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Civil Procedure—Appeal—Certified Questions

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volved on the trial or their privies, and further that mutuality of estoppel was lacking. The Appellate Division reversed⁵⁷ and was upheld by the Court.

Here there is neither privity nor derivative liability. Yet, relying principally on the *Good Health* case the Court held that the underlying principles of the exceptions to the mutuality rule—that a complaining party who has had a full opportunity to litigate certain issues should not be permitted to relitigate the *identical issues*⁵⁸ in a new action, and further that the policy behind res judicata is that it is in the interests of the state that there be an end to litigation—estopped the plaintiff.

While the Court emphasized that it was not adding a new class of exceptions to the general rule (the Court did not refer anywhere to the *Elder* case), it would seem that, in the face of an anomalous result, it has indeed done so. This decision indicates that though the courts may continue to pay their respects to the mutuality concept, the letter of the rule will not defeat the spirit of the doctrine of res judicata.

Appeal—Certified Questions

*Meenan v. Meenan*⁵⁹ involved an appeal upon certification of a question, by the Appellate Division who had reversed⁶⁰ the granting by Special Term of a motion for temporary alimony and other interlocutory relief. The question asked the Court of Appeals was whether "upon the facts presented", Special Term properly exercised its power and authority in granting the plaintiff's motion. *Hilton Watch Co. v. Benrus Watch Co.*⁶¹ was a like appeal upon certification by the Appellate Division, who had upheld⁶² the denial by the Special Term of a motion for leave to serve a supplemental complaint. This question asked whether the Special Term was correct in its denial. The Court of Appeals dismissed the appeals upon the ground that the appellant in each case had failed to comply with

57. 285 App. Div. 718, 140 N. Y. S. 2d 663 (1st Dep't 1955).

58. The Court laid great stress on this factor; query whether a plaintiff, in a negligence suit in New York against a joint tort-feasor, where the plaintiff had lost in a former action against defendant's joint tort-feasor because of a failure to prove freedom from contributory negligence, could be barred by "res judicata" because of such "identical issue"?

59. 1 N. Y. 2d 269, 135 N. E. 2d 30 (1956).

60. 286 App. Div. 775, 147 N. Y. S. 2d 122 (1st Dep't 1955).

61. 1 N. Y. 2d 271, 135 N. E. 2d 31 (1956).

62. 282 App. Div. 939, 126 N. Y. S. 2d 193 (1st Dep't 1953).

the provisions of section 603 of the Civil Practice Act, providing for a necessary specification by the Appellate Division of its disposition of the facts.⁶³

The Court of Appeals has the power to review questions of fact or discretion only on appeal from a final determination.⁶⁴ Certified questions are the means of an appeal from other than final determinations.⁶⁵ Therefore, the general rule is that a certified question which poses an issue of fact or discretion cannot be answered by the Court of Appeals, and an appeal taken on such a question must be dismissed unless the question can be fairly interpreted, without doing violence to the discernible intention of the Appellate Division, as presenting a decisive issue of law.⁶⁶

It is apparent, then, that an improperly drafted question which is not clear as to whether a question of law or fact is asked, can be interpreted as a question of law in order to grant the appeal. The Court, however, has declined to do this in certain cases. Where the Appellate Division could have based its determination upon discretion or a finding of fact, (as, for instance, the denial of a motion for temporary alimony), a question asking whether such was correct will be dismissed because there is not a decisive question of law for the Court to review. A finding by the Court of Appeals that such a motion could be granted under law, would not

63. N. Y. CIV. PRAC. ACT §603: Statement as to ruling upon facts required, where appeal on certified questions. Upon an appeal to the court of appeals on certified questions, the court of appeals shall presume that the questions of fact were determined by the appellate division in favor of the respondent in the court of appeals, unless the appellate division in its order granting permission to appeal shall have stated the disposition of the questions of fact by reciting either

(a) that the findings of fact have been affirmed, or

(b) that the findings of fact have not been considered, or

(c) that the findings of fact have been reversed or modified or that new findings of fact have been made, and shall have described them in the manner prescribed in subdivision two of section six hundred and two of this act.

