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ORDER SUBSTITUTING EXECUTORS AS PLAINTIFFS.

Essex County Circuit Court

MEYER L. RHEIN, *Plaintiff,*	*Action at Law.*
vs.	
SELICK J. MINDES, *Defendant.*	*Order.*

It appearing by petition duly verified and filed that Meyer L. Rhein, the plaintiff in this action, died a resident of the City of New York, State of New York, on July 16, 1928, after issue joined herein, that he left a will which has been duly admitted to probate by the Surrogate's Court of the County of New York, and that letters testamentary under said will were by said Court issued to Henry Crofut White, Harry Sammet and Lizbeth E. Rhein and that said executors have filed an exemplified copy of said will and of said letters in the office of the Register of the Prerogative Court.

And it further appearing that due notice of this application has been given to defendant and the Court having read said petition and heard the arguments of counsel and having duly considered the matter and being satisfied that the allegations of said petition are true and that the prayer of said petition should be granted

It is on this 22nd day of September, 1928

Order Substituting Executors as Plaintiffs.

Ordered that Henry Crofut White, Harry Sammet and Lizbeth E. Rhein, executors as aforesaid, be and they are hereby substituted as plaintiffs in this action, in the place and stead of Meyer L. Rhein, deceased, and that this action stand revived and be continued in the name of Henry Crofut White, Harry Sammet and Lizbeth E. Rhein as executors of the last will and testament of Meyer L. Rhein, deceased.

WORRALL F. MOUNTAIN,
Judge.

NOTICE AND GROUNDS OF APPEAL.

Filed November 5, 1928.

ESSEX CIRCUIT COURT.

MEYER L. RHEIN, *Plaintiff,* vs. SELICK J. MINDES, *Defendant.*	*Action at Law.* *On Appeal from Essex Circuit.* *Notice and Grounds of Appeal.*

To Henry C. White, Esq., attorney for plaintiff:

PLEASE TAKE NOTICE, that the defendant appeals to the New Jersey Supreme Court, from the judgment entered in this cause, on the following grounds:

1. The Court erred in ordering summary judgment in favor of the plaintiff and against the defendant.

2. The Court erred in ordering defendant's counter-claim to be struck out.

Dated October 29, 1928.

COULT, SATZ & TOMLINSON,
Attorneys for Defendant.

Service of copy of the within notice and grounds of appeal is hereby acknowledged this 2nd day of November, 1928.

HENRY CROFUT WHITE,
Attorney for Plaintiff.

COMPLAINT.

Summons duly issued, May 25, 1928.

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN,
Plaintiff,

against

SELICK J. MINDES,
Defendant.

MEYER L. RHEIN, residing in the Borough of Manhattan, City, County and State of New York, says that:

(1) On December 7, 1927, he recovered a judgment against the defendant in the City Court of the City of New York, New York County, which is a Court of Record in the State of New York, for the sum of $1,144.35, after due personal service of the summons and complaint upon said Selick J. Mindes in the City, County and State of New York, whereby according to the laws of the said State, said Court duly obtained jurisdiction over said defendant and of said action for the purpose of rendering judgment therein.

(2) Said defendant appeared in said action and upon a trial thereof, judgment of which an exemplified copy is hereto attached, marked A and hereby made part of the complaint, was rendered in favor of this plaintiff and against said defendant for $1,144.35 as by said copy appears.

Complaint.

(3) The plaintiff is still the owner and holder of the said judgment.

(4) No part of the said judgment has been paid and accordingly the said sum of $1,144.35, with interest thereon from December 7, 1927, is now due and payable to the plaintiff herein.

(5) Plaintiff demands damages against the defendant in the sum of $1,144.35, with interest thereon from December 7, 1927, with his costs and disbursements of this action.

HENRY CROFUT WHITE,
Attorney for Plaintiff,
1150 Rahway Road, Plainfield, N. J.

The People of the State of New York, by the grace of God, free and independent:

To all to whom these Presents shall come,

GREETING:

Know Ye, that we, having inspected the files of the City Court of the City of New York, do find there remaining on file a certain Judgment Roll in an action wherein Meyer L. Rhein, plaintiff, and Selick J. Mindes, defendant, in the words and figures following, to wit:

Complaint—Copy of Judgment Roll.

