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Civil Procedure And Evidence—Proof of Consideration

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were of the opinion that this case was within an exception to the general rule.[76] This opinion was based on the contention that the *Rosseau* case[77] did not overrule the prior cases as the majority claimed, so that those cases were still part of the law of this state and thus constituted exceptions to the *Rosseau* doctrine. This contention seems erroneous in the light of Chief Justice Cullen's concurring opinion in the *Rosseau* case, in which he anticipated the confusion which would be caused by the failure of the majority to explicitly overrule these earlier cases.

Proof of Consideration

In an action on a letter promising to pay a sum of money on behalf of a third party debtor, defendant corporation alleged failure of consideration. Plaintiff claimed that the consideration was forbearance to sue the debtor, and that this fact was made known to defendant's officer by a telephone conversation between the debtor and the officer. The Court, (unanimously affirming a unanimous Appellate Division,[78] which had reversed the trial court)[79] *held,* there was sufficient evidence that defendant's officer was in fact the party at the other end of the telephone conversation, and thus knew of the consideration.[80]

The quantum of proof necessary to establish this fact was held to be met by, inter alia, testimony of plaintiff's lawyer that the debtor had made the telephone call in his presence, pursuant to a discussion they had had on this matter, had referred to a page in a little notebook on which defendant's officer's name and telephone number appeared, asked for defendant's officer by name, relayed the instructions which plaintiff's attorney wished to be given to defendant, including the information as to forbearance, and that subsequently the defendant had acted in accordance with the instructions.

This case is to be distinguished from those in which what was *said* on the other end of a telephone wire was a vital factor in the case;[81] here, all that was necessary was that the other party *heard* the information. A subsidiary point was the admission in evidence of an office memorandum made by plaintiff's lawyer's secretary in the ordinary course of business,[82] purporting to report a telephone call

76. *Healy v. Healy,* 55 App. Div. 315, 66 N. Y. Supp. 927 (4th Dep't 1900); *aff'd,* 166 N. Y. 624, 60 N. E. 1112 (1901); *Bouton v. Welch,* 170 N. Y. 554, 63 N. E. 539 (1902).
77. See note 73, *supra.*
78. 284 App. Div. 703, 134 N. Y. S. 2d 562 (1st Dep't 1954).
79. 205 Misc. 958, 131 N. Y. S. 2d 244 (1954).
80. *Ruegg v. Fairfield Securities Corporation,* 308 N. Y. 313, 125 N. E. 2d 585 (1955).
81. *Gubelman v. Ands Koch, Inc.,* 234 N. Y. 425, 138 N. E. 81 (1923).
82. See C. P. A. §374 (a).

from defendant to plaintiff's lawyer; this was allowed as "some corroboration." Another question was whether the trial court had made a finding of fact or of law with regard to the telephone conversation. This was held to be unimportant; in non-jury cases (including those in which trial by jury was waived)[83] a reversal and entry of judgment is possible,[84] upon the making of new findings,[85] including findings of fact.[86]

Statute of Limitations—Malpractice

In an action upon an alleged contract for medical treatment claimed to have been improperly performed, a motion to dismiss on the grounds that the statute of limitations for malpractice governed and had expired was denied.[87]

Plaintiff alleged a contract between himself and defendant surgeon for a particular surgical operation. It was claimed that defendant had agreed to perform the operation in a workmanlike manner, and had promised that the plaintiff would be cured within two days. The operation was in fact performed in such a way as to cause considerable internal injury to the plaintiff, requiring hospitalization for a month and considerable medical care. This action was brought over two years later.

The statute of limitations for contract actions is six years;[88] for malpractice it is two years.[89] In order to permit recovery, it was therefore necessary to find a cause of action founded upon breach of contract. Since the case arose upon appeal from a motion to dismiss, the court was required to accept as true all allegations of the plaintiff. The court emphasized the fact that New York State will recognize contracts between a physician and his patient,[90] though it admitted that such contracts are a rarity. The court also placed great weight on the nature of the damages alleged, pointing out that only contract damages were sought in the action.

The dissent claimed that the "gravamen" or foundation of the action was

83. *Lamport v. Smedley,* 213 N. Y. 82, 106 N. E. 922 (1914); *Caldwell v. Nicolson,* note 40 *supra.*
84. Note 43, *supra.*
85. *York Mortgage Corp. v. Clotar Const. Corp.,* 254 N. Y. 128, 172, N. E. 265 (1930); see note 44, *supra.*
86. *Sagorsky v. Malyon, supra* note 45.
87. *Robins v. Finestone,* 308 N. Y. 543, 127 N. E. 2d 330 (1955).
88. C. P. A. §48 (1).
89. C. P. A. §50 (1).
90. *Colvin v. Smith,* 276 App. Div. 9, 92 N. Y. S. 2d 794 (3rd Dep't 1949); *accord, Safian v. Aetna Life Ins. Co.,* 260 App. Div. 765, 24 N. Y. S. 2d 92 (1st Dep't 1940), *aff'd,* 286 N. Y. 649, 36 N. E. 2d 692 (1941).