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Civil Procedure—Res Judicata and Collateral Estoppel—Identity of Parties

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rendering of a default judgment upon failure of a party to appear or proceed to trial. Relying on *Mink v. Keim*,[17] 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*,[18] 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.[19]

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*, [20] 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

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).

negligence of the deceased employee and had recovered judgment. In this action by the State Fund, he pleaded that the accident, subject of both suits, was caused solely by the employee, the State of New York, which the defendant identified with the State Insurance Fund, being bound by the prior judgment.

The Court of Appeals, acknowledging that there is no exact precedent on the question of the identity of the State and the Fund for purposes of res judicata, determined that this was not a question of res judicata but rather a collateral estoppel, and hence, in effect, determined that the State and State Insurance Fund are two separate and distinct parties. Judge Desmond further stated that "[i]t would be unreal to say that the plaintiffs in this present suit participated in the prior suit and we are admonished to be cautious in extending these doctrines [of res judicata] to cases where a party might be deprived of a full day in court."

In effect, then, the prior judgment was nothing more than persuasive precedent not binding upon the present suit. The decision appears to recognize the realities of the situation wherein, in fact, the operations of the State of New York and the State Insurance Fund are quite separate.

Notice of Amount on Summons for Default Judgment Not Restrictive of Jurisdiction as to Causes of Actions Sued

Rule 46 of the Rules of Civil Practice provides that if an action be brought for the breach of an express or implied contract for a specific sum, and a complaint is not served with the summons, plaintiff *may* serve with the summons a notice stating the sum of money for which judgment will be taken in case of default.

The Court in *Everitt v. Everitt*[21] was faced with the problem of whether, after a general appearance had been entered by a non-resident defendant, plaintiff could serve a complaint adding several causes of action to the initial cause contemplated by the notice under Rule 46.

Defendant, a non-resident, was served with summons and notice while temporarily within the state. She filed notice of general appearance and demanded a complaint. Upon service of the complaint, the defendant moved to strike the additional causes stated therein on the ground that she was not a person subject to the jurisdiction of the court.[22] This motion was granted by the Special Term,[23] and the second and third causes of action were dismissed. The Appellate Division reversed,[24] and certified questions to the Court of Appeals as to whether

21. 4 N.Y.2d 13, 171 N.Y.S.2d 836 (1958).
22. N. Y. CIV. PRAC. ACT §237(a).
23. 157 N.Y.S.2d 130 (Sup.Ct. 1956).
24. 3 A.D.2d 413, 161 N.Y.S.2d 172 (1st Dep't 1957).