CITY COURT OF THE CITY OF NEW YORK.

NEW YORK COUNTY.

MEYER L. RHEIN,
Plaintiff,
against
SELICK J. MINDES,
Defendant.

Costs of Plaintiff.

COSTS.

Costs before Notice of Trial	$15.00
Costs after Notice of Trial	15.00
Trial Fee, Issue of Fact	30.00
Term Fees	10.00
Additional Allowance because Trial Lasted more than Two Days	10.00
	$80.00
Disbursements	13.35
Total	$93.35

DISBURSEMENTS.

Clerk's Fees on Entering Judgment	$1.00
Affidavits and Acknowledgments	.50
Serving Copy Summons and Complaint on Defendant	2.00
Satisfaction Piece	.25
Transcript and Filing, Supreme Court	.85
Jury Fees	3.00
Sheriff's Fees on Execution	2.50
Extract from Minutes	.25
Filing Note of Issue	3.00
	$13.35

I hereby certify that I have taxed this Bill of Costs at $93.35.

H. C. Perry, Clerk.

County of New York, *ss.*

Harry Sammet, the attorney for the plaintiff in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein; that they are reasonable in amount, and that each of the persons above named as witnesses attended as such witness on the trial of said action the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from, the said place of trial; and that each of said persons were necessary and material witnesses, or so believed to be; and that the copies or documents or papers as charged herein were actually and necessarily obtained for use.

HARRY SAMMET.

Sworn to before me this 3rd day
of December, 1927.

Lillian C. Trueg,
Notary Public.

Queens Co. Clk's No. 1810, Reg. No. 3299.
N. Y. Co. Clk's No. 133, Reg. No. 9140.
Kings Co. Clk's No. 22, Reg. No. 9076.
Bronx Co. Clk's No. 14, Reg. No. 2932.
Commission expires March 30, 1929.

City Court of the City of New York.

New York County.

Meyer L. Rhein,

Plaintiff,

—against—

Selick J. Mindes,

Defendant.

BILL OF COSTS

And Notice of Adjustment.

Take Notice, that the within is a copy of the items of the Costs and Disbursements in the within action, and that the same will be adjusted by the Clerk of the City Court, New York County, at his office, in 32 Chambers street, on the 9th day of Dec., 1927, at 10 o'clock in the forenoon of that day, and the amount inserted in the Judgment Roll.

Yours, &c.,

Harry Sammet,
Attorney for Plaintiff,
1440 Broadway.

To Remington & Meek,
141 Broadway,
Attorneys for Defendant.

Service of the within Costs and Notice of Adjustment is hereby admitted December 7, 1927.

Remington & Meek,
Attys. for Defendant.

Complaint—Copy of Judgment Roll.

CITY COURT OF THE CITY OF NEW YORK.

MEYER L. RHEIN, *Plaintiff,* *against* SELICK J. MINDES, *Defendant.*	*Summons with Notice.*

To the Above Named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney, within six days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, December 11, 1925.

HARRY SAMMET,
Attorney for Plaintiff,
Office and P. O. Address,
165 Broadway, New York City.

To the Defendant:

Notice is hereby given to you that, upon your default to appear, or answer the within summons, judgment will be taken against you for the sum of $1,051.00 with interest from the 4th day of December, 1923, and the costs of this action.

HARRY SAMMET,
Attorney for Plaintiff.

Complaint—Copy of Judgment Roll.

CITY COURT OF THE CITY OF NEW YORK,
NEW YORK COUNTY.

MEYER L. RHEIN, *Plaintiff,* against SELICK J. MINDES, *Defendant.*	*Affidavit of Service* *Summons and Complaint.*

STATE, CITY AND COUNTY OF NEW YORK, *ss.*

KEAVA BERNZWEIG, being duly sworn, says that he is 21 years of age. That on the 22nd day of January, 1926, at 38th street and 7th avenue, Borough of Manhattan, City of New York, he served the summons and complaint in this action, hereto annexed, upon Selick J. Mindes, defendant in this action, by delivering a true copy of the said summons and complaint to such defendant personally and leaving the same with Selick J. Mindes.

