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Priorities in Judgment Debtor's Personalty Where Section 5234 Is Inapplicable

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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).

any priorities in the above situation the court should have permitted all of the judgment creditors to share pro rata (after the state and city claims were satisfied). There is something to be said for either disposition. CPLR 5234 might be reconsidered with an eye towards giving priority status to judgment creditors who serve subpoenas or restraining notices under article 52.

ARTICLE 55 — APPEALS GENERALLY

Motion to dismiss for failure to diligently prosecute an appeal — Indication that courts are becoming stricter.

In *Tonkonogy v. Jaffin,*[248] a motion was made to dismiss appeals taken from orders dismissing a complaint for insufficiency and a judgment entered thereon. The notices of appeal were served in December 1963. The motion to dismiss was made in May 1964 on the ground that the appellants had not taken any steps to perfect the appeals. The appellate division, first department, granted the motion, holding that an undue delay in the perfection of an appeal tends to frustrate the rights of the respondent and that the rules[249] pertaining to the time limitations for perfecting an appeal are not to be lightly regarded. The court pointed out that a motion to dismiss for failure to prosecute is addressed to the sound discretion of the court and stated the requirements that the appellant, in opposing such a motion, must show that the appeal has merit and that there is a satisfactory excuse for his failure to perfect the appeal.

An analogy may be drawn between the instant case and the case of *Sortino v. Fisher.*[250] *Sortino* involved a motion to dismiss for failure to prosecute the action (as opposed to an appeal). The appellate division, first department, reversed the order of the lower court which had denied the motion, holding that the delay was substantial and unreasonable.[251] It further pointed out that an excuse based on the plaintiff's attorney's press of business would be rejected. This argument was also advanced in *Tonkonogy,* and was rejected, along with the excuse that the appellants lacked funds with which to prosecute the appeal. The court disposed of the latter excuse by pointing out that a person who lacks

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[248] 21 App. Div. 2d 264, 249 N.Y.S.2d 934 (1st Dep't 1964).

[249] CPLR 5530. There are rules in each of the four departments. N.Y. APP. DIV. RR. V. XI, XII, XIII (2), pt. 1 (1st Dep't 1963) are specifically involved in this case.

[250] 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).
A scholarly discussion of the *Sortino* case is available in 38 ST. JOHN'S L. REV. 448-52 (1964).

[251] The sting has been taken out of the *Sortino* case by the amendment of CPLR 3216 by the legislature in 1964. See 38 ST. JOHN'S L. REV. 406, 461-63 (1964).