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CPLR 5201: Future Income of a Spendthrift Trust Held Attachable

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the future;[143] and in *Uy v. Shapmor, Inc.*,[144] the appellate term stated: "were this an automobile accident case . . . [the inadvertent mention of insurance would not have been a ground for declaring a mistrial] because it is generally known by the public today that New York State has provided for compulsory liability insurance of automobiles."[145]

While the deliberate disclosure of the presence of a liability insurer is still a ground for declaring a mistrial, the *Halstead* decision has effectuated the liberal policy of the CPLR by ignoring inadvertent, non-prejudicial disclosure.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Future income of a spendthrift trust held attachable.

In *Cohen v. Carl M. Loeb, Rhoades & Co.*,[146] the court held that an attachment of the income of a spendthrift trust was effective, to the extent of ten per cent, against both the accrued income and future income of the trust. The Loeb company, defendant in the case, had impleaded one Dolan based upon his contract of indemnity. As third-party plaintiff, the Loeb company obtained an order attaching Dolan's interest in a certain testamentary trust, the corpus of which was located in New York. In holding the attachment valid, the court cited *Koch v. Burdsal*[147] as authority for the proposition that the attachment was effective against ten per cent of the future income of the trust.[148]

CPLR 6202 makes subject to *attachment* "any debt or property against which a money judgment may be enforced as provided in section 5201," which in turn essentially provides for *execution* against any property which could be *assigned or transferred*.[149] The apparent purpose of CPLR 6202 is to equate property subject to execution with property subject to attachment and thereby to eliminate the discrepancies which resulted from separate listings

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[143] SECOND REP. 233. See also 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4110.05 (1965).

[144] 45 Misc. 2d 543, 257 N.Y.S.2d 208 (App. T. 1st Dep't 1965).

[145] *Id.* at 544, 257 N.Y.S.2d at 209; Hager v. Bushman, 255 App. Div. 934, 8 N.Y.S.2d 725 (4th Dep't 1938); *cf.* Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

[146] 48 Misc. 2d 159, 162, 264 N.Y.S.2d 463, 466 (Sup. Ct. N.Y. County 1965).

[147] 199 Misc. 880, 104 N.Y.S.2d 782 (N.Y. City Ct. 1951).

[148] Cohen v. Carl M. Loeb, Rhoades & Co., 48 Misc. 2d 159, 162, 264 N.Y.S.2d 463, 466 (Sup. Ct. N.Y. County 1965). See also note 158 *infra* for a discussion of *Koch*.

[149] See CPLR 5201(b). As to debts, as opposed to property, CPLR 5201(a) permits enforcement of a money judgment against "any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor. . . ."

of each under the CPA.[150] However, section 5201 is not the only provision authorizing execution under the CPLR. CPLR 5231 provides for execution against ten per cent of the judgment debtor's income in excess of thirty dollars per week. This provision applies both to income from a trust and to earnings of the judgment debtor for his personal services, which, under CPLR 5205(e) (1) and (2) are made applicable to the satisfaction of money judgments.

But here an apparent gap opens in the legislative policy to equate attachment with execution by means of the broad test of assignment. Earnings for personal services, which are assignable up to ten per cent,[151] are subject to attachment[152] to the extent of ten per cent under *Morris Plan Industrial Bank v. Gunning*.[153] The future income of a spendthrift trust is not assignable[154] and, it would seem to follow, not subject to attachment under CPLR 6202 and CPLR 5201. Under CPA § 916, which was in force when *Gunning* held wages to be attachable, it was explicitly provided that only the defendant's assignable interest in a trust was subject to attachment.[155] Furthermore, the cases construing CPA § 916 expressly indicated that future income of a spendthrift trust could not be attached.[156] There is no indication that the legislature intended any substantive change in this area by enacting CPLR 6202.[157] On the contrary, reading CPLR 6202 and CPLR 5201 together, the legislature appears to have continued to exempt non-assignable future income of a spendthrift trust from attachment. Therefore, it would appear that the court in *Cohen* was technically in error when it interpreted CPLR 6202, 5201, and 5231 to allow attachment of future spendthrift trust income.[158]

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[150] See THIRD REP. 149.

[151] N.Y. PERS. PROP. LAW § 48-a.

[152] Subject to attachment—to be distinguished from their being subject to execution in satisfaction of a judgment for which CPA § 684 explicitly provided.

[153] 295 N.Y. 324, 67 N.E.2d 510 (1946).

[154] That is to say the right of the beneficiary of an express trust to receive the rents and profits of real property or the income of personal property is not assignable under N.Y. PERS. PROP. LAW § 15 and N.Y. REAL PROP. LAW § 103.

[155] CPA § 916(6).

[156] Judis v. Martin, 218 App. Div. 402, 407, 218 N.Y. Supp. 423, 427 (1st Dep't 1926), *appeal dismissed*, 244 N.Y. 605, 155 N.E. 916 (1927); Pray v. Boissevain, 27 Misc. 2d 703, 704, 212 N.Y.S.2d 432, 433-34 (Sup. Ct. N.Y. County 1961); Harry Winston, Inc. v. Acheson, 144 N.Y.S.2d 472, 475 (Sup. Ct. N.Y. County 1955).

