2d 265, 200 N.E.2d 70 (1st Dist. 1964).

31. *Id.*

32. *Id.*

(defendant) for the use of [Creditor (plaintiff-garnishor)] v. [Garnishee (third party)].”

Like many other early statutory procedures for enforcement of judgments, the garnishment was initially designed to be used only if an execution failed to recover assets of the debtor. Until fifty years ago, a creditor could use a garnishment only if an execution against the debtor had been returned unsatisfied.<sup>33</sup>

The garnishment procedure “is in the nature of a proceeding in rem but moves against a garnishee in personam.”<sup>34</sup> It combines both in rem and in personam aspects. It is in personam because it is directed toward a specific party. However, it is primarily in rem in that it is directed toward assets in the hands of the garnishee. Further, a claim asserted by a judgment creditor against a garnishee must be one the judgment debtor itself could have maintained.<sup>35</sup>

The Illinois courts have held repeatedly that garnishment is strictly construed so as to not be extended to cases beyond its intended realm of application. The garnishment process is purely a creature of statute, and every case must be brought within the scope of this statute, and whatever the case may be, “the words of the statute must control.”<sup>36</sup> This rule has led to limitations on the use of garnishments that limit its effectiveness as a mechanism of enforcing judgments.

#### IV. LIMITATIONS ON THE USE OF NON-WAGE GARNISHMENT

In *Powell v. Prudence Mutual Casualty Co.*,<sup>37</sup> the court held:

Not every specie of liability owing by a garnishee to his judgment debtor is within the reach of an affidavit for garnishment. Rather, the garnishment statute itself clearly manifests an intention to confine the garnishment process to but two classes of assets; namely (1) a debt, for the collection of which, the garnishee might have properly maintained the traditional actions of debt or assumpsit, or (2) property belonging to the judgment debtor in the possession, custody, or control of the garnishee.<sup>38</sup>

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33. See *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 124 N.E. 454 (1919).

34. *Freeport Motor Cas. Co. v. Madden*, 354 Ill. 486, 188 N.E. 415, 417 (1933).

35. *Baron v. Villareal*, 100 Ill. App. 2d 366, 241 N.E.2d 227 (2d Dist. 1968); *Wolff v. Hallaway*, 116 Ill. App. 2d 270, 253 N.E.2d 596 (1st Dist. 1969).

36. *Cohen v. N. Ave. State Bank*, 304 Ill. App. 413, 26 N.E.2d 691, 693 (1st Dist. 1940) (quoting *Wheeler v. Chicago Title & Trust Co.*, 217 Ill. 128, 75 N.E. 455, 457 (1905)).

37. *Powell v. Prudence Mut. Cas. Co.*, 88 Ill. App. 2d 343, 232 N.E.2d 155, 157 (1st Dist. 1967).

38. *Id.*

The following are limitations on the use of non-wage garnishment:

1. Only certain types of property and assets in the hands of garnishees are subject to garnishment. The types of assets that can be reached via garnishment are limited.<sup>39</sup> Property sought to be garnished must be of a legal rather than an equitable character; thus, beneficial or equitable estates or interests are not subject to garnishment.<sup>40</sup> For example, intangible personal property, such as beneficial interests in land trusts, seats on exchanges, and private club memberships, have been held to be outside the scope of the assets that can be reached by garnishment.<sup>41</sup> However, such property may be reached by a citation proceeding under section 2-1402(c)(5).

