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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

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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-

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[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).

quirement is due to the legislative concern for the welfare of the judgment debtor and his family. Under this section creditors may not reach any part of the income of a debtor who earns less than the statutory amount.[242] Furthermore, a judgment debtor may avoid income execution by limiting his income to thirty dollars per week.[243] The judgment creditor has the burden of proving that the judgment debtor has received more than thirty dollars per week.[244]

When the judgment debtor has not received income at weekly intervals, the courts have computed the average weekly income to see if the statutory requirement has been met. Thus, under a predecessor of CPLR 5231(b), the court computed the income of a six thousand dollar trust fund to be three hundred dollars per year (a five per cent return) or twenty-five dollars a month, which was less than the statutory minimum.[245]

It appears that the attitude of the courts will be substantially the same under CPLR 5231(b) as under prior law. The computation of an average weekly income is the only practicable method of treating non-weekly payments.

ARTICLE 55 — APPEALS GENERALLY

CPLR 5528: Failure of appellant to provide adequate appendix not grounds for immediate affirmance.

In *E. P. Reynolds, Inc. v. Nager Elec. Co.*,[246] the Court of Appeals was presented with the problem of determining the sanction that an appellate court should impose upon an appellant who submits an inadequate appendix with his brief. (Appellant contended that the judgment was contrary to and against the weight of the evidence.)

Under the Civil Practice Act this problem did not arise, for when an appeal was taken on this ground it was customary to stipulate that the record contain all the evidence and exceptions.[247] This meant a lengthy record on appeal, which involved "exorbitant printing costs to litigants" [248] which in some instances discouraged resort to the trial court itself.[249] Many records were so "voluminous

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[242] 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5231.10 (1965).

[243] *Ibid.* See generally Wood v. Dock & Mill Co., 193 App. Div. 236, 184 N.Y. Supp. 225 (4th Dep't 1920).

[244] Gottlieb v. Bravin, 127 N.Y.S.2d 6 (App. T., 1st Dep't 1953).

[245] Ellis v. Chapman, 165 App. Div. 79, 150 N.Y. Supp. 673 (1st Dep't 1914).

[246] 17 N.Y.2d 51, 215 N.E.2d 339, 268 N.Y.S.2d 15 (1966).

[247] SECOND REP. 345.

[248] 1945 N.Y. LEG. DOC. No. 15, ELEVENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL 413.

[249] *Ibid.*