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## Civil Procedure—Separate Trial Where Insurance Company Joined as Party Defendant

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## COURT OF APPEALS, 1957 TERM

rendering of a default judgment upon failure of a party to appear or proceed to trial. Relying on *Mink v. Keim*,<sup>17</sup> the Court reaffirmed its position that a judgment under this section may be entered only upon a complaint or counterclaim. The defendant had no action on which to proceed since his property damage action had been settled and his contention was accordingly rejected.

### Separate Trial Where Insurance Company Joined as Party Defendant

In *Kelly v. Yannotti*,<sup>18</sup> appellant, an insurance company, had been impleaded by the defendant in a negligence action. When a jury trial was demanded, appellant moved under section 96 of the Civil Practice Act to sever the actions. The issue before the Court of Appeals was whether denial of this motion by the trial court constituted an abuse of discretion.

The New York courts have long held that in actions where insurance companies are impleaded a finding that the plaintiff is entitled to recover might influence the jury in its determination of the separate issue of whether defendant was covered by the alleged insurance contract, or that conversely, a finding that defendant is covered by insurance might influence the determination of plaintiff's right to relief. Thus, motions for severance have been allowed so as not to have the same jury pass on both issues.<sup>19</sup>

In the present case the Court held that denial of the motion to sever constituted an abuse of discretion since there would be no impairment of a substantial right of any party and the insurance company probably would be subject to some prejudice if the main action and the third party action were tried by the same jury.

### Res Judicata and Collateral Estoppel—Identity of Parties

In *Commissioners v. Low*,<sup>20</sup> the State Insurance Fund (workmen's compensation insurer for the State of New York) brought the action as statutory assignee of the representative of a state employee, killed in an accident while on duty in a state automobile. The suit was brought against the private motorist and owner of the other car in the accident which resulted in the employee's death. Prior to this action by the State Insurance Fund, the private motorist had himself sued the State of New York on the theory that the accident was caused solely by the

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17. 291 N.Y. 300, 52 N.E.2d 444 (1943).

18. 4 N.Y.2d 603, 176 N.Y.S.2d 660 (1958).

19. See, e.g., *Simpson v. Foundation Co.*, 201 N.Y. 479, 95 N.E. 10 (1911); *Taplin v. Stevens*, 280 App. Div. 960, 117 N.Y.S.2d 606 (4th Dep't 1952); *Warner v. Star Co.*, 162 App. Div. 458, 147 N.Y.Supp. 803 (2d Dep't 1914); *Delany v. Allen*, 200 Misc. 734, 105 N.Y.S.2d 635 (Sup.Ct. 1951); *Butera v. Donner*, 177 Misc. 966, 32 N.Y.S.2d 633 (Sup.Ct. 1942).

20. 3 N.Y.2d 590, 170 N.Y.S.2d 795 (1958).