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intimately what that witness is going to say?"[112] Thus, the court reasoned that the claimant could not properly prepare for trial without examining the consultant engineer. And, the court added that compliance with section 17 of the Court of Claims Act automatically satisfied the "special circumstances" requirement of CPLR 3101(a)(4). Accordingly, the state was ordered to produce the engineer for examination.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Prior judgment establishing freedom from negligence does not ipso facto establish freedom from contributory negligence in second action.

In *Schwartz v. Public Administrator*[113] the Court of Appeals ruled that there remained only two prerequisites to the invocation of the doctrine of collateral estoppel: "an identity of issue which has necessarily been decided in the prior action . . . and . . . a full and fair opportunity to contest the [prior] decision."[114] In *Schwartz*, the defendant, driver D-1, moved to dismiss a personal injuries action brought against him by the plaintiff, driver D-2, on the ground that a prior adjudication of negligence on the part of driver D-2 barred recovery. In a prior action, passengers in the Schwartz car brought a successful personal injuries action against *both* drivers D-1 and D-2 as codefendants.[115] As a result, the defendant D-1 was able to persuade the Court that the prior determination of negligence estopped plaintiff D-2 from demonstrating his freedom from contributory negligence, a necessary element of his prima facie case, in the second action.

Recently, in *Nesbitt v. Nimmich*,[116] the Appellate Division, Second Department, refused to extend the *Schwartz* rationale to a slightly varied situation. Plaintiff, driver D-1, moved for summary judgment in a personal injury action against defendant, driver D-2, on the basis of a prior action against both drivers. In contrast to the facts in *Schwartz*, the jury had returned a verdict against the present defendant alone, acquitting the present plaintiff of negligence vis-à-vis the original plaintiff. Thus, plaintiff argued that by implication the jury had exonerated him on the issue of contributory negligence. The appellate division disagreed, reasoning that "it does not necessarily follow that

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112 7B McKINNEY'S CPLR 3101, commentary 22, at 27 (1970).

113 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); *see generally* Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969); *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 144-51 (1969).

114 24 N.Y.2d at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

115 30 App. Div. 2d 193, 291 N.Y.S.2d 151 (1st Dep't 1968).

116 34 App. Div. 2d 958, 312 N.Y.S.2d 766 (2d Dep't 1970).

the plaintiff . . . can prove he was free from contributory negligence merely because the passenger who sued him in the first action was unable to establish his negligence by a fair preponderance of the evidence."[117] Thus, although plaintiff might be entitled to partial summary judgment on the issue of defendant's negligence,[118] he would have the burden of proving his own freedom from contributory negligence, and if the evidence were evenly balanced, defendant would be entitled to judgment in his favor.

CPLR 3213: Surety's labor and material bond deemed not to constitute an instrument for the payment of money only.

Although CPLR 3213 has already been the subject of three amendments, it is not yet clear what is encompassed by the phrase "instrument for the payment of money only."[119] At least, that is the overall impression yielded by an examination of the cases arising under this section.[120] That a negotiable instrument qualifies as a presumptively meritorious claim is certain.[121] But, beyond this it is difficult to predict whether a particular instrument will meet the court's definition of a money-only instrument. Perhaps the most well-received criterion advanced thus far is that an instrument is susceptible to 3213 treatment if a prima facie case is established by proof of the instrument and a failure to make the payments prescribed thereunder.[122]

In *Kipp Brothers, Inc. v. Hartford Accident & Indemnity Co.*[123] the Supreme Court, Westchester County, ruled that a labor and material bond executed by defendant as surety is not the type of instrument envisioned by the draftsmen of CPLR 3213. The court reasoned that although plaintiff had a direct action against the surety, the latter's obligation was secondary to the principal's duty of performance and only arises when the principal breaches its obligation. Since proof of facts extraneous to the bond would thus be necessary to establish a

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117 *Id.* at 959, 312 N.Y.S.2d at 768.

118 CPLR 3212 (e); *cf.* De Paul v. George, 34 App. Div. 2d 620, 309 N.Y.S.2d 90 (1st Dep't 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 358 (1970).

119 The construction problems arising under CPLR 3213 are due in part to the fact that similar relief did not exist under the CPA. In addition, the legislative reports on the section are silent as to what instruments the section was intended to encompass. *See* FIRST REP. 91; FIFTH REP. 492; SIXTH REP. 338.

120 For a discussion of cases arising under this section, see H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 860 (2d ed. 1968); *The Quarterly Survey*, 45 ST. JOHN'S L. REV., 359, 160 (1970); *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 335 (1969).

121 Seaman-Andwall Corp. v. Wright Mach. Corp., 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968).

122 *Id.*

123 63 Misc. 2d 788, 314 N.Y.S.2d 89 (Sup. Ct. Westchester County 1970).