2. The indebtedness owed to the debtor by the garnishee must be presently due. A creditor can only recover debts that are presently due and owing at the time the garnishment answer is filed.<sup>42</sup> A creditor cannot recover debts that are contingent or that become due in the future.<sup>43</sup> A garnishment proceeding is an improper remedy when the judgment creditor is seeking a contingent or unliquidated asset, and the trial court need not decide claims based on unliquidated assets.<sup>44</sup> A creditor does not have the ability to recover money from the garnishee unless there is a legal obligation that the debtor would be entitled to enforce itself.<sup>45</sup>

One particularly interesting case addressing the issue of whether funds were due the debtor is *Zucker v. United States Computer Corp.*<sup>46</sup> In that case, the debtor had deposited an out-of-state check nine days before the service of the garnishment. Two days prior to the garnishment, the bank had closed the defendant's accounts and converted the proceeds into cashiers' checks payable to the bank. On the date of service of the garnishment, the bank inquired as to the status of the check but was unable to obtain a definitive status from the

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39. *Capes v. Burgess*, 135 Ill. 61, 25 N.E. 1000 (1890).

40. *May v. Baker*, 15 Ill. 89 (1853).

41. *See, e.g., Netter v. Bd. of Trade of City of Chicago*, 12 Ill. App. 607 (1st Dist. 1883).

42. *Baird v. Senne*, 13 Ill. App. 3d 226, 300 N.E.2d 554 (1st Dist. 1973).

43. *Zimek v. Ill. Nat'l Cas. Co.*, 370 Ill. 572, 19 N.E.2d 620, 622 (1939) ("the indebtedness sought to be garnished must be a liquidated sum due without contingency at the date when the answer to the garnishment suit is filed").

44. *Stevenson v. Samkow*, 142 Ill. App. 3d 293, 491 N.E.2d 1318 (1st Dist. 1986).

45. *See Cole v. Shanior*, 69 Ill. App. 3d 505, 387 N.E.2d 860, 861 (1st Dist. 1979) ("to impose a liability upon a garnishee, there must be an equivalent liability by the garnishee to the judgment debtor as would enable the judgment debtor to maintain an action directly against the garnishee in his own name, for his own use, and to recover a judgment against the garnishee").

46. *Zucker v. United States Computer Corp.*, 85 Ill. App. 3d 759, 408 N.E.2d 41 (3d Dist. 1980).

bank on which the check was drawn. Therefore, the bank answered “no funds” to the garnishment. Three days later, the bank determined that the check had cleared, and the bank paid the money to the debtor. The appellate court held that, under these facts, the garnishee was not indebted to the defendant within the meaning of the statute at the time of the garnishment.<sup>47</sup> This case shows that even when a garnishee appears to be indebted to the debtor, it may not be unless the funds are actually in its hands at the time of the service of the garnishment.

3. A garnishment does not permit a judgment creditor to go on a fishing expedition. In *Cohen v. North Avenue State Bank*, the creditor served garnishments on every bank in Chicago seeking assets of the debtors.<sup>48</sup> The court dismissed the garnishments, holding that the creditor could not have reasonably believed that the debtors held funds in every bank as alleged in the affidavits of garnishment.<sup>49</sup>

4. A garnishment cannot be converted into a citation proceeding.<sup>50</sup>

#### V. NATURE OF THE LIEN OF GARNISHMENT

A garnishment lien extends only to those funds in the hands of the garnishee *at the time of service of the garnishment*.<sup>51</sup> 735 ILCS 5/12-707(a) states:

The judgment or balance due thereon becomes a lien on the indebtedness and other property *held by the garnishee at the time of the service of garnishment summons* and remains a lien thereon pending the garnishment proceeding.<sup>52</sup>

The result of this statute is that a garnishment does not reach property acquired after service of a garnishment. For example, if a bank is holding \$1,000 of the debtor’s funds and is served with a garnishment at 1:00 p.m., only this \$1,000 can be reached even if the debtor makes another \$1,000

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47. *Id.*

48. *Cohen v. N. Ave. State Bank*, 304 Ill. App. 413, 26 N.E.2d 691 (1st Dist. 1940).

49. *Id.*

50. *Nat’l Home, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago*, 16 Ill. App. 2d 111, 147 N.E.2d 412 (1st Dist. 1958).

51. 735 ILL. COMP. STAT. ANN. 5/12-707(a) (West 2006).

