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CPLR 5231: Judgment creditor entitled to ten per cent of money in debtor's checking account.

CPLR 5205(e)(2) states that "ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days" of service of an income execution is exempt from application to the satisfaction of such money judgment.

In *Power v. Loonam*,²³² the debtor moved to vacate restraining provisions contained in a subpoena duces tecum upon a \$269 checking account listed in the name of the judgment debtor's wife. The judgment debtor claimed that these funds were salary intended to meet current living expenses, thereby qualifying as exempt income. In granting the motion, the court declared the judgment creditor entitled to ten per cent of the amount currently on deposit in the account. The balance of the funds were released to the judgment debtor's wife. In so doing, the court stated that had an income execution been in effect, the judgment creditor could have reached only ten per cent of the earnings of the debtor.

The usual rule is that the restraining order will not reach wages.²³³ Under CPLR 5222, such "restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court." Where the order is violated, punishment by contempt follows unless the property is exempt²³⁴ pursuant to the provisions of CPLR 5205 or CPLR 5206, or unless the employer pays wages to the debtor.²³⁵ In order to reach these earnings, the judgment creditor should secure an income execution under CPLR 5231.²³⁶

Unlike a restraining order, an income execution does not go directly to the employer but is first served on the judgment debtor himself. It is only upon the debtor's default, or the sheriff's inability to serve the debtor, that the income execution may be served (after the required lapse of time) on the person from whom the judgment debtor is receiving his income.²³⁷ Such

²³² 49 Misc. 2d 127, 266 N.Y.S.2d 865 (Sup. Ct. Nassau County 1966). See *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 169 (1965).

²³³ See *Widder Bros. v. Kaffee*, 19 App. Div. 2d 817, 195 N.Y.S.2d 601 (1st Dep't 1963).

²³⁴ See *Chemical Corn Exch. Bank v. Monforte*, 8 App. Div. 2d 737, 187 N.Y.S.2d 384 (2d Dep't 1959).

²³⁵ See *Gill v. Schwartz*, 273 App. Div. 606, 78 N.Y.S.2d 721 (1st Dep't 1948).

²³⁶ 6 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶ 5251.14 (1965). The judgment creditor may also reach earnings by securing an installment payment order under CPLR 5226.

²³⁷ 7B MCKINNEY'S CPLR 5231, commentary 161 (1963).

income execution may not, however, total more than ten per cent of the total income received.²³⁸

In the instant case, the court has given effect to the restraining order as to ten per cent of the judgment debtor's salary or the same amount that the judgment creditor would have been able to reach by using an income execution.²³⁹ In so doing, the court has allowed such creditor to take immediate steps to restrain the judgment debtor from divesting himself of ten per cent of his earnings, without waiting for the specified time period provided for in the income execution statute.

The practitioner thus may be able to use the *Power* case as a basis for the immediate attachment of ten per cent of the debtor's income, at least in those cases where that income has been received from the employer and is in a checking account. However, it would appear highly doubtful that the courts would go so far as to allow this method to so restrain an employer from paying the debtor his full wages, for this would defeat the very purpose of CPLR 5231's enactment.²⁴⁰

CPLR 5231(b): Computation of income received from trust fund to be made on an average weekly basis for purposes of requirements of income execution.

The Surrogates Court, Kings County, in a proceeding instituted by the trustee of a testamentary trust to settle its final account, held that the trust income accruing to the judgment debtor was not subject to levy under a prior garnishment order, since it did not, when computed on an average weekly basis, exceed the minimum amount of twenty-five dollars per week under CPA § 684 and thirty dollars per week under its successor, CPLR 5231(b).²⁴¹ Thus, where the payments to the life beneficiary are not made on a weekly basis, the court held that it is necessary to compute the average weekly payment. If that average payment falls below the statutory minimum, as in the instant case, the levy is inoperative for that period.

CPLR 5231(b) states that "where a judgment debtor is receiving more . . . than thirty dollars per week from any person, an income execution for installments therefrom of not more than ten percent thereof may issue. . . ." This thirty dollar re-

²³⁸ CPLR 5231.

²³⁹ See 7B MCKINNEY'S CPLR 5222, *supp. commentary* 22-23 (1965). It should be noted that the court is giving effect to the restraining order as against the bank where the salary was deposited, and not as against the employer of the judgment debtor.

²⁴⁰ *Ibid.*

²⁴¹ *In re Ostergren's Will*, 49 Misc. 2d 894, 268 N.Y.S.2d 906 (Surr. Ct. Kings County 1966).