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CPLR 5528: Failure of Appellant to Provide Adequate Appendix Not Grounds for Immediate Affirmance

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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.*

as to make it impossible for judges to read even a small part of them in the time at their disposal." [250]

The legislature, in enacting CPLR 5528, brought about substantial reform by adopting the appendix method which had met with success in other jurisdictions.[251] Under this method, a copy of all the papers and a transcript of the proceedings and evidence of the trial is forwarded to the appellate court as the record on appeal. However, the appellant is required to submit as an appendix only so much of the record as is material to the questions presented by the appeal.[252] This system confines the printed record on appeal to essential matter, reduces the cost of printing, and relieves the court of the burden of separating what is inconsequential from what is pertinent to the question argued.[253] If there is any failure to comply with the requirement that the appendix not contain unnecessary matter, the court may impose or withhold costs as a penalty.[254]

Confronted with an appellant who submitted a sparse appendix (a 13 page appendix extracted from a trial transcript of over 950 pages) the appellate division, in *Reynolds,* affirmed solely upon the ground that the appendix was insufficient to permit determination of the question sought to be raised.[255] Noting that the draftsmen assumed that the main problem would be the printing of appendices that were too extensive rather than too attenuated, the Court of Appeals reversed stating that the most effective guarantee against an inadequate appendix is both the attorney's desire to supply the court with all material necessary to convince it to adopt his client's position and the threat of cost sanctions. Should these guarantees fail to provide an adequate appendix, the Court indicated that a "court may direct the appellant to submit a further appendix or it may dismiss the appeal unless appellant files a further appendix within a specified period of time." [256] To hold otherwise would

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[250] *Id.* at 414. It was stated that "[i]t is perhaps fair to say that 55% of the printed records in all civil cases in the appellate courts of New York State contain more than one hundred pages, and often such records contain several hundred and even thousands of pages." *Id.* at 413.

[251] SECOND REP. 345.

[252] *Id.* at 345-46. See 1945 N.Y. LEG. DOC. No. 15, *supra* note 248.

[253] *Id.* at 427.

[254] CPLR 5528(e).

[255] E. P. Reynolds, Inc. v. Nager Elec. Co., 21 App. Div. 2d 306, 250 N.Y.S.2d 487 (2d Dep't 1964). The appellate court stated that they were unable to say that the verdict was against the weight of the evidence or that appellant should win as a matter of law. *Id.* at 308, 250 N.Y.S.2d at 489; see Sparrow v. Yellow Cab Co., 273 F.2d 1, 4 (7th Cir. 1959). *Cf.* Esso Standard Oil Co. v. Secatore's, Inc., 246 F.2d 17, 22-23 (1st Cir. 1957).

[256] 17 N.Y.2d 51, 55-56, 215 N.E.2d 339, 340-41, 268 N.Y.S.2d 15, 17-18 (1966).

decrease the value to be derived from an appendix by encouraging the inclusion of material unnecessary to the questions sought to be reviewed.

Whichever course is chosen, the court's control over the adequacy of the appendix would be effectively maintained while, at the same time, the appellant would initially avoid the serious sanction of an affirmance without consideration of the merits. Thus, harsher penalties might defeat the purpose of CPLR 5528 by encouraging the careful advocate to submit an unreasonably lengthy appendix in order to avoid the extreme consequence of a mistaken belief that only a lesser portion of the record need be printed.

ARTICLE 63 — INJUNCTION

CPLR 6301: Granting of preliminary mandatory injunctions.

Preliminary mandatory injunctions are rarely granted, especially if the relief given is the same in fact or in effect as that which would result after a trial. However, in *Graham v. Board of Supervisors*,[257] the court found sufficient circumstances to warrant the granting of this "extraordinary" [258] remedy.

Mandatory injunctions are less frequently granted than prohibitory injunctions. The issuance of a mandatory injunction is usually rationalized as a means of preserving the status quo or preventing irreparable injury to the complainant. Compelling action and preserving status quo are not incompatible terms. The classic statement on the compatability of the two was made by Judge Taft of the United States Circuit Court in *Toledo, A. A. & N.M. Ry. v. Pennsylvania Co.*:

> The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits.[259]

As a general rule, in addition to showing that the status quo is jeopardized by a failure to act and that there is danger of irreparable injury, it must also be shown that the complainant

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[257] 49 Misc. 2d 459, 267 N.Y.S.2d 383 (Sup. Ct. Erie County 1966).

[258] People *ex rel.* McGoldrick v. Follette, 199 Misc. 492, 98 N.Y.S.2d 893 (Sup. Ct. Ulster County 1950).

[259] 54 Fed. 730, 741 (N.D. Ohio 1893).