He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as defendant in this action.

KEAVA BERNZWEIG.

Sworn to before me this 23rd day
of January, 1926.

VIRGINIA M. KEENE,
Comm. of Deeds, N. Y. C.
New York County Clerk's No. 103.
Reg. 27061.
Com. expires May 5, 1927.

Complaint—Copy of Judgment Roll.

CITY COURT OF THE CITY OF NEW YORK.

MEYER L. RHEIN,
Plaintiff,

against

SELICK J. MINDES,
Defendant.

Plaintiff above named, by Harry Sammet, his attorney, shows and alleges:

I. That plaintiff is a physician and dentist duly admitted to practice in the State of New York.

II. That plaintiff at the special instance and request of the defendant, performed dental services for the defendant between January 18, 1922, and December 4, 1923.

III. That said services were reasonably worth the sum of $1,051.

IV. That said sum of $1,051 has been duly demanded from the defendant but that no part thereof has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of $1,051 with interest thereon from December 4, 1923, together with the costs and disbursements of this action.

HARRY SAMMET,
Attorney for Plaintiff,
Office and P. O. Address, 165 Broadway,
Borough of Manhattan, City of New York.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

MEYER L. RHEIN, being duly sworn, deposes and says that he is the plaintiff in the within action; that he has read the foregoing complaint and knows the contents thereof, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

MEYER L. RHEIN.

Sworn to before me this 27th day of January, 1926.

STEPHEN A. HUBBARD,
Notary Public, N. Y. Co. No. 479.

CITY COURT OF THE CITY OF NEW YORK.

MEYER L. RHEIN,
Plaintiff,

against

SELICK J. MINDES,
Defendant.

Defendant, appearing by Remington & Meek, his attorneys, answers plaintiff's complaint as follows:

ANSWER.

1. Defendant denies any knowledge or information sufficient to form a belief as to whether or not plaintiff is a physician and dentist, duly licensed to practice in the State of New York, and therefore denies the same and calls for proof thereof.

2. Defendant, on information and belief, denies each and all the remaining allegations in plaintiff's complaint contained.

For a further and complete defense defendant says:

3. Plaintiff, as defendant is informed and believes, claims to have done or caused to be done certain dental work upon defendant's wife; but whatever was done was not done at defendant's instance and request and plaintiff has received the sum of $1,146.00 in payment therefor, which sum is far in excess of the reasonable worth of all said alleged services.

WHEREFORE, defendant demands judgment that the complaint be dismissed with costs and disbursements.

REMINGTON & MEEK,
Attorneys for Defendant,
Office and P. O. Address, 141 Broadway,
Borough of Manhattan, City of New York.

Complaint—Copy of Judgment Roll.

CITY COURT OF THE CITY OF NEW YORK,
NEW YORK COUNTY.

MEYER L. RHEIN,
Plaintiff,

against

SELICK J. MINDES,
Defendant.

The plaintiff, for his bill of particulars, shows and alleges:

I. That the services rendered to the defendant's wife were rendered under the personal supervision of the plaintiff and at all the times during the course of the said work the said plaintiff was in control and in charge of the same.

II. The services rendered to the defendant were partly performed by Dr. E. G. Van Valey, an associate of the plaintiff, by Dr. Nell E. Halsted also an associate of the plaintiff.

III. That the following services were rendered by Dr. E. G. Van Valey:
1922

January 18th 2 Hrs.
Upper right second molar; Na & k, ream canals, diagnostic wires and X-Ray ..... $ 30.

January 23rd 1½ Hrs.
Upper right second molar; Na & k, ream canals, diagnostic wires, and three X-Rays ..... 25.

January 31st 1½ Hrs.
Lower right third molar; Testing for vitality and fournd non-vital adjusting crown ..... 10.

February 6th 2 Hrs.
Upper left first bicuspid cemented banded porcelain crown, Upper right second molar; electrolytic medication, and cultures taken..... 100.

February 14th 1½ Hrs.
Upper right second molar; Na & k, ream canals, diagnostic wires X-Ray and Prophylaxis ..... 17.

