

## Pleading--Parties--Partial Assignments--Workmen's Compensation (Doleman v. Levine, 295 U.S. 221 (1935))

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It is said to be a well established principle of the common law that for injury to the child by a parent no action will lie.<sup>9</sup> There were no cases of such action prior to 1891 in either the English or American reports, although there were many cases of criminal proceeding against parents by minor children which might have been brought civilly if such right of action existed.<sup>10</sup> But the theory that there never was an action at common law has been denied.<sup>11</sup> Maintenance of these actions, it was argued, would tend to destroy the peace of society and the tranquility of the home. A sound public policy designed to subserve the peace of the family and the best interests of society should, therefore, forbid the maintenance of such actions.<sup>12</sup> It is also argued, that as long as the relationship exists with its reciprocal rights and obligations, the child should not be allowed "to bite the hand that feeds it."<sup>13</sup>

While it has been the generally accepted principle to deny such right of action to the child, it seems that denying the right in certain cases defeats the purpose of the law.<sup>14</sup> However, the rule denying the right of action is established in this state.<sup>15</sup>

G. H. M.

PLEADING — PARTIES — PARTIAL ASSIGNMENTS — WORKMEN'S COMPENSATION.—Plaintiff's intestate was killed in the course of his employment by the negligent driving on the part of defendant, a party other than the employer. The deceased left surviving a wife and a dependent father as heir at law and next of kin. Under the

<sup>9</sup> 1 COOLY, TORTS (3d ed. 1906) 492.

<sup>10</sup> Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925).

<sup>11</sup> Dunlap v. Dunlap, 82 N. H. 352, 150 Atl. 905 (1930).

<sup>12</sup> Hewlitt v. George, 68 Miss. 703, 9 So. 885.

<sup>13</sup> Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923). Here the court expounds the philosophy behind the principle denying relief, and in explaining the lack of English cases says: "If this restraining doctrine was not announced by any of the writers of the common law, because no such case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai."

<sup>14</sup> Thus, in Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893 (1905), the attorney for the plaintiff (the child seeking civil redress for the rape committed upon her by her father) argued to this effect: Every law has limitations. A law is founded upon some good reason and the object and purpose to be obtained must be looked for as a fair test of its scope and limitations. The harmonious relationship of the home had been most seriously disrupted and the father had been committed to the penitentiary. However, the court decided that there could be no practical line of demarkation and that the rule must stand for the principle permitting the action would be the same and the torts would vary only in degree.

<sup>15</sup> Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 128 (1928).

Compensation Act<sup>1</sup> of the District of Columbia, the wife alone elected to take compensation from the employer, and the employer as a statutory subrogee to her rights started a separate action against the defendant. The father, as administrator, then brought the present action for damages under the Wrongful Death Act.<sup>2</sup> Defendant's plea in abatement which set up the pendency of the suit brought by the employer was sustained by the Supreme Court of the district. On appeal, *held*, reversed. The employer as an assignee of a partial chose in action could not bring an action in his own name. His remedy was in equity by proper joinder of parties, to compel the administrator to bring suit and distribute any proceeds. *Doleman v. Levine*, 295 U. S. 221, 55 Sup. Ct. 741 (1935).

The rule at common law forbade the partial assignee of a chose in action to sue at law in his own name,<sup>3</sup> in order thereby to prevent splitting of the claim against the defendant and a multiplicity of suits in court.<sup>4</sup> But he could sue in equity where the court had jurisdiction to bring in all parties in interest and try the single cause.<sup>5</sup> This common law difficulty of joinder of parties was removed by the code in New York so that now each assignee of part of a claim has a cause of action at law<sup>6</sup> where all proper parties may be joined, on defendant's motion to amend the complaint.<sup>7</sup> Since the rule forbidding splitting of a claim operates to the defendant's advantage, his failure to move for proper joinder before trial will be deemed a waiver of the defect.<sup>8</sup> A non-joinder of parties,

<sup>1</sup> LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 44 STAT. 1440, 33 U. S. C. A. § 933 (A-E) (1927); *cf.* N. Y. WORKMEN'S COMPENSATION ACT § 29.

<sup>2</sup> CODE OF LAWS FOR DIST. OF COLUMBIA, tit. 21, §§ 1-3 (1929); *cf.* N. Y. DEC. EST. LAW (1921) § 130.

<sup>3</sup> 2 CARMODY, N. Y. PRACTICE (1930) § 503; Cook, *The Alienability of Choses in Action* (1917) 30 HARV. L. REV. 449; Note (1927) 13 CORN. L. Q. 129.

<sup>4</sup> *Carvill v. Mirror Films*, 178 App. Div. 644, 165 N. E. Supp. 678 (1st Dept. 1917); *Porter v. Lane Construction Corp.*, 212 App. Div. 528, 209 N. Y. Supp. 54 (4th Dept. 1925), *aff'd*, 244 N. Y. 523, 155 N. E. 881 (1926); *Williams v. Atlantic Assur. Co., Ltd.*, 1 K. B. 81 (1933).

