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Civil Procedure—Sheriff's Right to Poundage under Civil Practice Act Section 687-a

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omission or failure to perform a nondelegable type of duty (e.g., the duty of an owner of realty or a shipowner to furnish the injured party with a safe place to work), as distinguished from the failure to observe for the protection of the interests of another person that degree of care and vigilance which the circumstances justly demand, which constitute passive negligence entitling one to indemnity."

Looking at the allegations found in the complaints in the present case, the Court found that the allegation of negligence in the performance of defendant's work and in the handling of materials was a fault of commission and, therefore, active negligence. The second allegation in dispute presented a more delicate problem for the Court. It charged the defendants with "failure . . . to supply the plaintiff's intestate with a safe place to work"—seemingly an allegation of passive negligence. The Court, looking at this allegation in the context of the complaint, found this not to be passive negligence since in legal contemplation the plaintiff and defendant were strangers. Under such circumstances defendant was under no duty to supply plaintiffs with a safe place to work. The Court said that this was an allegation of active negligence for it was an allegation which meant that Davis & Co., the contractor, did owe decedents a duty not to make their place of work unsafe by the manner in which it performed its work on the premises of Wallace & Tiernan, Inc., the decedents' employer.

Judge Van Voorhis dissented on the ground that it was premature to dismiss the third-party complaint before it was known upon what basis recovery, if any, may be awarded at the trial to the original plaintiff against the third-party plaintiff.

The present case, though not adding anything novel in regard to third-party practice, is a lucid and carefully prepared exposition on the intricacies of third-party pleading. It appears, however, that a right of indemnity might be denied to a defendant due to formalistic technicalities found in the original complaint in an action. Therefore, instead of a rule of realism, we have a rule of formalism. Be that as it may, it is still a rule that allows flexibility to meet the exigencies of whatever situation the courts face.

SHERIFF'S RIGHT TO POUNDAGE FEES UNDER CIVIL PRACTICE ACT SECTION 687-A

In *Personeni v. Aquino*,[75] the plaintiff, after a duly levied execution by the sheriff on a debt owed to the judgment debtor, failed to take action to collect the debt, or to obtain an order under Section 687-a, subdivision 7, of the New York Civil Practice Act to extend time in which to do so, and hence the levy became void. In rejecting the sheriff's claim for poundage fees under Section 1558, subdivision 19,[76] of the Civil Practice Act, the majority decision of the

75. 6 N.Y.2d 35, 187 N.Y.S.2d 764 (1959).

76. N.Y. CIV. PRAC. ACT § 1558:
"A sheriff is entitled for the services specified in this section to the following fees" . . . (subdivision 19, now 21) ". . . Where an execution has been vacated or set aside, the sheriff is entitled to poundage. . . ."

Court of Appeals,[77] affirming the lower courts, held that the inaction of the plaintiff did not amount to a vacatur or setting aside of execution within the meaning of that section.

The sheriff attempted to establish that the plaintiff's failure to proceed further was tantamount to interference with process, but as contemplated in early cases, the interference must be of such a nature as to be deemed equivalent to collection.[78] This would suggest that the interference must necessarily take the form of affirmative action, rather than mere passivity.

Since the statute authorizes poundage fees in specified instances of non-collection, it is in derogation of the common law permitting such fees only after collection by the sheriff, and must be strictly construed.[79] Although the dissent looked elsewhere in the statute for guides to interpretation of the provision in question,[80] the majority properly looked to the provision itself to prevent amplification of the scope of the provision through reference. Thus the court reached the conclusion that the mere passage of time involved in Section 687-a, subdivision 7, which voided the execution, was not within the statutory exception permitting poundage fees without collection.

EMPLOYEE'S INTEREST IN SUBROGATED CLAIM CAN BE PLEADED AND PROVED

An employee, covered by workmen's compensation, who fails within a designated time to bring suit against a third party tortfeasor to recover for injuries sustained subrogates his cause of action to his employer or the employer's compensation carrier. The subrogee, after deducting compensation monies paid to or on behalf of the employee and reasonable expenses incurred in effecting such recovery, is required to pay two-thirds of the remainder of any recovery to the employee or his dependents.[81]

The plaintiff subrogee in *U. S. Gypsum v. Riley-Stoker Corp.* attempted to plead and prove the injured employee's interest in the possible recovery.[82] The Supreme Court[83] and Appellate Division[84] had disallowed this attempted pleading and proof on a *stare decisis* basis.

The First and Fourth Departments of the Appellate Division have not permitted this, reasoning that the employee's interest is presented by a proper disclosure in the jury charge,[85] and that such a pleading would put undue empha-

77. Judge Froessel dissented in an opinion in which Chief Judge Conway concurred.
78. Flack v. State of New York, 95 N.Y. 461 (1884); Campbell v. Cothran, 56 N.Y. 279 (1874).
79. *Ibid.*
80. The dissent considered the omission of "by order of court" following "vacated or set aside," as included in subdivision 18, now 20, as conclusive of a legislative intent to comprehend all vacaturs in any manner provided by law.
81. N.Y. WORKMEN'S COMP. LAW § 29.
82. 6 N.Y.2d 188, 189 N.Y.S.2d 145 (1959).
83. 11 Misc.2d 572, 174 N.Y.S.2d 18 (1958).
84. 7 A.D.2d 894, 182 N.Y.S.2d 320 (4th Dep't 1959).
85. Comm'r State Ins. Fund v. Wilaka Constr. Co., 279 App. Div. 1043, 113 N.Y.S.2d 285 (1st Dep't 1952).