

Contempt of Court for Disobedience of Article 52 Subpoena

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With the above statements as defendant's evidence, the court proceeded to define the different types of verdicts. The most common of the illegal verdicts is the "compromise verdict." This is a verdict arrived at when a juror surrenders a conscientious conviction on one material issue in return for the relinquishment by another juror of his conscientious conviction on another issue. The court was quick to point out that jurors may give weight to the opinions of other jurors and reasonable concessions may be made. Thus, to set aside a verdict as being one of compromise, it must appear that a conscientious conviction was sacrificed. The compromise verdict may be detected by the fact that a given verdict cannot be found consistent with any version of the proof.

The decision then proceeded to distinguish the "quotient verdict," which is illegal, from a legal verdict arrived at by averaging. The "quotient verdict" results from an agreement pursuant to which each juror writes down the amount of damages he would award and the twelve figures are averaged to arrive at the amount of damages. The fact that each juror discloses his own figure as to damages does not in and of itself make the verdict illegal. The essential element of the illegality of the "quotient verdict" is the prior agreement to be *bound* by the result of the computation.²²⁵

Having defined these concepts, the court held that the verdict here was not shown to have been arrived at by an illegal method. The presumption is that no illegal arrangements were made and therefore the party attempting to overturn a verdict must affirmatively show that it was arrived at by improper means.²²⁶ Herein lies the difficulty for the practitioner. How does one sustain the burden of proof in this instance? "It is well settled that a juror is not competent to impeach his verdict. . . ." ²²⁷ Therefore, proof must be given by someone other than a juror. The court, sustaining the verdict at bar, did not have occasion to investigate the difficult questions of proof invariably attendant upon overturning a verdict on the basis of something that occurred in the jury room.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

Contempt of court for disobedience of article 52 subpoena.

In *James v. Powell*²²⁸ an interesting contention was made by the contemnor's attorney. Defendant-contemnor is a rather re-

²²⁵ *Id.* at 5, 249 N.Y.S.2d at 302.

²²⁶ *Id.* at 6, 249 N.Y.S.2d at 303.

²²⁷ PRINCE, RICHARDSON ON EVIDENCE § 423 (9th ed. 1964).

²²⁸ 43 Misc. 2d 314, 250 N.Y.S.2d 635 (Sup. Ct. 1964).

sourceful judgment debtor, upon whom a subpoena *duces tecum* was served. Defendant Powell did not appear on the date specified therein and the plaintiff moved to punish him for contempt.²²⁹ The supreme court granted plaintiff's motion and the order provided that the defendant could purge himself of his contempt by paying the entire judgment or by appearing for examination on a new date. Defendant appealed from the contempt order, and this appeal was subsequently suspended by stipulation of the parties pending the disposition of the appeal from the judgment itself in the appellate division. The stipulation provided, in part, that defendant would appear for an examination if the judgment was affirmed, entirely or conditionally.

The judgment was conditionally affirmed (for a lesser amount) and the defendant failed to appear for examination on the date fixed by the court. Plaintiff then applied for an order of arrest of defendant based on the contempt order granted by the court prior to the stipulation of the parties.

Defendant contended that the contempt order related to a "prior judgment" which had, in effect, been extinguished, and that a new judgment was now in existence as a result of the conditional affirmance by the appellate division. Defendant further contended that the motion to arrest was premature under Section 5251 of the CPLR²³⁰ and that plaintiff had to start enforcement proceedings anew on the "new" judgment.

Mr. Justice Chimera disposed of the above arguments by stating:

The contempt order . . . does not relate to a prior judgment. There is only one judgment in this case. A modification on appeal does not constitute a second judgment. Plaintiff's instant application relates to the [original] contempt order. . . .²³¹

The case stands for the proposition that a modification of a judgment on appeal does not constitute a new or so-called second judgment.

Contempt is not available to punish a defendant simply for failure to pay a money judgment.²³² It is available, however, when contemptuous conduct appears in the *course* of enforcing it.²³³ In the case of *Matter of Reeves*,²³⁴ the court of appeals upheld a

²²⁹ CPLR 5251 provides in part that: "Failure of any person to comply with a subpoena . . . shall . . . be punishable as a contempt of court."

²³⁰ *Ibid.*

²³¹ *James v. Powell*, 43 Misc. 2d 314, —, 250 N.Y.S.2d 635, 640 (Sup. Ct. 1964).

²³² CPLR 5104.

²³³ *Supra* note 229.

²³⁴ 274 N.Y. 74, 8 N.E.2d 283 (1937).

finding of contempt on the ground that the judgment debtor was punished because of his disrespect and disobedience of a court order and not because he was unable to pay the judgment.

CPLR 5221: Enforcement procedures connected with surrogate's court decrees must be brought in supreme or county court.

In *In re Finkelstein's Estate*,²³⁵ an order was moved for directing a bank to release certain funds from an estate account. The bank argued that it could not release the money because a judgment creditor of the decedent had served a subpoena²³⁶ on it, which subpoena restrained it from paying out the money except (among other things) by court order. The question arose as to where such an order must be sought. It was sought here in the surrogate's court. The court denied the motion on the ground that the motion had to be made in the supreme or a county court.

The reason lies in CPLR 5221. That section provides, in subdivision (b), that all motions under article 52 must be made in a court specified in subdivision (a). The latter provides, in effect, that proceedings by way of enforcement of surrogate's court decrees must be instituted in supreme or a county court.²³⁷ Hence, the instant application had to be made to the latter court.

The practitioner should note these phenomena connected with the enforcement of judgments. While proceedings to enforce a judgment of the supreme and county courts, and certain other courts specified in CPLR 5221(a), may be brought in the same court which rendered the judgment, that is not so of the surrogate's court or of most of the state's lower courts. As to them, the enforcement procedures (other than mere execution) must be brought in the supreme or county court.²³⁸

²³⁵ 43 Misc. 2d 820, 252 N.Y.S.2d 499 (Surr. Ct. 1964).

²³⁶ Under the CPLR, the subpoena would be governed by CPLR 5223 and 5224, and would not effect a restraint. The restraint would be effected by the service of a restraining notice under CPLR 5222, a device entirely distinct from the subpoena under the CPLR. Under prior law, it was the subpoena which itself contained a restraint, and it was apparently that kind of subpoena which was used, perhaps erroneously, in the instant case. The matter is not of moment; the court treated the subpoena as if it were also a restraining notice under CPLR 5222 and disposed of the case accordingly.

²³⁷ The surrogate's court and proceedings in enforcement of its decrees are governed by paragraph 3 of CPLR 5221(a).

²³⁸ The lower courts which may entertain enforcement proceedings in connection with their own judgments are listed in paragraphs 1 and 2 of CPLR 5221(a). All other courts fall within paragraph 3 of that provision, and hence enforcement of their judgments must be sought in the supreme or a county court.