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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. Vanderbuilt 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).

effect that Garmoja would deposit a sum in Italian currency with Credito Lombardo (an Italian bank) for Corti's account. An equivalent amount in United States currency was then to be transferred to defendant American bank for the credit of Anlyan, the American exporter to whom Corti's license ran. Prior to this transfer Anlyan assigned the credit to plaintiff. Defendant was notified of the assignment and agreed that when the credit was received it would be credited to plaintiff's account. The transfers by Garmoja and Credito Lombardo were completed, but defendant bank paid the amount to Anlyan who absconded. In this action by the American exporter against the American bank, the jury found that the bank was negligent in paying the funds to Anlyan and had breached its contract with plaintiff. The Trial Court,[4] however, set aside the verdict on the ground that the agreement was illegal by Italian law, and it was, therefore, against the public policy of New York to enforce any portion of the contract.[5] This determination was affirmed by the Appellate Division,[6] and reversed by the Court of Appeals in a five-two decision.[7]

Those cases which apply the exception to the established rule do so where the person holding the property was not a party to the illegal transaction and is merely holding the property as an agent or trustee for a party to it.[8] The majority in the Court of Appeals held that the National City Bank was not a party to the illegal transaction, but merely held the money as an agent for the plaintiff shipping company. For this reason, the case fell within the exception and the plaintiff was allowed to enforce his contract right. The minority, on the other hand, characterized the entire undertaking as one illegal transaction with which the defendant was indirectly involved, and for that reason would have left the parties as it found them.

Both the majority and the minority assumed that the plaintiff was an *alter ego* of Gamoja and, as such, a party to the illegal transaction. Neither, however, suggested that the defendant was a real party, or even that it had reason to suspect the purpose behind the assignment. Therefore, it would seem that it should be characterized as a non-participating depository within the terms of the exception as framed above.

There is, however, another aspect to the case. One phrasing of the rule indicates that a party in a suit will not be allowed to rely upon an illegal undertaking to prove any portion of a cause of action.[9] This statement proceeds

4. 11 Misc. 2d 397, 173 N.Y.S.2d 509 (Sup. Ct. 1958).
5. Defendant claimed that Article VIII Section 2(b) of the Bretton Woods International Monetary Agreement, [60 Stat. 1411, 22 U.S.C. § 286(h) (1945)] made the plaintiff's action unenforceable in New York state. The majority of the Court, however, indicated that this treaty in no way effected the common-law exception to the rule against enforcement of illegal agreements.
6. 6 A.D.2d 1036, 178 N.Y.S.2d 1019 (1st Dep't 1958).
7. *Supra* note 3.
8. Dewitt v. Brisbane, 16 N.Y. 508 (1858); Stone v. Freeman, *supra* note 1.
9. "Whether a demand connected with an illegal transaction is capable of being enforced at law depends on whether the party requires any aid from the illegal transaction to establish his case." Woodworth v. Bennett, *supra* note 2 at 276.

on the ground that the rule is intended as a disability to the plaintiff, and not a protection to the defendant.[10] If the instant case is viewed in this manner, the outcome hinges on whether the whole plan or merely the Gamoja-Corti transfer is characterized as the illegal transaction. The plaintiff must rely on the assignment or it has no claim at all. This assignment would seem to be an essential part of the illegal transaction and, if the second statement of the rule is applied, the result reached by the minority would seem correct.

EFFECT OF SPECIFIC DISCLAIMER ON INTRODUCTION OF EVIDENCE OF FRAUD

In *Danann Realty Corp. v. Harris*[11] the Court repeated its adherence to the basic tenet that ". . . a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract . . . ,"[12] but the plaintiff buyer in this instance had, as did the plaintiff in *Cohen v. Cohen*,[13] specifically disclaimed reliance on representations not embodied in the contract.

The trial courts' order, reversed by the Appellate Division in a memorandum opinion which refused to extend the holding in *Cohen*,[14] was reinstated by the Court of Appeals' decision that it would be impossible for the plaintiff to prove reliance since the specific disclaimer of reliance on enumerated representations destroyed the allegation in the complaint that he had in fact relied. This was especially so since the plaintiff had means available to him ". . . of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation. . . ."[15]

In *Cohen*, as in the instant case, the dissenting opinion urged that since fraud vitiates every contract, and since the law recognizes the ineffectiveness of a general merger clause to preclude proof of fraud, there should be no distinction made between a general and specific disclaimer since the former includes the latter, and fraud is fraud.[16]

Contrary to the dissent,[17] the majority holding properly considered a conflicting principle that required maintaining a contract's effectiveness as an instrument of agreement.[18] As the court indicated in *Ernst Iron Works v.*

10. Carr v. Hoy, 2 N.Y.2d 185, 158 N.Y.S.2d 572 (1957).
11. 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959).
12. Bridger v. Goldsmith, 143 N.Y. 424, 38 N.E. 458 (1894); Jackson v. State of New York, 210 App. Div. 115, 205 N.Y.S. 658, *aff'd* 241 N.Y. 563, 150 N.E. 556 (1925); A general merger clause is a general provision in the contract to the effect that the entire understanding of the parties is included in the agreement. See: *The Merger Clause and Its Application to Fraud*, 6 BROOKLYN LAW REVIEW 446 (1937), 3 Williston, *Contracts* §§ 811, 811A (Rev. Ed., 1936).
13. 1 A.D.2d 586, 151 N.Y.S.2d 949, *aff'd* 3 N.Y.2d 813, 166 N.Y.S.2d 10 (1957). In this case, a contract designed to settle pending marital litigation, provided that the husband had made no representations concerning reconciliation, and the wife's later attempt to bring suit alleging misrepresentation of the husband's intent on reconciliation was rejected by the court.
14. Danann Realty Corp. v. Harris, 6 A.D.2d 674, 174 N.Y.S.2d 219 (1st Dep't 1958).
15. *Supra* note 11 at 322, 184 N.Y.S.2d 599, 603 (1959).
16. *Supra* note 11 at 325, 184 N.Y.S.2d 599, 607 (1959).
17. Justice Fuld dissenting.
18. *Supra* note 11 at 323, 184 N.Y.S.2d 599, 604 (1959).