February 24th 1 Hr.
Upper right second molar; Na & K, ream canals, diagnostic wires X-Ray ..... 13.

April 7th 1½ Hrs.
Upper right second molar; Electrolytic medication, X-Ray ..... 15.

April 14th 1 Hr.
Upper right second molar; Electrolytic medication, and two cultures taken ..... 10.

April 25th 1½ Hrs.
Upper right second molar; Electroyltic medication, diagnostic wires, three X-Rays ..... 20.

May 2nd 1¼ Hrs.
Upper right second molar, Novocain injection, Na & k ream canals, wire and X-Ray ..... 18.

May 15th 1½ Hrs.
Upper right second molar; Electrolytic medication, fill lingual root X-Ray ..... 20.

May 22nd 1¼ Hrs.
Electrolytic Medication, fill Disto Buo. canal X-Ray ..... 17.

May 31st 1¼ Hrs.
Upper right second molar, Electrolytic medication, fill mes. canal X-Ray ..... 15.

July 26th
Upper right first bicuspid porcelain jacket crown adjusted, stained and cemented in place ..... 125.

October 10th 1½ Hrs.
Upper left lateral incisor, preparation for inlay ..... 15.

October 13th 1 Hr.
Upper right second molar; X-Ray covered root filling ..... 15.

October 18th 1¼ Hrs.
Upper right second molar, preparation and impression for inlay .... 10.

October 24th
Upper right second molar, gold and platinum inlay cemented and prophylaxis ..... 45.

November 8th 1 Hr.
Upper right second molar, mesial and occlusal surfaces preparation and impression for inlay ..... 10.

November 13th 1 Hr.
Upper right first molar distal at gingiva-Amalgam filling ..... 10.

November 22nd 1¼ Hrs.
Upper right first molar mesial, occlusal and distal surfaces, preparation for inlay ..... 10.

November 27th 1¼ Hrs.
Upper right first and second molars, impressions for inlays ..... 10.

1923
April 9th 1 Hr.
Upper right second molar, impressions for inlay ..... 8.

April 19th 1 Hr.
Upper right first and second molars; impressions for inlays .... 10.

May 1st
Upper right first and second molars; two gold and platinum inlays ..... 70.

June 26th
Upper right second bicuspids; cemented coping crown, steel facing 25.

July 31st
Upper left lateral incisor porcelain jacket crown ..... 40.

October 18th
Upper right lateral incisor placed temporary crown and X-Ray ..... 55.

November 14th
Upper right lateral incisor, porcelain jacket crown ..... 125.

December 14th 1¼ Hrs.
Lower left first and second bicuspids;. Removed decay—Gutta percha fillings ..... 15.

4. That the following services were rendered by Dr. Nell E. Halsted:

1922
July 31st 1 Hr.
Prophylaxis ..... 10.

October 24th ½ Hr.
Treating inflammation of gums .... 6.

1923
February 15th 1 Hr.
Prophylaxis ..... 10.

May 10th 1 Hr.
Prophylactic treatment ..... 10.

November 13th 1 Hr.
Prophylaxis ..... 10.

5. The upper right second molar was so badly decayed that the pulp had become diseased. The diseased pulp was removed, the canals cleaned, the three root canals in the tooth were filled, and the lost tooth structure was replaced with two gold and platinum inlays. Upon completion of this work the tooth appeared to be in good condition.

On the lower right third molar tests were made which led to the conclusion that the pulp was non-vital, and extraction of this tooth was advised.

Upper left first bicuspid: Prior to February, 1922, this tooth had been without a natural crown. This tooth was restored with a banded

porcelain crown with Steel's facing, resulting in the restoration of the natural appearance and masticatory efficiency of the same.

The upper right first bicuspid was so badly decayed that a metalic restoration of the same would be unsightly, thereby resulting in the necessity of placing a porcelain jacket crown, which restored the lost tooth structure and enhanced the appearance of the teeth.

Upper right first molar: On account of the decay in this tooth, it was necessary to insert an amalgam filling at the cervix, together with a large inlay.

Upper right second bicuspid: The natural crown on the said tooth was missing. A crown was cemented in place of the natural one which was missing and this restored the usefulness and appearance of the lost structure.