<sup>5</sup> *Field v. Mayor of N. Y.*, 6 N. Y. 179 (1852); *Porter v. Lane Construction Corp.*, 212 App. Div. 528, 209 N. Y. Supp. 54 (4th Dept. 1925), *aff'd*, 244 N. Y. 523, 155 N. E. 881 (1926).

<sup>6</sup> N. Y. CIV. PRAC. ACT (1920) § 8; *cf.* *Chase v. Derring*, 104 App. Div. 192, 93 N. Y. Supp. 434 (2d Dept. 1905); Rothchild, *The Simplification of Civil Practice* (1924) 24 COL. L. REV. 732, 748.

<sup>7</sup> N. Y. CIV. PRAC. ACT (1920) § 192; *Porter v. Lane Construction Corp.*, 212 App. Div. 528, 209 N. Y. Supp. 54 (4th Dept. 1925), *aff'd*, 244 N. Y. 523, 155 N. E. 881 (1926); *Sisson v. Hassett*, 155 Misc. 667, 280 N. Y. Supp. 148 (1935).

<sup>8</sup> N. Y. CIV. PRAC. ACT (1920) § 278; *Porter v. Lane Construction Corp.*, 212 App. Div. 528, 209 N. Y. Supp. 54 (4th Dept. 1925), *aff'd*, 244 N. Y. 523, 155 N. E. 881 (1926); *Sisson v. Hassett*, 155 Misc. 667, 280 N. Y. Supp. 148 (1935).

however, is not a jurisdictional defect but may be remedied, and the complaint cannot be dismissed as not stating a cause of action.<sup>9</sup>

In the instant case, the employer as an indemnitor could not avail himself of the equity of subrogation and sue in his own name because he did not discharge the entire obligation<sup>10</sup> and as his right to subrogation here was statutory, he could not sue independently on his partial claim in the absence of authorization in the statute.<sup>11</sup> The employer's remedy, as at common law, was in equity by proper joinder of parties to compel the administrator to bring suit and to distribute any proceeds. In New York the employer would have had to bring suit in the name of the administrator, but on the theory that the latter was the "real party in interest" and the statutory trustee of the entire group of beneficiaries.<sup>12</sup> A New York case, *Globe Indemnity Co. v. Atlantic Lighterage Corp.*,<sup>13</sup> construing the same statute<sup>14</sup> as the one here, held that as between an employer and his insurer, both part claimants to a chose in action against a third party, only the employer could sue in his own name, being the legal owner of the cause of action and the statutory trustee for the beneficiaries.<sup>15</sup> The opinion in the *Globe* case is entirely consistent with the decision in the instant case and expresses sound law.

I. J. B.

<sup>9</sup> *Porter v. Lane Construction Corp.*, 211 App. Div. 528, 209 N. Y. Supp. 54 (4th Dept. 1925); *Sisson v. Hassett*, 155 Misc. 667, 280 N. Y. Supp. 148 (1935); Rothchild, *The Simplification of Civil Practice* (1924) 24 Col. L. Rev. 732, 748.

<sup>10</sup> *Aetna Life Ins. Co. v. Moses*, 287 U. S. 530, 53 Sup. Ct. 231 (1933). Same construction in *N. Y. Travellers Ins. Co. v. Padula Co.*, 224 N. Y. 397, 121 N. E. 348 (1924); *McGrath v. Carnegie Trust Co.*, 221 N. Y. 92, 116 N. E. 787 (1917).

<sup>11</sup> *Mandeville v. Welch*, 18 U. S. 277 (1820). Cf. *General Acc. Fire & Assur. Corp. v. Zerbe Const. Co.*, 269 N. Y. 227, 233, 199 N. E. 89, 91 (1935) (A party who is not an assignee but who is equitably entitled to a portion of a recovery may be joined as a party plaintiff and may obtain a separate judgment. This would not be splitting the cause of action.).

<sup>12</sup> N. Y. CIV. PRAC. ACT (1920) § 210; *Thompson v. Whitemarsh*, 120 N. Y. 35, 2 N. E. 273 (1885); *Matter of Zirpola v. Casselman, Inc.*, 237 N. Y. 367, 143 N. E. 222 (1924); *U. S. Fidelity and Guaranty Co. v. Graham & Norton Co.*, 254 N. Y. 50, 171 N. E. 903 (1930).

<sup>13</sup> *Globe Indemnity Co. v. Atlantic Lighterage Corp.*, 244 App. Div. 97, 278 N. Y. Supp. 212 (1st Dept. 1935). This case was decided March 22, 1935. *Doleman v. Levine* was decided April 29, 1935.

<sup>14</sup> LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 44 STAT. 1440, 33 U. S. C. A. § 933 (A-E) (1927).

<sup>15</sup> The Federal Longshoremen's Act differs from the N. Y. Workmen's Compensation Act in that in the latter the award of compensation operates as an assignment to the insurer of the cause of action of the injured employee against a third party.