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Civil Procedure And Evidence—Declaratory Judgment

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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).

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Service Commission). The Court was also of the opinion that the prayer for injunctive relief compelling the acquisition of new machinery could be more adequately handled by the Public Service Commission, and that a prohibitory injunction would interfere with the defendant's duty to collect the taxes.⁶⁷

The dissenters would have allowed the complaint to stand as to the causes of action for injunction and declaratory judgment. The lower courts had not, in their discretion, dismissed⁶⁸ and the dissenters were of the opinion that a controversy existed, the issue being not whether the phone calls were taxable but whether the defendant could continue to force its subscribers to pay taxes not due and require those subscribers to submit to the company's private procedures as to refunds. They also thought direct application to the courts for injunctive relief was available here, on the ground that where plaintiff alleges illegal collection by a public utility of taxes not statutorily authorized, direct application for relief may be made to the Court.⁶⁹

Dead Man Statute

In a suit against the estate of plaintiff's putative father, based upon an alleged oral contract to support the plaintiff made between plaintiff's alleged father and maternal grandmother, the Court *held*, the mother was a competent witness and the grandmother an incompetent witness under New York Civil Practice Act §347.⁷⁰ The interest which renders a witness incompetent under this section is only such as results from the direct legal operation of the judgment.⁷¹ Therefore, although the effect of the agreement would be to lift from the mother the financial burden of the child's support, her testimony is admissible.⁷²

The Court's conclusion as to the competency of the grandmother was based upon the general principle that where a person sues on a contract made for his benefit he derives his interest from the party who furnishes the consideration.⁷³ This general rule has at times been departed from,⁷⁴ but for the most part has been followed and is firmly entrenched as part of the law of this state.⁷⁵ The dissenters

67. Administrative Code of City of New York §N41-2.0.

68. Note 65, *supra*.

69. *Kovarsky v. Brooklyn Union Gas Co.*, 279 N. Y. 304, 18 N. E. 2d 287 (1938). The majority distinguished this case on the ground that here the company claimed the right to collect and retain the money collected.

70. *Duncan v. Clarke*, 308 N. Y. 282, 125 N. E. 2d 569 (1955).

71. *Hobart v. Hobart*, 62 N. Y. 80 (1875).

72. *Connelly v. O'Conner*, 117 N. Y. 91, 22 N. E. 753 (1889).

73. *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916 (1904).

74. *Ward v. N. Y. Life Ins. Co.*, 225 N. Y. 314, 122 N. E. 207 (1917).

75. *Crocker v. N. Y. Trust Co.*, 245 N. Y. 17, 156 N. E. 81 (1927); *Matter of Brown-ing's Estate*, 280 N. Y. 584, 20 N. E. 2d 25 (1939).