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Civil Procedure—Judgment Absolute Stipulations

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evidence as a matter of law[22] or when by no rational process could a jury come to a contrary finding.[23] But, as long as there is a question of fact, it is for the jury and not for the court.[24] In the latter instance, a court is restricted to granting a new trial if the jury's findings are against the weight of evidence but it may not dismiss the complaint.[25] In non-jury trial cases, the Appellate Division may not dismiss the complaint because the trial court's findings are against the weight of evidence but it may reverse the judgment by making new findings of fact supporting that judgment.[26]

In determining whether sufficient evidence has been introduced to raise a question of fact for the jury, the court will draw every reasonable inference from the evidence in the aspect most favorable to uphold the jury's findings on the issue.[27]

In the instant case, the court held that evidence which tended to show that the plaintiff had made a gift and not a loan to the defendant's wife was sufficient to establish a prima facie case on the defendant's counterclaim enabling the jury by a rational process to find that the money given to the defendant's wife was *in fact* a gift and not a loan. The Court's determination appears to be entirely correct in view of the fact that rescission may be had if there is a misrepresentation of a material fact although not amounting to fraud.[28]

Judgment Absolute Stipulations

In *Gilligan v. Tishman Realty & Construction Co.*,[29] the non-stockholder tenants of a co-operative apartment building brought an action against the defendant, Realty, and the stockholders of the co-operative apartment building established by Realty. The Appellate Division reversed the trial court's dismissal in favor of the defendants and ordered a new trial.[30] Some of the stockholders of the

22. *In re Case*, 214 N. Y. 199, 108 N. E. 408 (1915); *Blum v. Fresh Grown Preserves Corp.*, 292 N. Y. 241, 54 N. E. 2d 809 (1944).
23. *Stein v. Palisi*, 308 N. Y. 293. 125 N. E. 2d 575 (1955), 5 BUFFALO L. REV. 222 (1956).
24. *McDonald v. Metropolitan Street Ry.*, 167 N. Y. 66, 60 N. E. 282 (1901).
25. *Caldwell v. Nicolson*, 235 N. Y. 209, 139 N. E. 243 (1923).
26. N. Y. CONST. art. VI §8, N. Y. CIV. PRAC. ACT §584, . . . appellate court may reverse judgment . . . appealed from . . . and render final judgment . . . except where it may be necessary . . . to grant a new trial . . .; *Caldwell v. Nicolson, supra*, note 25.
27. *Faber v. City of New York*, 213 N. Y. 411, 107 N. E. 756 (1915); *Osipoff v. City of New York*, 286 N. Y. 422, 36 N. E. 2d 646 (1941); *Sagorsky v. Maylon*, 307 N. Y. 584, 123 N. E. 2d 79 (1954), 5 BUFFALO L. REV. 63 (1955).
28. *Bloomquist v. Snow*, 222 N. Y. 375, 118 N. E. 855 (1918).
29. 1 N. Y. 2d 121, 134 N. E. 2d 100 (1956).
30. 283 App. Div. 157, 126 N. Y. S. 2d 813 (1st Dep't 1953),

co-operative appealed to the Court of Appeals on stipulation for judgment absolute,[31] where decision was rendered against them.[32] Before a new trial was commenced against the non-appealing defendants, plaintiffs served a supplemental complaint demanding that the prior judgment against the appealing defendants be held binding against the non-appealing defendants because the latter had decided who would appeal, had decided what stipulations were to be presented, had paid costs and expenses, and had selected counsel, thus, in effect, controlling litigation. The Court of Appeals, reversing the Appellate Division,[33] dismissed the supplemental complaint.

Williams v. Western Union Co.,[34] relied on by the Court, held that if some of the defendants appealed on stipulation for judgment absolute, the other defendants would not be bound if they were not jointly interested in the defense. The facts of the *Williams* case differ from this case in that the appealing defendant there was the major party in interest, and the non-appealing defendants did not participate in the defense on the appeal for stipulation on judgment absolute. Nor was there any question of lack of good faith as there is in the present case. In order to rely on this decision, the Court obviously not only found that there was no jointness of interest between the appealing and the non-appealing defendants, but that mere participation in the litigation on appeal could not bind the non-appealing defendants to the judgment on appeal.