52. *Id.* (emphasis added.)



deposit at 1:10 p.m. the same day. This principle is clearly shown by *Zucker v. United States Computer Corp.*<sup>53</sup>

As a result, garnishment is best used to reach debts or assets that are not liquid or subject to fluctuation, such as the proceeds of insurance policies. Garnishments are frequently used in policy dispute cases when judgment has been entered against the defendant but the insurer (the garnishee) declines to pay the judgment as a result of a policy dispute with its insured, the judgment debtor. However, garnishments can be used to reach bank accounts.

Best practices today have creditors using Citations to Discover Assets instead of Non-Wage Garnishment.

## VI. HISTORY OF WAGE DEDUCTION

The wage deduction order is an outgrowth of the garnishment procedure. A century ago there was no difference between a garnishment for wages and other funds. The garnishment law was effective against employers, and wages were not in any way exempt. If judgment was against an individual, all of the individual/employee judgment debtor's salary was taken. In response to a need to exempt family income, a separate wage garnishment was created.<sup>54</sup>

The wage garnishment evolved into the wage deduction order. Although readers will occasionally see references to "wage garnishments" in relatively recent judicial decisions, this is an incorrect term; the wage deduction procedure is not a true garnishment, as it imposes a continuing lien, whereas a garnishment is characterized by a lien on the debtor's assets in possession of the garnishee at the time of service.<sup>55</sup>

## VII. CITATION TO DISCOVER ASSETS

The citation to discover assets has become a dominant procedure of the modern era because the citation can be adapted to perform any action that could be performed by other postjudgment procedures.<sup>56</sup> The citation can be used in the same manner as a wage deduction.<sup>57</sup> It can be used to enter any order that could be entered in a garnishment proceeding.<sup>58</sup> Also, it can be used to reach the same result as some of the more exotic collection procedures such as charging orders, sequestration, and the like.

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53. *Zucker v. United States Computer Corp.*, 85 Ill. App. 3d 759, 408 N.E.2d 41 (3d Dist. 1980).

54. Robert G. Markoff, et al., *Creditor's Rights in Illinois*, § 2.14 (IICLE, 2004).

55. *Id.*

56. See 735 ILL. COMP. STAT. ANN. 5/2-1402(c) (West 2008).

57. See *Kauk v. Matthews*, 100 Ill. App. 3d 107, 426 N.E.2d 552 (2d Dist. 1981).

58. 735 ILL. COMP. STAT. ANN. 5/2-1402(c)(4) (West 2008).

The citation is a much more powerful tool against third-party respondents than a garnishment because the citation has a continuing lien and provides a ready vehicle to obtain discovery as to assets belonging to the judgment debtor because of the broad range of orders that can be entered into a citation proceeding and because of the liberal construction given to the citation statute.

A citation to discover assets proceeding is also referred to as a supplementary proceeding.<sup>59</sup> Although the term “supplementary proceeding” is occasionally used as a generic term for postjudgment proceedings in general, it is only correctly used to describe citation proceedings.

The citation to discover assets combines features of several common law procedures: the creditor’s bill, garnishment, execution, levy and sale. With the 2007 amendment to the citation statute, the Citation to Discover Assets is the omnibus enforcement of judgment procedure. Almost everything creditors may do by another enforcement may be done with a citation.

#### VIII. HISTORY OF CITATIONS

The citation to discover assets is a relatively recent development in the history of collection of judgments. The principal process for enforcement of a money judgment at common law was the execution. The execution was a writ issued by the clerk of court directing a court officer to seize and sell assets of the judgment debtor. Those assets could either be personal property or real estate.<sup>60</sup>

If this process did not result in a full satisfaction of the judgment, when the sheriff returned the writ (satisfied in part or in no part satisfied), the judgment creditor had the right to file a creditor’s bill in equity asking the court to permit discovery of assets and their application to satisfaction of the judgment.<sup>61</sup>

This was generally the state of the law in Illinois until 1941, when the first citation statute was created. That statute provided that, following the return of an execution unsatisfied, a creditor could cite any party believed to have assets of the judgment debtor. However, that statute section did not provide any remedy if the third party transferred assets or engaged in other collusive behavior with the debtor. In 1955, the citation statute was amended to create the continuing citation lien and penalties for transfer of property

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59. 735 ILL. COMP. STAT. ANN. 5/2-1402 (West 2008).