64. N. Y. CIV. PRAC. ACT §589: Appeal by permission. Appeal to the court of appeals by permission lies only

1. by permission of the appellate division and not otherwise.

(a) from a judgment or order of the appellate division which does not finally determine the action or special proceeding in which it is entered, . . .

4. (a) The appeals authorized by this section shall be allowed upon questions of law when required in the interest of substantial justice; and the appellate division, when it allows such an appeal, shall certify that questions of law have arisen which in its opinion ought to be reviewed by the court of appeals.

(b) In its order allowing an appeal from a judgment or order which does not finally determine an action or special proceeding, the appellate division shall certify the questions of law *decisive of the correctness of its determination* . . . (emphasis added).

65. *Matter of City of New York (Vernon Parkway)* 285 N. Y. 326, 34 N. E. 2d 341 (1941); *Braunworth v. Braunworth*, 285 N. Y. 151, 33 N. E. 2d 68 (1941).

66. *Matter of Westerfield*, 163 N. Y. 209, 57 N. E. 403 (1900); *Gittleman v. Feltman*, 191 N. Y. 205, 83 N. E. 969 (1908); See generally, COHEN AND KARGER, POWERS OF THE NEW YORK COURT OF APPEALS (1952), pp. 358-87.

be determinative of the question of the correctness of the Appellate Division's order, because it could have based its finding on fact or discretion.⁶⁷

In other cases, however, the Court had *interpreted* the question as implying that the Appellate Division had determined the facts or discretion in favor of one or the other parties, in order to treat the question as one of law. Thus, the facts were presumed to have been found in favor of the appellant,⁶⁸ or respondent,⁶⁹ in order to take jurisdiction. Sometimes the presumption was wrong.⁷⁰

In 1942, in order to correct the uncertainty in this area, the legislature enacted section 603 of the Civil Practice Act. This provides that unless the question certified clearly states otherwise, it should be conclusively presumed that the Appellate Division interpreted the facts in favor of the respondent.⁷¹ It applies to questions of discretion as well.⁷²

In the instant cases, therefore, the Court of Appeals necessarily was bound to treat the questions of fact and discretion as having been found for the respondent. The legislature has foreclosed the possibility of interpreting the Appellate Division's view of the facts one way or the other in order to call the question one of law. Thus, the cases are squarely and properly within the doctrine that where upon appeal there is not the occasion for an answer necessarily determinative of the correctness of the order appealed from, the Court will dismiss.⁷³

CONSTITUTIONAL LAW

Injunction Obscenity Statute Upheld

In New York the problem of obscene literature is dealt with in two statutes — section 1141 of the Penal Law which makes it a misdemeanor to sell or distribute obscene matter and section 22(a) of the Code of Criminal Procedure which gives injunctive powers over this type of literature. These statutes have not gone without

67. *Parkas v. Parkas*, 285 N. Y. 155, 33 N. E. 2d 70 (1941); *Greenhouse v. Rochester Taxicab Co.*, 244 N. Y. 559, 155 N. E. 896 (1927); *Braunworth v. Braunworth*, 285 N. Y. 151, 33 N. E. 2d 68 (1941).

68. *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901); *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449 (1897); *Mencher v. Richards*, 283 N. Y. 176, 27 N. E. 2d 982 (1940); See 7TH ANNUAL REPORT OF THE JUDICIAL COUNCIL, pp. 508-509.

69. *Matter of Board of Water Supply*, 277 N. Y. 452, 14 N. E. 2d 789 (1938); *Countryman v. State of New York*, 277 N. Y. 586, 13 N. E. 2d 782 (1938); See 7TH ANNUAL REPORT OF THE JUDICIAL COUNCIL, pp. 511-512.

70. *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901).

71. See note 63, *supra*.

72. *Mencher v. Chesley*, 297 N. Y. 94, 75 N. E. 2d 257 (1947); *Langan v. First Trust & Deposit Co.*, 296 N. Y. 60, 70 N. E. 2d 15 (1946); See 8TH ANNUAL REPORT OF THE JUDICIAL COUNCIL, p. 434.

73. See cases, note 67, *supra*.