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In *Erenerol v. McCarthy*[239] plaintiff, a judgment creditor, moved pursuant to 5226 to order a judgment debtor to satisfy the judgment by making weekly installment payments. The fact that the defendant was a seaman created a problem since Section 601 of Title 46 of the *U. S. Code* was applicable to him. The section provides that "no wages due . . . to any seaman . . . shall be subject to attachment . . . from any court. . . ."[240]

The court, in granting the plaintiff's motion, stated that the wages cannot be attached or, by analogy, reached by an income execution under CPLR 5231 before the seaman obtains possession of them. However, it continued, the wages may be reached after they are out of the employer's hands. There is ample authority for this proposition.

The New York Court of Appeals had previously held that, although the wages of a federal employee are not subject to garnishment, once the wage is paid the state may apply a portion of this income toward the payment of his debts.[241] In addition, Section 793 of the Civil Practice Act, the predecessor of Section 5226 of the CPLR, was a vehicle used to reach income that could not be reached by execution. As a specific example of this use, wages of a federal employee are cited.[242]

In summary, it seems well established that section 5226 may be used to avoid the bar of federal statutes which prevent the garnishment of federal wages. It is merely a matter of getting a 5226 order, operative against the judgment debtor after wage payments are received, rather than using the income execution of 5231.

There is an irony here. The courts have indicated that the reason why the installment payment order circumvents the federal prohibition is that it reaches the wages *after* they are in the hands of the employee. The fact is, however, that the income execution itself, under CPLR 5231, runs directly against the judgment debtor. It should therefore be available against the wages because it is actually seeking them only after they are in the judgment debtor's own hands, the very factor upon which use of the installment payment order of 5226 has been justified. The courts may be called upon to resolve this question. It could not arise under prior law because there, under CPA § 684, the income execution was served only upon the employer, and hence would

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[239] 20 App. Div. 2d 798, 248 N.Y.S.2d 464 (2d Dep't 1964).
[240] 38 Stat. 1169 (1915), 46 U.S.C. § 601 (1958).
[241] Reeves v. Crownshield, 274 N.Y. 74, 80, 8 N.E.2d 283, 285 (1937).
[242] Reeves v. Crownshield, 274 N.Y. 74, 8 N.E.2d 283 (1937); Bowes v. Perkins, 169 Misc. 624, 8 N.Y.S.2d 525 (Sup. Ct. 1938).

be seeking to reach wages not yet paid. It was, for that reason, found barred by federal prohibition. Shall the income execution still be so barred, though it seeks wages in the hands of the judgment debtor himself, rather than in the hands of the employer?

Priorities in judgment debtor's personalty where section 5234 is inapplicable.

In re Goldberg[243] was a proceeding to determine the priorities among several creditors in an award the judgment debtor had received in the court of claims. The amount of the award had been deposited in a bank by the state comptroller and was to be paid out pursuant to the direction of the supreme court. The State of New York and the City of New York both claimed a priority in the fund as against various judgment creditors on the ground that the sovereign had a common-law priority for taxes which had become due prior to the service of subpoenas by the other judgment creditors. Faden Paper Corp. and H. Wool & Sons, judgment creditors, argued that they were entitled to priority in the award because they had served third-party subpoenas[244] and restraining orders[245] upon the comptroller prior to service by any of the other creditors.

Justice Koreman, relying on well-established case law,[246] held that the state and city were entitled to the common-law priority of a sovereign. With respect to the private judgment creditors, Faden Paper Corp. and H. Wool & Sons, the court held them entitled to priority as against other judgment creditors, since they had served their third-party subpoenas prior to the other judgment creditors.

The priorities as among judgment creditors found in CPLR 5234 were inapplicable in the instant case. That section only applies when an execution is delivered to the sheriff or when orders under article 52 are filed.[247] Since there is no provision in the CPLR to cover the situation presented in the instant case, the court had to rely on common-law principles to establish priorities. The court adopted a "first in time" approach, in that the judgment creditor who first served his subpoena was given priority over a private judgment creditor who subsequently served a subpoena. Such a method rewards the diligent creditor. One may argue, however, that since the CPLR does not provide for

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[243] 43 Misc. 2d 1037, 252 N.Y.S.2d 776 (Sup. Ct. 1964).
[244] CPLR 5224.
[245] CPLR 5222.
[246] *E.g.*, Matter of Brown Printing Co., 285 N.Y. 47, 32 N.E.2d 787 (1941); Matter of Atlas Television Co., 273 N.Y. 51, 6 N.E.2d 94 (1936); City of New York v. Leibowitz, 5 Misc. 2d 1033, 138 N.Y.S.2d 359 (Sup. Ct. 1955).
[247] See 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5234.17 (1964).