60. Robert G. Markoff, et al., *Creditor’s Rights in Illinois*, § 2.41 (IICLE, 2004).

61. Ill. Rev. Stat., c. 22, para. 49 (1973).

subject to the citation. Further, a judgment creditor was no longer required to attempt an execution prior to initiating citation proceedings.<sup>62</sup>

However, the garnishment remained the dominant remedy until the 1970s because of a perception that the citation was an extraordinary remedy. The Historical and Practice Notes to the citation to discover assets statute stated in 1983:

The citation to discover assets procedure prescribed by this section and rule 277 is an extraordinary remedy, essentially equitable in character, intended to reach recalcitrant or dishonest debtors who are able but unwilling to satisfy in part or in whole judgments or decrees against them. The practice is not to be used as a club to attempt to bludgeon a judgment debtor into settlement of judgments or decrees which he is without property to pay. Nor should it be used to deal with assets which are known to the judgment creditor and can be reached by ordinary means of enforcing a judgment.<sup>63</sup>

*Kauk v. Matthews*, cited this passage with approval.<sup>64</sup> However, this view incorrectly characterized the citation statute as “an extraordinary remedy.” While the garnishment was always considered to be subject to strict construction, the opposite has been true of the citation proceeding, which has been given a liberal construction by the courts.<sup>65</sup>

Once the view that the citation was to be given a liberal interpretation began to take hold, the citation supplanted the garnishment as the primary tool for enforcement of judgments.

#### IX. USE OF THE CITATION—AN IMPROVEMENT ON THE NON-WAGE GARNISHMENT

The citation to discover assets is a mechanism to discover and recover assets.<sup>66</sup> The citation authorizes the judgment creditor to go on a fishing expedition for the judgment debtor’s assets if the judgment creditor has a reasonable belief that the respondent possesses assets of the debtor.<sup>67</sup>

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62. See 735 ILL. COMP. STAT. ANN. 5/2–1402(a) (West 2008) (“It is not a prerequisite to the commencement of a supplementary proceeding that a certified copy of the judgment has been returned wholly or partly unsatisfied.”).

63. Albert E. Jenner, Jr., Philip W. Tone, and Arthur M. Martin, *Historical and Practice Notes*, S.H.A. (1983), c. 110, para. 2–1402.

64. 100 Ill. App. 3d 107, 112, 426 N.E.2d 552, 556 (2d Dist. 1981).

65. See, e.g., *Bentley v. Glenn Shipley Entes., Inc.*, 248 Ill. App. 3d 647, 619 N.E.2d 816 (4th Dist. 1993); *Second New Haven Bank v. Kobrite, Inc.*, 86 Ill. App. 3d 832, 408 N.E.2d 369 (2d Dist. 1980).

66. *Bloink v. Olsen*, 265 Ill. App. 3d 711, 638 N.E.2d 406 (2d Dist. 1994).

67. *Regan v. Garfield Ridge Trust & Sav. Bank*, 247 Ill. App. 3d 621, 617 N.E.2d 818 (2d Dist. 1993).

