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Civil Procedure—Employee's Interest in Subrogated Claim can be Pleaded and Proved

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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 Court⁸³ and Appellate Division⁸⁴ 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).

sis on that interest.⁸⁶

The Second Department has allowed such a pleading on the grounds that since the eventual recovery substantially accrues to the employee's benefit, it should not appear that the insurer is endeavoring to collect and retain for itself all the damages, and also, that the interest of the injured party is no less real because someone else brings the action.⁸⁷

The Court of Appeals adopted the Second Department's position, recognizing that a jury which is apprised of the employee's interest from the beginning is more apt to return a verdict of similar magnitude as when the employee himself brings the action.

The effect of this decision is that when and if an employee's rights are litigated there is a better chance that he will be fully compensated even though he has not brought the action himself. Since the Legislature has already decreed that the recovery should largely inure in the employee's behalf, it seems proper that the recovery should adequately reflect the damages sustained.

CONTRACTS

RECOVERY OF PROPERTY INVOLVED IN AN ILLEGAL TRANSACTION

There has been a long standing rule in New York that the courts will not lend their weight to the enforcement of an illegal agreement.¹ One exception to this rule is that a party who is a mere depository for funds or property involved in the illegal transaction cannot avail himself of the rule so as to avoid liability to the party for whom he is holding them.² The basic rule is premised on the policy against aiding the parties to an illegal transaction; as for the exception, the policy against unjust enrichment apparently is given greater weight and recovery is allowed.

*Southwestern Shipping Corp. v. National City Bank*³ posed a factual situation in which the rule or the exception might have applied, depending upon the manner in which the transaction involved was characterized. Italian foreign exchange regulations require that an Italian importer must obtain a permit license before he can pay for imports in United States currency. One Garmoja desired to purchase chemicals through plaintiff, but did not have the required permit license. In order to pay in dollars Garmoja made an agreement with Corti, an Italian firm which had such a license, to the

86. *Comm'r State Ins. Fund v. Clark Carting Co.*, 274 App. Div. 559, 86 N.Y.S.2d 313 (4th Dep't 1948).

87. *Liberty Mut. Ins. Co. v. American Stevedores*, 278 App. Div. 661, 102 N.Y.S.2d 465 (2d Dep't 1951).

1. *Gray v. Hook*, 4 N.Y. 449 (1851); *Stone v. Freeman*, 298 N.Y. 268, 82 N.E.2d 571 (1948), and cases cited therein.

2. *Stone v. Freeman*, *supra* note 1; *Murray v. Vanderbilt* 39 Barb. (N.Y.) 140 (1863); *Woodworth v. Bennett*, 43 N.Y. 273 (1870); *Merritt v. Millard*, 4 Keyes (N.Y.) 208 (1870).

3. 6 N.Y.2d 454, 190 N.Y.S.2d 352 (1959).