It is recognized that the general rules governing judgments are applicable to judgments rendered on stipulation.[35] The Court's decision was probably influenced by the authority, though not stating it, that participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment.[36] Moreover, the Court explicitly felt bound by the judgment in *Fish v. Vanderlip*,[37] where it was decided that mere indentical interest and participation in the outcome of a litigation do not constitute joint interest. But that case involved a contract of insurance where, as the Court there stated, the rights and obligations of every one of the associates was wholly separate.[38]

31. N. Y. CIV. PRAC. ACT §588(3); Appeal to the Court of Appeals as of right lies . . . from an order of the Appellate Division granting a new trial . . . where appellant stipulates that upon affirmance, judgment . . . absolute shall be rendered against him, and upon such appeal, the Court of Appeals shall affirm and render judgment . . . absolute against the appellant unless it determines that the Appellate Division erred as a matter of law in granting the new trial . . . .

32. 306 N. Y. 974, 120 N. E. 2d 230 (1954), *modified on rehearing*, 307 N. Y. 698, 120 N. E. 2d 863 (1954).

33. 286 App. Div. 812 142 N. Y. S. 2d 206 (1st Dep't 1955).

34. 93 N. Y. 162, 9 Abb. N. Cas. 437 (1883).

35. *Canfield v. Elmer E. Harris & Co.*, 252 N. Y. 502, 107 N. E. 121 (1930).

36. *Old Dominion Copper M & S Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193 (1909); appliying New York law.

37. 218 N. Y. 29, 112 N. E. 425 (1916).

38. See note 37 *supra* at 39, 112 N. E. at 428.

The word "identical" is defined as "exactly the same for all practical purposes."[39] Thus an identical interest can be said to be an interest exactly the same as another interest for all practical purposes. It must be admitted that identical interest alone will not bind the non-appealing defendant to the previous judgment merely because he participated in the defense.[40] This is true even if he had an identical interest with an interest previously litigated since his interest may not have been set forth or defended so as to come within his constitutional guarantee of due process of law.[41] But the writer believes that the non-appealing defendants' right to their day in court can be waived by certain conduct on their part. There is authority to the effect that if one prosecutes a suit to protect his own right or assists in prosecution of an action in aid of some interest of his own and controls that action, although the suit is brought in name of another, he is bound by the judgment.[42] It appears that a question of fact arose whether the non-appealing defendants participated to the extent that they might be bound by the judgment on stipulation for judgment absolute. It is submitted that in view of the question of fact, the majority, while applying the statute literally, failed to construe the statute liberally, and was in error in holding, as a matter of law, that no question of fact existed.

Mutuality of Estoppel

Where the liability of a defendant is based in part upon the act of a third party, it does not strike unfairly that a plaintiff, who has failed in a prior action against that third party, should be prevented by res judicata from raising again the identical issues decided in the prior suit.[43] This indeed would seem to be most in accordance with the underlying policy of res judicata, *i.e., interest republicae ut sit finis litium.*[44] Yet such a result must be reached with some difficulty by the courts because of a verbal stumbling block. As has been said, "The repetition of a catchword can hold analysis in fetters for fifty years or more."[45] The catchword here is "mutuality."

Under the doctrine of "mutuality of estoppel" a party is precluded from asserting a judgment in estoppel unless he would also be estopped had the same judgment gone the other way; or, in other terms, the judgment must be equally conclusive on both parties.[46] Most reasons advanced for the rule, such as fairness,[47]

39. BLACK'S LAW DICTIONARY (4th ed. 1951); *Cain v. Moore,* 74 Fla. 77, 76 So. 337 (1917).
40. See note 37 *supra.*
41. U. S. CONST. amend. XIV, §1; N. Y. CONST. art I, §6.
42. *Flynn v. Colonial Discount Co.,* 149 Misc. 607, 269 N. Y. S. 2d 893 (City Ct. 1933); *cf. Henderson v. Henderson,* 247 N. Y. 428, 160 N. E. 775 (1928).
43. *Cf.* RESTATEMENT, JUDGMENTS §99 (1942).
44. *Good Health Products v. Emery,* 275 N. Y. 14, 9 N. E. 2d 758 (1937).
45. Cardozo, *Mr. Justice Holmes,* 44 HARV. L. REV. 682 (1931).
46. *Nelson v. Brown,* 144 N. Y. 384, 39 N. E. 355 (1895).
47. 1 FREEMAN, JUDGMENTS §429 (5th ed. 1925).