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# CPLR 5519(a)(1): Stay Protects the State from Punishment for Contempt

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on the mortgage, and further, that the account not lapse into more than one month's arrears at any future date. Failure by defendant to satisfy these requirements would allow the plaintiff to have the mortgaged premises sold as per the judgment granted in foreclosure.

As evidenced by this decision,[148] CPLR 5240 is a valuable safeguard against judicial injustices. Attorneys should not hesitate to request its application, and judges should not refrain to use it as the broad source of authority it is intended to be.[149]

## ARTICLE 55 — APPEALS GENERALLY

*CPLR 5519(a)(1): Stay protects the state from punishment for contempt.*

Pursuant to CPLR 5519(a)(1), the state, its political subdivisions, and its officers and agencies are accorded an automatic stay in any enforcement proceeding once a notice of appeal is served upon the adverse party.[150] Such service is complete under CPLR 2103(b)(2) the moment it is mailed.

Accordingly, the Supreme Court, Nassau County, held in *Byrne v. Long Island State Park Commission*,[151] that the state and the attorney general were not guilty of contempt because state officials prevented peaceful picketing in contravention of an injunction order.[152] Thirty minutes after service of a copy of this order, the state mailed a notice of appeal to the plaintiff, thereby effectively staying the injunction, although the notice was not received until several days later.[153] Concluding that the stay foreclosed punishment for the state's activity during this interim,[154] the court denied the defendant's request to renew the application upon proper papers.[155]

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148 *Accord*, Lee v. Community Capital Corp., 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971).

149 *See* 7B MCKINNEY'S CPLR 5236, supp. commentary at 155 (1970).

150 *See* 7 WK&M ¶ 5519.03.

151 67 Misc. 2d 1084, 325 N.Y.S.2d 147 (Sup. Ct. Nassau County 1971).

152 Byrne v. Long Island State Park Comm'n, 66 Misc. 2d 1070, 323 N.Y.S.2d 442 (Sup. Ct. Nassau County 1971).

153 67 Misc. 2d at 1086, 325 N.Y.S.2d at 149, *citing* Hacker v. City of New York, 25 App. Div. 2d 35, 266 N.Y.S.2d 194 (1st Dep't), *rev'd on other grounds*, 26 App. Div. 2d 400, 275 N.Y.S.2d 146 (1st Dep't 1966), *aff'd*, 20 N.Y.2d 722, 229 N.E.2d 613, 283 N.Y.S.2d 46, *cert. denied*, 390 U.S. 1036 (1967).

154 67 Misc. 2d at 1086, 325 N.Y.S.2d at 149-50. The court cited Union Free School Dist. No. 7 v. Allen, 30 App. Div. 2d 629, 290 N.Y.S.2d 669, 671 (3d Dep't 1968), where it was held that a stay was itself suspended while an appeal by the Commissioner of Education was pending.

155 Plaintiff had proceeded by notice of motion rather than by order to show cause or by warrant of attachment, as required by statute (N.Y. JUDICIARY LAW § 757 (McKinney 1968)). 67 Misc. 2d at 1085, 325 N.Y.S.2d at 148. There is disagreement as to whether this defect is jurisdictional in nature or a mere irregularity. *Compare, e.g.*, Johnson v. Ackerman, 192 App. Div. 890, 181 N.Y.S. 772 (2d Dep't 1920) *with, e.g.*, Maigille v. Leonard,

Whatever the relative merits of CPLR 5519(a)(1),[156] its application in *Byrne* is clearly correct.

## ARTICLE 71 — RECOVERY OF CHATTEL

*CPLR 7102: Replevin statute upheld against constitutional attack.*

The New York replevin law, article 71 of the CPLR, amended in response to *Laprease v. Raymours Furniture Co.*,[157] has recently been the subject of careful judicial scrutiny. Thus far, the statute has withstood the constitutional challenges which have been levied against it, including the procedural due process argument made in *General Electric Credit Corp. v. Fred Pistone, Jr., Inc.*[158] The plaintiff therein was the vendor's assignee of a conditional sales agreement. Title to the goods, heavy duty equipment, was to remain in the plaintiff until full payment was made. When the defendant fell behind in his payments, the plaintiff notified him of his default and ordered him to return the equipment. Upon the defendant's failure to comply, the creditor obtained an order of seizure under CPLR 7102. When confronted with this order by the sheriff, the debtor refused to surrender the goods or to state their location.

In the ensuing contempt proceeding, the defendant, relying on *Laprease,* contended that the order of seizure should be vacated because the statute was unconstitutional as a denial of procedural due process. Rejecting this argument, the court declared that by amending CPLR article 71 the Legislature had remedied its constitutional deficiencies. Under the deficient statute, a creditor could obtain a "prejudgment seizure without even an *ex parte* order of a judge or court. . . ."[159] The creditor would deliver to the sheriff an affidavit, a requisition, and an undertaking, and the sheriff could then seize the property.[160]

> The new CPLR 7102 eradicate[d] the "requisition" procedure, substituting in its place an "order of seizure". This interposes a neu-

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102 App. Div. 367, 92 N.Y.S. 656 (2d Dep't), *aff'd,* 181 N.Y. 558, 74 N.E. 1120 (1905). The state's timely assertion of this defect permitted the court to avoid this issue. 67 Misc. 2d at 1085, 325 N.Y.S.2d at 148.

156 The characterization of CPLR 5519 as "most unfortunate" (7 WK&M ¶ 5519.03) has been approved by the Appellate Division, Third Department, in Union Free School Dist. No. 7 v. Allen, 30 App. Div. 2d 629, 290 N.Y.S.2d 669, 671 (3d Dep't 1968).

157 315 F. Supp. 716 (N.D.N.Y. 1970).

158 68 Misc. 2d 475, 326 N.Y.S.2d 898 (Sup. Ct. Westchester County 1971).

159 *Id.* at 479, 326 N.Y.S.2d at 902, *citing* Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 725 (N.D.N.Y. 1970).

160 Former CPLR 7102(a). For a further discussion of the former replevin practice, see H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 221 (3d ed. 1970); Comment, Laprease *and* Fuentes: *Replevin Reconsidered,* 71 COLUM. L. REV. 886, 888 (1971).