Upper right lateral: This tooth was replaced by a combination crown banded dowel and jacket. This restored the structure and appearance of the tooth.

Lower left first and second bicuspid; Temporary fillings of gutta percha were inserted which arrested the progress of the decay at that time.

Upper left lateral: The natural crown was badly broken down. It was replaced by a porcelain jacket, thereby restoring to the said tooth its natural appearance and usefulness.

Dated New York, October 25, 1927.

Yours, etc.,

HARRY SAMMET,
Attorney for Plaintiff,
Office and P. O. Address, 1440 Broadway,
Borough of Manhattan, City of New York.

To Remington & Meek, Esqs., attorneys for defendant, Office and P. O. address, 141 Broadway, Borough of Manhattan, City of New York.

County of New York. }
State of New York, } *ss.*

Meyer L. Rhein, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action. That he has read the foregoing bill of particulars and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

MEYER L. RHEIN.

Sworn to before me this 25th day of October, 1927.

Lillian C. Trueg,
Notary Public.
Queens Co. Clerk's No. 1810, Reg. No. 3299.
N. Y. Co. Clerk's No. 133, Reg. No. 9140.
Kings Co. Clerk's No. 22, Reg. No. 9076.
Bronx Co. Clerk's No. 14, Reg. No. 2932.
Commission expires March 30, 1929.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

AARON GOODY, being duly sworn, deposes and says: That he is over the age of 21 years. That on the 15th day of November, 1927, at No. 141 Broadway, in the Borough of Manhattan, he served the foregoing bill of particulars upon Remington & Meek, by delivering to and leaving with a stenographer employed by them a true copy thereof at 4:30 P. M. of that day.

Deponent further says that he knew the attorney mentioned and described in said bill of particulars as the attorney for the defendant therein.

AARON GOODY.

Sworn to before me this 15th day of November, 1927.

LILLIAN C. TRUEG,
Notary Public.
Queens Co. Clerk's No. 1810, Reg. No. 3299.
N. Y. Co. Clerk's No. 133, Reg. No. 9140.
Kings Co. Clerk's No. 22, Reg. No. 9076.
Bronx Co. Clerk's No. 14, Reg. No. 2932.
Commission expires March 30, 1929.

Complaint—Copy of Judgment Roll.

CITY COURT OF THE CITY OF NEW YORK.
NEW YORK COUNTY.

MEYER L. RHEIN, *Plaintiff,* *against* SELICK J. MINDES, *Defendant.*	*Notice of Trial by Plaintiff.*

PLEASE TO TAKE NOTICE that the issue of fact and law in this action will be brought to trial and an inquest taken at a trial term, Part I of the above named court, appointed to be held in and for the City of New York, at the Court House, The Brownstone Building, at No. 32 Chambers street, in the Borough of Manhattan, City of New York, on the 25th day of February, 1926, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated 19th day of February, 1926.

HARRY SAMMET,
Attorney for Plaintiff, 165 Broadway,
Borough of Manhattan, New York City.

To Remington & Meek, Esqs., attorneys for defendant, 141 Broadway.

EXTRACT FROM CLERK'S MINUTES.

MEYER L. RHEIN,
Plaintiff,
against
SELICK J. MINDES,
Defendant.
} *Verdict.*

At a trial term of the City Court of the City of New York, held at the Brownstone Building, 32 Chambers street, City Hall Park, in the City of New York, on the 29-30 days of November and December 1-2, A. D. 1927.

Present:

Hon. Justice Joseph T. Ryan, Justice.

VERDICT.

The Court charge the jury who say that they find a verdict for the plaintiff and assess the damages at the sum of $1,051.

Motion to set aside verdict made and denied.

Motion for new trial made and denied.

10 days' stay of execution after notice of entry of judgment.

30 days to make and serve a case.

(Extract from the minutes.)

HARRY C. PERRY,
Clerk.

O. K.
A. J. K.

JUDGMENT.

CITY COURT OF THE CITY OF NEW YORK,
NEW YORK COUNTY.

MEYER L. RHEIN,
Plaintiff,

against

SELICK J. MINDES,
Defendant.