The following chart shows the advantages of a citation over wage deduction orders and non-wage garnishments:

DIFFERENCES BETWEEN CITATIONS, WAGE DEDUCTION  
ORDERS, AND NON-WAGE GARNISHMENTS

	<u>Non-Wage Garnishment</u>	<u>Wage Deduction Order</u>	<u>Citation</u>
Creates lien upon service	Yes	Yes	Yes
Creates lien on all personal property	Yes	No	Yes
Requires respondent to appear personally	No	No	Yes
Anyone can serve process	No	Yes	Yes
Can use certified mail	No*	Yes	Yes
Creates continuing lien	No	Yes	Yes
Requires final order	Yes	Yes	Yes
May be returnable in attorney's office	No	No	Yes
Requires document production	No	No	Yes
Priority uses stacking rule	No	Yes	Yes
May go anywhere in state for debtor	Yes	Yes	Yes
May go anywhere in state for third party	Yes	Yes	No
Creditor can obtain contempt sanction for non-response	No	No	Yes
Creditor can obtain conditional judgment for nonappearance of third party	Yes	Yes	Yes

\*Except small claim

## X. PUBLIC ACT 95-0661

In their 2007 article in this law journal, Judges Donnelly and Tailor discuss several areas of Illinois law that they felt should be addressed to more fully complete the laws regulating enforcement of judgment.<sup>68</sup> The areas of their concern included: personal property beyond the jurisdiction of the court, the Sheriff's inability to sell certain property, the need to have a sheriff sell property and dead ends in the wage deduction procedure.<sup>69</sup>

At the time the judges were writing their article, a bill was pending in the Illinois State legislature that addressed their concerns. The bill, Senate Bill 229, is now known as Public Act 95-0661.<sup>70</sup> In early 2008, the Illinois legislature passed the bill and then overrode the Governor's amendatory veto. The act became law effective January 1, 2008. The first fifteen pages of the law actually do little more than amend several acts regulating financial institutions by adding "citations to discover assets" as permissible court process to which financial institutions are required to respond and produce documents.<sup>71</sup> Previous law included: subpoenas, summons, warrants and court orders. Although financial institutions have always been required to comply with citations to discover assets, their lack of inclusion in these sections had caused them concern.

The remainder of the Act contains eleven amendments relating to citations and wage deductions. (It also amends court costs, federal court judgments and replevins, not discussed here.)<sup>72</sup>

Citation proceedings (735 ILCS 5/2-1402) are amended in four distinct and important ways:

A. Paragraph (c)(3) is amended to allow a judgment creditor to recover a corporate judgment debtor's property by filing a petition within the citation proceedings. This process ends the question of whether or not a creditor must file a brand new complaint to pierce a corporate veil or set aside a fraudulent transaction in circumstances where specific funds or property are to be recovered.<sup>73</sup>

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68. Honorable Sanjay T. Tailor and Honorable Thomas More Donnelly, *Survey of Illinois Law: Enforcement of Judgment*, 31 S. ILL. U. L.J. 819 (2007).

69. *Id.*

70. 2007 Ill. Laws 8810, Pub. Act 95-0661.

71. *Id.*

72. *Id.*

73. 735 ILL. COMP. STAT. ANN. 5/2-1402(c)(3) (West 2008).

B. Paragraph (c)(5) allows the court to compel a judgment debtor to resign a membership in an exchange, club or other entity so that the membership may be sold for the benefit of the judgment creditor.<sup>74</sup> Several court decisions had held that club and/or exchange memberships were not subject to seizure and sale for the benefit of a judgment creditor.<sup>75</sup> They constituted the only property of a judgment debtor other than exempt property that could not be reached by a judgment creditor in Illinois.<sup>76</sup>

C. Paragraph (e) represents a major advancement in Illinois practice and enhances centuries of law relating to the process of selling a judgment debtor's property. The court is now authorized to order someone other than the sheriff to sell the property upon such terms as are just and equitable. It is envisioned that such methods would follow those used in bankruptcy court proceedings whereby a debtor's property is liquidated to maximize value.<sup>77</sup>

D. A new paragraph (k-5) is directed to property that the court determines to be wages. In such cases, the court is to apply the statutory wage deduction exemptions to any funds that are liened. In addition, the court is to proceed as if a wage deduction proceeding had been filed.<sup>78</sup>

The Wage Deduction Act is amended in five ways:

A. Section 735 ILCS 5/12-803 and 5/12-808(e) were amended by changing several words.<sup>79</sup> It was these words which were the subject of Governor Blagojevich's amendatory veto. The issue was whether or not wage deduction exemptions set by the legislature are discretionary. Illinois practice since the inception of the Wage Deduction Act has been that the wage deduction exemption set by the legislature is mandatory. Some judges in Northeast Illinois had issue rulings that the language of the statute was permissive and that they could therefore raise the exempt amount as they believed appropriate. Rather than entering deduction

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74. 735 ILL. COMP. STAT. ANN. 5/2-1402(c)(5) (West 2008).

