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Civil Procedure And Evidence—Deposit in Lieu of Bail

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THE COURT OF APPEALS, 1954 TERM

The Court also held that another cause of action for accrued rent, and expenses and attorney's fees incurred in collecting the rent (a clause for such assessment being part of the leasehold agreement) was not barred as *res adjudicata* by the prior injunction action. This cause of action is based on the refusal of the tenant to pay additional rent rather than a refusal to allow access to the premises. The court maintained defendant's refusals showed a violation of two rights by two distinct legal wrongs. The New York rule is that no suit for future rent can be brought in the absence of an acceleration clause,⁵⁴ and since the amount of plaintiff's expense could not be ascertained until the conclusion of the injunction suit, it followed that an action to recover such rent is not barred by a judgment in a previous action.⁵⁵

Deposit in Lieu of Bail

New York Civil Practice Act §859, which governs the disposition of deposits in lieu of bail, is divisible into a discretionary and a mandatory clause. Distribution under the former comes into operation only where there is an arrest pursuant to a court order under New York Civil Practice Act §827. In any other arrest situation,⁵⁶ the distribution is mandatory.

Defendant husband was arrested pursuant to a court order under Civil Practice Act §827, and his wife made application to have the money he deposited in lieu of bail applied in partial satisfaction of a judgment for accrued alimony and counsel fees. The Court *held*, that the special term had no power as a matter of law to direct payment of money so deposited pursuant to such an arrest in satisfaction of a money judgment for alimony arrears antedating his arrest, where the defendant had at all times kept himself amenable to the court process.⁵⁷

Although it has been held that money so deposited by a third person can be used to satisfy a judgment,⁵⁸ (a *fortiori* if deposited by the defendant rather than by a third person) the decision is not surprising in the light of earlier cases which recognized the distinction between the two clauses. *Subernick v. Subernick*⁵⁹ held that the sole purpose of bail in a matrimonial action is to insure the husband's presence in court so that the court may enforce its orders in an authorized manner. Recourse may not be had to bail under Civil Practice Act §859 for payment of

54. *McCready v. Lindenborn*, 172 N. Y. 400, 65 N. E. 208 (1902).

55. *Smith v. Kirkpatrick*, 305 N. Y. 661, 11 N. E. 2d 209 (1953).

56. E.g., New York Civil Practice Act §826.

57. *Chancer v. Chancer*, 303 N. Y. 204, 124 N. E. 2d 233 (1955).

58. *Lichter v. Raff*, 149 Misc. 53, 266 N. Y. Supp. 748 (1933) (arrest here under C. P. A. §826).

59. 123 Misc. 174, 204 N. Y. Supp. 437 (1924); Cf. *Wesenberg v. McCormack*, 110 Misc. 775, 198 N. Y. Supp. 340, 341 (1922).

money directed to be paid by the court unless the husband is not available to process, the wife's remedy being to cite him for contempt if he does not pay. Only when the defendant breaches his undertaking will the "subject to discretion of court" clause come into operation.

The majority and dissent agreed that the discretionary clause of Section 859 applied. The former distinguished an earlier decision by showing that the arrest there depended upon the nature of the action;⁶⁰ they found an abuse of discretion in the instant case in that the arrest was only to insure defendant's presence in the jurisdiction, saying, "the deposit is not answerable for more than the defendant himself is answerable."

The dissent by Judge Froessel evinced the opinion that there was no abuse of discretion here, and that this case was controlled by the *Standard Electric* decision⁶¹ which the majority distinguished. This decision was written by Judge Froessel and concurred in by the rest of the court. Thus we have the curious situation where the writer of an opinion believes it controlling and those concurring distinguish it.

Declaratory Judgement

A telephone patron sought an accounting, injunction and declaratory judgment against the telephone company, alleging an illegal collection and holding of sales taxes. The telephone company admitted the allegations and was willing to refund the amount illegally held upon application. The Court dismissed the complaint for failure to state a cause of action.⁶²

Under the above facts, no fiduciary relationship exists; a claim based upon overpayment, particularly where there is no dispute as to the right to recover, establishes no cause of action for accounting.⁶³ The claim for declaratory judgment lacks the requisite "actual controversy" for granting relief.⁶⁴ Even assuming a controversy, the court in its discretion could refuse to entertain the application⁶⁵ "where an adequate remedy is already provided"⁶⁶ (here, by resort to the Public

60. *Standard Electric Equipment Corp. v. Laszkowski*, 305 N. Y. 58, 110 N. E. 2d 555 (1953)—an arrest of the Defendant for misappropriation of money belonging to the Plaintiff. Held: Plaintiff is entitled to have the deposited money applied in satisfaction of its judgment as against the claim of the third party depositor.

61. *Ibid.*

62. *Jacob Goodman & Co. v. New York Tel. Co.*, 309 N. Y. 258, 128 N. E. 2d 406 (1955); Rules of Civil Procedure, Rule 106.

63. *Terner v. Glickstein & Terner, Inc.*, 283 N. Y. 299, 28 N. E. 2d 846 (1940).

64. 5 CARMODY, NEW YORK PRACTICE §1960.

65. New York Civil Practice Act, §473; Rules of Civil Procedure, Rule 212.

66. *Bareham v. City of Rochester*, 246 N. Y. 140, 158 N. E. 51 (1927); *James v. Alderton Dock Yards*, 256 N. Y. 298, 176 N. E. 401 (1931).