The issues in this action having been duly brought on for trial before Hon. Joseph T. Ryan, one of the Justices of this Court and a jury at trial term, Part I of this court, held on the 29th and 30th days of November, 1927, and on the 1st and 2nd days of December, 1927, at the City Court House, No. 32 Chambers street, in the Borough of Manhattan, City of New York, and the jury having returned a verdict in favor of the plaintiff and against the defendant for the sum of one thousand fifty-one ($1,051) dollars and the costs of the plaintiff having been taxed at ninety-three 35/100 dollars.

Now, on motion of Harry Sammet, attorney for the plaintiff, it is

ADJUDGED that the plaintiff, Meyer L. Rhein, do recover of the defendant, Selick J. Mindes, the sum of one thousand fifty-one ($1,051) dollars costs as taxed, making in all the sum of eleven hundred and forty-four 35/100 dollars and that said plaintiff have execution therefor.

Dated New York, December 7, 1927.

H. C. PERRY,
Clerk.

All which we have caused by these to be exemplified and the Seal of the City Court of the City of New York to be hereunto affixed.

WITNESS, EDWARD B. LA FETRA, Esquire, Chief and Presiding Justice of our said Court, at the Court House, No. 32 Chambers street, in The City of New York, this 24th day of May, A. D. 1928.

HARRY C. PERRY,
Clerk.

CITY COURT OF THE CITY OF NEW YORK.

MEYER L. RHEIN,
against
SELICK J. MINDES.

I, EDWARD B. LA FETRA, Chief and Presiding Justice of the City Court of The City of New York, do hereby certify that Harry C. Perry, whose name is subscribed to the preceding exemplification, is the Clerk of the said City Court of The City of New York, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the said exemplification is the Seal of the said City Court of The City of New York, and that the attestation thereof is in due form of law.

Dated, New York, May 24, 1928.

EDWARD B. LA FETRA,
Chief and Presiding Justice of the City Court of The City of New York.

STATE OF NEW YORK,
CITY OF NEW YORK. } *ss.*

I, HARRY C. PERRY, Clerk of the City Court of The City of New York, do hereby certify that Edward B. La Fetra, whose name is subscribed to the preceding certificate, is the Chief and Presiding Justice of the City Court of The City of New York, duly elected and sworn, and that the signature of said Justice to this certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the said Court, this 24th day of May, 1928.

HARRY C. PERRY,
Clerk.

(SEAL)

ANSWER AND COUNTER-CLAIM.

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN, *Plaintiff,*	*Action at Law.*
vs.	*Answer and Counter-claim.*
SELICK J. MINDES, *Defendant.*	

Defendant, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint herein, says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Defendant has no knowledge or information sufficient to form a belief as to paragraph 3.

4. Paragraph 4 is admitted, except the allegation that said judgment is now due and payable to the plaintiff herein, which allegation is denied.

Defendant, by way of counter-claim against the plaintiff, says:

1. Plaintiff, Meyer L. Rhein, before and at the time of the wrongs herein complained of, was and still is a licensed physician, surgeon and dentist of the State of New York.

2. Said plaintiff before the date of the committing of the wrongs and injury herein set forth, undertook for hire and reward as such physician, surgeon and dentist, to perform certain operations and repair work involving the teeth, teeth

roots and jaws of one Kate A. Mindes, who was then and has since been the wife of the said defendant.

3. Said operations and work were performed in the City of New York and State of New York on divers dates between March 2, 1920, and December 4, 1923, during the whole of which period said Kate A. Mindes was constantly and without interruption under the care of the said plaintiff as such physician, surgeon and dentist, and subject to his advice and treatment.

4. That while the said Kate A. Mindes was under the care of the said plaintiff, and on divers dates between and including the dates hereinabove mentioned, the said plaintiff in performing the said operations and repair work failed to exercise reasonable and ordinary care and intelligence in the exercise of his skill and the application of his knowledge, in that he, the said plaintiff, by himself and by his agents and servants thereto duly authorized, carelessly and negligently caused, suffered and procured the said Kate A. Mindes to be and become injured in and about her teeth, teeth roots, jaws, mouth, face, skull, bones and tissues of the face and head, ears and eyes and nerves of the face, head and body, by improperly and unskillfully undertaking and performing certain dental treatment which he then and there knew, or ought to have known, would have been dangerous and injurious to the health, comfort and life of the said Kate A. Mindes.