[157] See THIRD REP. 148-49.

[158] Koch v. Burdsal, 199 Misc. 880, 104 N.Y.S.2d 782 (N.Y. City Ct. 1951), which *Cohen* cited as authority for the attachability of future trust income, appears to be doubtful precedent. There, the court allowed a quasi in rem basis of jurisdiction to have an in personam effect. After the day of judgment, the court in *Koch* held that the res of the trust, which had been attached for jurisdiction in the original action, could be executed against

The real issue, however, is not whether the decision is technically correct, but what are its practical consequences and whether it is consistent with the overall legislative intent. *Cohen* certainly fulfills the broad desire of the legislature to make uniform the property which is subject to execution and which is attachable. This rule is highly desirable where the attachment is the only basis of securing jurisdiction, *i.e.,* the quasi in rem action, and where the attached property will be the only means the successful plaintiff would have to satisfy the judgment. It seems unfair to prevent a potential plaintiff, with a valid cause of action against a beneficiary of a New York trust, from initiating a quasi in rem action against the beneficiary. In such a case, the res is the accumulated income of the trust. The injustice becomes manifest when it is seen that CPLR 5231 permits execution against the same income. In addition, there seems to be no practical reason to distinguish between ordinary wages which are attachable despite their not being "certain" as is required by CPLR 5201(a), and the income of a spendthrift trust which is subject to execution by virtue of the same provision. However, the practitioner must weigh these considerations against the fact that a strict reading of the statute further forbids attachment of non-assignable property. At least in instances where attachment of property within the state is necessary for jurisdictional purposes, it seems highly desirable that this legislative gap be bridged as was accomplished by the court in *Cohen.*

Of further interest to the practitioner is the fact that *Cohen* held that the service of the order of attachment made therein was valid and proper under CPLR 6214. CPLR 6214(a) provides that a levy of attachment shall be made by serving the proper garnishee (the trustee in this case) with the order of attachment in the same manner as a summons is served. In *Cohen,* the trust property was located in New York and the law of New York was controlling with respect to the administration of the trust; the trustee was served with the order of attachment by registered mail and personally in Florida; the depository of the trust fund (a New York trust company) was served in New York; and the beneficiary, Dolan, was served by publication. Although CPLR 6214 does not specify whether such trustee must be served within the state, when the trust property itself is within the state, it seems, under fundamental principles of jurisdiction, that the court has power over the property provided that reasonable notice has been given to the interested parties.[159]

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even as to future income accruing *after* date of final judgment. A true quasi in rem action would appear to admit execution only on income accrued up to the date of judgment.

[159] Pennoyer v. Neff, 95 U.S. 714, 723, 727 (1878).

CPLR 5201: Fund beyond judgment creditor's execution.

In *Valerio v. College Point Sav. Bank*,[160] the judgment creditor sought to levy on a fund composed of monthly payments made by the judgment debtor as mortgagor to the mortgagee bank. These payments, under the mortgage contract, were to be held in trust by the bank to insure satisfaction of monthly tax and insurance obligations. Under this contract, the judgment debtor had no right to any of the money paid while any part of the principal or interest was owing to the bank. The court, in a rationale similar to that used in construing the CPA counterparts of CPLR 5225(b) and 5227, held that the judgment creditor's rights in the fund could be no greater than that of the judgment debtor.[161] Thus, the judgment creditor, when he seeks to levy on the property of the judgment debtor in the hands of a third party, can only do so subject to the terms of the contract. To be more precise, the judgment creditor may execute on the property of the judgment debtor in the possession of a third party by commencing a special proceeding in which the judgment debtor has an interest,[162] or where the third party is a "person who . . . is or will become indebted to the judgment debtor. . . ." [163]

Prior commentary had noted the difficulty of drawing any distinction between these two categories of third-party possessors. Indeed, attorneys were advised to avoid the difficulty by proceeding against third parties under both sections simultaneously.[164] The *Valerio* decision does not attempt to clarify this problem. This is an area of considerable importance to judgment creditors since, under CPLR 5227, the court may require that payment be made directly to the judgment creditor, whereas under CPLR 5225(b), payment or delivery is to be made through a sheriff. Whenever a sheriff must be employed as an intermediary, his fees will diminish the recovery and his procedures will cause a certain delay. It is important to note that the judgment creditor in *Valerio* followed the advice of the commentary and employed both these sections. Until a distinction is made between the two, the practitioner is similarly advised to employ both 5225(b) and 5227 in this type of proceeding.

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[160] 48 Misc. 2d 91, 264 N.Y.S.2d 343 (Sup. Ct. Suffolk County 1965).
[161] *Compare id.* at 92, 264 N.Y.S.2d at 344, *with* Slaff v. Slaff, 9 App. Div. 2d 80, 83, 191 N.Y.S.2d 636, 639 (1st Dep't 1959) *and* Central Suffolk Hosp. Ass'n v. Downs, 213 N.Y.S.2d 192, 194 (Sup. Ct. Kings County 1961). CPA §§ 794, 796 were formerly applicable.
[162] CPLR 5225(b).
[163] CPLR 5227.
[164] See 7B McKINNEY'S CPLR 5225, supp. commentary 26 (1965).