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CPLR 4402: Inadvertent Reference to Insurance in Action Involving Automobile Registered in New York Not Sufficient Ground Upon Which to Declare a Mistrial

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Under CPLR 4102(a), a demand for a jury trial must be contained in the note of issue or in a written demand served upon the parties within ten days after service of the note of issue.[136] If a special verdict is required, the trial judge, under CPLR 4111, frames the issue for the jury's verdict. "No longer are motions for framing issues to be made," [137] said the court, except under CPLR 4212, regarding the advisory jury.

ARTICLE 44 — TRIAL MOTIONS

CPLR 4402: Inadvertent reference to insurance in action involving automobile registered in New York not sufficient ground upon which to declare a mistrial.

Upon the trial of the action in *Halstead v. Sanky*,[138] a passenger in plaintiff's auto revealed, upon cross examination, that he had given a statement to someone concerning the accident and that he received $2000.00 in settlement of his own claim. On re-direct, he was asked whether the person with whom he had settled was a representative of the defendant. The witness answered, " 'he was from the insurance company.' " [139] The defendant's motion for a mistrial was denied after a poll of the jury revealed that the reference to insurance did not affect the jurors' determination of the case.[140]

The court refused to declare a mistrial based merely upon the single inadvertent reference to insurance, especially since the auto was registered in New York. The court stated that New York has a compulsory insurance law [141] and the jurors were questioned, on *voir dire*, concerning their relationship to insurance companies;[142] therefore, to attribute to the jury ignorance of the existence of insurance in this case would be tantamount to a condemnation of the jury system.

The CPLR revisors have commented that in light of compulsory insurance, the matter of insurance will be of limited importance in

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[136] Such a demand must specify the issues to be determined by the jury unless a general demand for a jury trial is made. See 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4102.08 (1965).

[137] Brown v. Brown, 47 Misc. 2d 1046, 263 N.Y.S.2d 717, 718 (Sup. Ct. N.Y. County 1965).

[138] 48 Misc. 2d 586, 265 N.Y.S.2d 426 (Sup. Ct. Kings County 1965).

[139] *Id.* at 587, 265 N.Y.S.2d at 427.

[140] This court polled the jury under the procedure sanctioned by the Court of Appeals in Weisgerber v. Ancona, 284 N.Y. 665, 30 N.E.2d 608 (1940).

[141] N.Y. VEHICLE & TRAFFIC LAW § 312(1). This section makes proof of insurance coverage a condition precedent to registering a motor vehicle.

[142] CPLR 4110 allows a prospective juror to be asked whether he is a "shareholder, stockholder, director, officer or employee or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property. . . ."

the future;[143] and in *Uy v. Shapmor, Inc.*,[144] the appellate term stated: "were this an automobile accident case . . . [the inadvertent mention of insurance would not have been a ground for declaring a mistrial] because it is generally known by the public today that New York State has provided for compulsory liability insurance of automobiles."[145]

While the deliberate disclosure of the presence of a liability insurer is still a ground for declaring a mistrial, the *Halstead* decision has effectuated the liberal policy of the CPLR by ignoring inadvertent, non-prejudicial disclosure.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Future income of a spendthrift trust held attachable.

In *Cohen v. Carl M. Loeb, Rhoades & Co.*,[146] the court held that an attachment of the income of a spendthrift trust was effective, to the extent of ten per cent, against both the accrued income and future income of the trust. The Loeb company, defendant in the case, had impleaded one Dolan based upon his contract of indemnity. As third-party plaintiff, the Loeb company obtained an order attaching Dolan's interest in a certain testamentary trust, the corpus of which was located in New York. In holding the attachment valid, the court cited *Koch v. Burdsal*[147] as authority for the proposition that the attachment was effective against ten per cent of the future income of the trust.[148]

CPLR 6202 makes subject to *attachment* "any debt or property against which a money judgment may be enforced as provided in section 5201," which in turn essentially provides for *execution* against any property which could be *assigned or transferred*.[149] The apparent purpose of CPLR 6202 is to equate property subject to execution with property subject to attachment and thereby to eliminate the discrepancies which resulted from separate listings

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[143] SECOND REP. 233. See also 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4110.05 (1965).

[144] 45 Misc. 2d 543, 257 N.Y.S.2d 208 (App. T. 1st Dep't 1965).

[145] *Id.* at 544, 257 N.Y.S.2d at 209; Hager v. Bushman, 255 App. Div. 934, 8 N.Y.S.2d 725 (4th Dep't 1938); *cf.* Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

[146] 48 Misc. 2d 159, 162, 264 N.Y.S.2d 463, 466 (Sup. Ct. N.Y. County 1965).

[147] 199 Misc. 880, 104 N.Y.S.2d 782 (N.Y. City Ct. 1951).

[148] Cohen v. Carl M. Loeb, Rhoades & Co., 48 Misc. 2d 159, 162, 264 N.Y.S.2d 463, 466 (Sup. Ct. N.Y. County 1965). See also note 158 *infra* for a discussion of *Koch*.

[149] See CPLR 5201(b). As to debts, as opposed to property, CPLR 5201(a) permits enforcement of a money judgment against "any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor. . . ."