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Poundage Fees

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"legal conclusions" and "allegations of wrong doing" did apprise the parties and court of the particular transactions complained of. By requiring specific allegations of facts in the petition, the court actually required a more detailed and stricter pleading than is required in an action.[308] Though the procedures of the special proceeding are more summary and expeditious than those of an action,[309] one may argue that a petition giving the respondent "notice of the transactions . . . intended to be proved . . ."[310] affords him ample basis on which to oppose it. In that light, there is practical reason, too, for using 3013's criteria for pleadings in actions as the criteria to govern petitions in special proceedings. A counterpoise here is that the special proceeding is less appropriate to the use of disclosure devices (though they are available there[311]) than is an action, for which reason it may be incumbent upon a petition to be more informative than a complaint. These factors were not investigated by the court. The CPLR itself was apparently satisfied to make 3013's criteria applicable, by cross-reference, not only to the petition in an Article 78 proceeding,[312] but to the petition in all special proceedings governed by the CPLR.[313] This point does not appear to have been urged in the *Gallagher* case. That case, moreover, appears to have been disposed of on the merits rather than on the mere omissions of pleading, though these omissions are referred to by the court.

ARTICLE 80 — FEES

Poundage fees.

Morris v. Morris[314] involved an application by a sheriff for poundage fees. The sheriff served a copy of an execution on a garnishee. After the garnishee's refusal to deliver the property (a promissory note) to the sheriff, the judgment creditor instituted a special proceeding against the garnishee under CPLR 5225 and 5227 (as contemplated by 5232(a)) to compel surrender of the note. The court granted the poundage fees, holding that the sheriff was entitled to poundage notwithstanding the fact that it was necessary for the judgment creditor to bring a proceeding when the garnishee failed to turn the note over to the sheriff pursuant to the levy. The judgment creditor prevailed in the proceeding, and payment of the note was made directly to plaintiff's attorneys

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[308] See the *Foley* case, *supra*, note 305.
[309] CPLR Art. 4; see 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 401.01 (1963).
[310] CPLR 3013.
[311] See CPLR 408.
[312] CPLR 7804(d).
[313] See CPLR 402.
[314] 43 Misc. 2d 854, 252 N.Y.S.2d 641 (Sup. Ct. 1964).

instead of to the sheriff. The court held this to be the equivalent of a "settlement," [315] entitling the sheriff to payment. That the sheriff did not have physical custody of the property levied upon was not deemed significant; it was reasoned that the sheriff had done all that was within his power to conserve the property for the creditor.

ARTICLE 81 — COSTS GENERALLY

Costs disallowed under present law in case properly commenced in supreme court under prior law.

In *Casella v. Board of Educ.*,[316] the lower court awarded plaintiff a sum for costs in addition to a five thousand dollar personal injury judgment. The appellate division reversed, holding that under Section 1474 of the CPA, plaintiff was not entitled to costs. When this action was commenced, section 1474(1)[317] provided that a plaintiff could recover no costs in an action brought in the supreme court of any county in New York City if the action, except for the amount claimed, could have been brought in the City Court of the City of New York, unless the plaintiff recovered four thousand dollars or more. The 1962 amendment to section 1474 substituted the Civil Court of the City of New York for the City Court and six thousand dollars as the minimum sum. Judgment was entered after the effective date of the amendment. Even though the civil court was not in existence at the time the action was commenced, the court found that plaintiff was bound by the amendment, reasoning that the right to costs depends on the statutes in effect at the time the action is terminated, not when it was begun.

The difficulty here is that the civil court was not in existence at the time the action was commenced, and the action was properly brought in the supreme court under the provisions then in force.

The case would be the typical one contemplated by CPLR 10003. That provision permits recourse to prior law, and application thereof, whenever — in a case commenced under prior law — the application of the new law "would work injustice." Though CPLR 8102(1) is not really new law — being the same for present purposes as CPA § 1474(1) as amended in 1962 — there would appear to be within CPLR 10003 a general power to avoid the unfortunate result of the *Casella* case. The Civil Court Act contains a provision of similar import, seeking to avoid the application of the new act to actions commenced under its predecessors whenever it appears necessary to apply prior law.

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[315] "Where a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made." CPLR 8012(b)(2).

[316] 21 App. Div. 2d 690, 250 N.Y.S.2d 474 (2d Dep't 1964).

[317] CPA § 1474(1) is now CPLR 8102(1).