75. See Honorable Sanjay T. Tailor and Honorable Thomas More Donnelly, *Survey of Illinois Law: Enforcement of Judgment*, 31 S. ILL. U. L.J. at 821 (2007).

76. 735 ILL. COMP. STAT. ANN. 5/2-1402(c)(5) (West 2008).

77. 735 ILL. COMP. STAT. ANN. 5/2-1402(e) (West 2008).

78. 735 ILL. COMP. STAT. ANN. 5/2-1402(k-5) (West 2008).

79. 735 ILL. COMP. STAT. ANN. 5/12-803 (West 2008); 735 ILL. COMP. STAT. ANN. 5/12-808(e) (West 2008).

orders (subject to certain minimum amounts) of 15 percent of gross wages, orders were being entered for as low as 4 percent of gross wages. Therefore, these amendments clarify the fact that it is the legislature that sets exemptions, not the judiciary.

B. A new paragraph (f) has been added to clarify the situation when an employer stops honoring a wage deduction order without informing the court or plaintiff as to its reasons. If an employer has no lawful excuse to stop deductions, a judgment creditor may ask the court to enter a conditional judgment for the balance due on the judgment. A Summons After Conditional Judgment is then to be served as in cases of an employer's failure to answer the original wage deduction summons. Lawful excuses for a termination of withholding would include a debtor's bankruptcy, termination from the job or income levels falling below the statutory minimums.<sup>80</sup>

C. A new paragraph, Section 5/12-808.5(3) addresses the situation of the creditor failing to provide the employer with updated certifications of the balance due on the judgment. In these situations, the employer may cease remitting funds to the creditor until the certification is received. However, the employer may not stop withholding. This new paragraph also states that the certifications as to the balance due need not be filed with the court.<sup>81</sup>

D. Another new paragraph, Section 5/12-808.5(4) provides that any party to the wage deduction proceeding, may upon motion with notice to all other parties, ask the court to review the balance due claimed by the Plaintiff. This confirms the court's continuing jurisdiction after entry of its order.<sup>82</sup>

E. The employer's fee in paragraph 5/12-814(c) has been set at 2 percent of the amount being deducted. It removes the confusing language relating to the \$12 fee which was a holdover from old law when the employer was allowed a fee of \$1 per week for the 12 week period of the wage deduction proceeding.<sup>83</sup>

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80. 735 ILL. COMP. STAT. ANN. 5/12-808(f) (West 2008).

81. 735 ILL. COMP. STAT. ANN. 5/12-808.5(3) (West 2008).

82. 735 ILL. COMP. STAT. ANN. 5/12-808.5(4) (West 2008).

83. 735 ILL. COMP. STAT. ANN. 5/12-814(c) (West 2008).

The foregoing amendments to the Illinois Code of Civil Procedure confirm that Citations to Discover Assets are the premier enforcement remedy in Illinois. Now, if only Supreme Court Rule 277 would be brought up to date.

#### XI. SUPREME COURT RULE 277: SUPPLEMENTARY PROCEEDINGS

It is the author's belief that Supreme Court Rule 277 was written as if a Citation to Discover Assets was to be used as an extraordinary remedy in Courts of Law instead of a creditor's bill in the Chancery Courts. As shown earlier in this article, Illinois law and practice relating to Citations to Discover Assets has moved far beyond a creditor's bill concept. Unfortunately, Supreme Court Rule 277 has not.

The rule is overly restrictive and fails to address current practice in several important ways.