5. As the direct and proximate result thereof, the said Kate A. Mindes became and was sick, sore, lame and disordered and suffered injuries in and about her head and body, some of which

are permanent in character, and caused shock and injuries to the nervous system of the said Kate A. Mindes.

6. As the result of the negligence aforesaid of the plaintiff, the defendant, Selick J. Mindes, has been and in the future will be deprived of the comfort, society and services of his said wife, and has expended and will in the future expend large sums of money for medical and dental attendance and treatment in order to cure his wife of her said injuries, and has expended, and will in the future expend, other sums of money for the hiring of services of others to do those things which his wife heretofore did for him.

WHEREFORE defendant demands of the plaintiff the sum of $10,000 damages on the counter-claim.

COULT, SATZ & TOMLINSON,
Attorneys of Defendant.

NOTICE OF MOTION AND AFFIDAVITS.

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN, *Plaintiff,*	*Action at Law.*
vs.	
SELICK J. MINDES, *Defendant.*	*Notice of Motion.*

To Messrs. Coult, Satz & Tomlinson, attorneys for defendant:

PLEASE TAKE NOTICE that on Saturday, the 21st day of July, 1928, at the Hall of Records, Newark, N. J., at ten o'clock in the forenoon (Daylight Saving Time), or as soon thereafter as counsel can be heard, I shall apply to Hon. Worrall F. Mountain, one of the judges of the Essex County Circuit Court, for an order striking out the answer and counter-claim heretofore filed herein by the defendant and for final judgment against said defendant, on the ground that said answer and counter-claim are frivolous and that said defendant has no legal defense to this action, which motion will be based upon the affidavits of Meyer L. Rhein and Harry Sammet hereto annexed copies of which are herewith served upon you.

Dated July 13, 1928.

Yours, &c.,

HENRY CROFUT WHITE,
Attorney of Plaintiff.

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN, *Plaintiff,* vs. SELICK J. MINDES, *Defendant.*	*Action at Law.* *Affidavit.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

MEYER L. RHEIN, of full age, being duly sworn according to law, on his oath deposes and says:

I am the plaintiff in this action and am a physician and dentist duly admitted to practice in the State of New York.

At defendant's request I performed dental services for him between January 18, 1922, and December 4, 1923. Such services were reasonably worth the sum of one thousand and fifty-one and 00/100 dollars ($1,051.00).

The defendant did not pay for these services and I brought suit against him therefor in the City Court of the City of New York and after a trial lasting three days recovered a judgment against him for one thousand one hundred forty-four and 35/100 dollars ($1,144.35) on December 7, 1927. The defendant appealed to the Appellate Term of the Supreme Court of the State of New York and that Court affirmed the judgment.

No part of this judgment has been paid. It is still in full force and effect. I have not assigned or satisfied it and am still the owner and holder of it. There is due me thereon from the defendant the sum of one thousand one hundred forty-four and 35/100 dollars ($1,144.35) with in-

terest thereon from the 7th day of December, 1927.

I believe there is no defense to this action.

MEYER L. RHEIN.

Sworn and subscribed to this 11th day of July, 1928, before me a Notary Public in and for the County of Richmond and State of New York duly commissioned and sworn and authorized to take affidavits within said County and State.

STEPHEN A. HUBBARD,
(SEAL) Notary Public, Richmond County.
Certificate filed in N. Y. County.
(N. Y. Clerk's certificate attached.)

Plaintiff's Notice of Motion and Affidavits.

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN, *Plaintiff,*	*Action at Law.*
vs.	
SELICK J. MINDES, *Defendant.*	*Affidavit.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

HARRY SAMMET, of full age, being duly sworn, according to law, on his oath deposes and says:

I am an attorney and counsellor at law of the State of New York and represented the plaintiff herein in his action in New York which resulted in the judgment upon which this action has been brought.

The plaintiff is a physician and dentist duly admitted to practice in the State of New York and there practising.