1. The rule provides that a proceeding may be brought against the judgment debtor or third party that the creditor believes *has* "property of or is indebted to the judgment debtor."<sup>84</sup> The Code of Procedure provides that a creditor "is entitled to prosecute supplementary proceedings for the purposes of examining the judgment debtor or any other person *to discover assets* or income of the judgment debtor not exempt from enforcement . . . ."<sup>85</sup> This dichotomy in language, *has property vs. to discover assets*, has caused some courts concern.

2. The rule allows only one Citation per party without leave of court. For a second citation, the rule requires that the creditor provide an affidavit showing that there is reason to believe that the debtor has property or income that the creditor is entitled to reach, that the existence of the property, income or indebtedness was not known to the judgment debtor during the prior proceeding and that the proceeding is sought in good faith to discover assets and not to harass the Defendant.<sup>86</sup> In today's modern economy where credit grantors do not have personal knowledge of their customers, as opposed to a creditor who lives in the same neighborhood as does the judgment debtor, it is very difficult for a creditor to deliver an appropriate affidavit.

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84. ILL. SUP. CT. R. 277(a).

85. 735 ILL. COMP. STAT. ANN. 5/2-1402(a) (West 2008) (emphasis added).

86. ILL. SUP. CT. R. 277(a).



3. The rule requires that a proceeding against a third party must “be commenced in a county of this state in which the party against whom it is brought resides . . . .”<sup>87</sup> It completely fails to take into account the possibility that a Third Party Citation may be addressed to a financial institution or an employer located outside the county of enforcement. We need only look to wage deduction proceedings and non-wage garnishments to determine that this rule is overly restrictive compared to the other acts which do not have such a limitation.

4. The Wage Deduction Act and the Non-Wage Garnishment Act have no restrictions on the number of proceedings that may be brought against the same third party (although case law does limit proceedings if it is found that they are meant to harass the Judgment Debtor). Accordingly, the rule should be relaxed so as to allow a judgment creditor to file a second or third proceeding against a Third Party Respondent as permitted by the other two enforcement acts.

5. The rule requires a Respondent to personally appear in court.<sup>88</sup> However, current practice is to allow Third Party Respondents to file a written answer to the proceedings in lieu of a personal appearance. The filing of a written answer in response to a Citation proceeding has been held to constitute a personal appearance for purposes of the rule. Therefore, the Rule should be amended to conform to current practice.

6. The rule should also be amended to allow for a written answer filed by a Third Party Respondent to constitute their appearance in the proceeding and confirmation of service of the citation upon them.

7. The rule is overly restrictive in respect to the continuation of judgment liens. Only “orders for the payment of money continue in effect notwithstanding the termination of the proceedings until the Judgment is satisfied or the court orders otherwise.”<sup>89</sup> In this, the court fails to address a lien acquired by service of a Citation upon personal property such as a land trustee or other chattel that may have to be sold in order to satisfy the judgment. The law should allow the court to impress liens against all property discovered during the proceedings and allow the lien to remain in place beyond the termination of the Citation proceedings.

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87. ILL. SUP. CT. R. 277(d).

88. ILL. SUP. CT. R. 277(e).

89. ILL. SUP. CT. R. 277(f).

When Supreme Court Rule 277 is updated, it will truly benefit the administration of justice as it relates to the enforcement of judgments in the State of Illinois.

## XII. CONCLUSION

One hundred and fifty years after Abraham Lincoln wrote about his exasperation in chasing the Sheriff all over the counties in order to enforce judgments, the law has changed in a manner which would probably be much to his liking. The use of a Citation to Discover Assets has become a very easy and efficient tool with which a creditor may enforce a judgment under the supervision of the court. No longer do we have a Sheriff dispossessing a judgment debtor of his or her property by simply going out and having a levy sale. The court has full authority to adjust the process so as to allow a judgment debtor a “safe landing” and protect the “healthy tensions” between creditor and debtor rights.