Between January 18, 1922, and December 4, 1923, at defendant's request, plaintiff performed dental services for the defendant which were reasonably worth the sum of one thousand and fifty-one and 00/100 dollars ($1,051).

Defendant did not pay for these services and on December 11, 1925, on plaintiff's behalf, I instituted suit against the defendant in the City Court of the City of New York to recover the amount due.

The defendant was duly personally served with the summons in the Borough of Manhattan of the City of New York on January 22, 1926, and thereafter appeared and interposed an answer denying the allegations of the complaint and setting up

as a further defense that the bill sued on was for services to defendant's wife and that these services were not performed at defendant's request and that the plaintiff had been paid a sum far in excess of the reasonable worth of his services.

Thereafter the plaintiff furnished the defendant with a verified bill of particulars covering several pages which showed in great detail the services rendered.

The trial of the case came on before Court and jury and was hotly contested taking over three days to try. The defendant attempted to prove by his witnesses that the plaintiff's services were unsatisfactory and not worth the amount charged therefor. The jury brought in a verdict in favor of the plaintiff for the full amount sued for and judgment was entered on December 7, 1927, for one thousand one hundred forty-four and 35/100 dollars ($1,144.35).

The defendant thereupon appealed to the Appellate Term of the Supreme Court and that court on May 2, 1928, affirmed the judgment.

I have read the pleadings in this present action, copies of which are attached to this affidavit.

The complaint sets up the recovery of the judgment in New York after due personal service of the summons and complaint on the defendant, the appearance of the defendant in said action, and that, after a trial thereof, judgment was rendered in favor of the plaintiff and against the defendant for one thousand one hundred forty-four and 35/100 dollars ($1,144.35), that the plaintiff is still the owner and holder of said judgment no part of which has been paid and that said sum of one thousand one hundred forty-four and 35/100 dollars ($1,144.35) with

interest is due. A complete exemplified copy of all the pleadings and proceedings in the New York action including the judgment is attached to the complaint herein.

The defendant's answer admits all the allegations of the complaint except that defendant alleges that he has no knowledge or information sufficient to form a belief as to whether plaintiff is still the owner and holder of the judgment and except that defendant denies that the judgment is now due the plaintiff.

The defendant then, by way of counter-claim, sets up a cause of action against the plaintiff for loss of his (defendant's) wife's services and for expenses, past and future, incurred and to be incurred, in attempting to cure his wife of injuries alleged to have been caused by the plaintiff's negligence in performing operations upon and in treating said wife in the City and State of New York on divers dates between March 2, 1920, and December 4, 1923, and demands ten thousand dollars ($10,000) damages on said counter-claim.

The services rendered to defendant's wife by plaintiff referred to in defendant's said counter-claim were included in those for which plaintiff recovered his judgment in New York and such counter-claim might have been set up by defendant in the New York action. Although such counter-claim was not set up, the value of the plaintiff's services was gone into upon the trial and adjudicated.

The cause of action attempted to be set up by the defendant in this action by way of counter-claim is barred in the State of New York by the Statute of Limitations there in force and under that statute and the decisions could not now be

maintained in that state either in an independent action or by way of counter-claim. It is specifically alleged in defendant's answer that the services rendered were rendered in the City and State of New York.

Section 49 of the New York Civil Practice Act, subdivision 6, provides that an action to recover damages for a personal injury resulting from negligence must be commenced within three years after the cause of action has accrued. The Court of Appeals has held that this provision applies to a cause of action by a husband for loss of services of his wife because of personal injuries to her caused by defendant's negligence.

Section 50 of the New York Civil Practice Act, subdivision 1, provides that an action to recover damages for malpractice must be commenced within two years after the cause of action has accrued.

I verily believe that there is no defense to this action and that the answer and counter-claim are frivolous and filed merely for the purpose of delay.

HARRY SAMMET.

Sworn and subscribed to this 13th day of July, 1928, before me a Notary Public in and for the County of Bronx, and State of New York duly commissioned and sworn and authorized to take affidavits within said County and State.

HENRY HESSE,
(L. S.) Notary Public (124),
Bronx County.
Certified in N. Y. Clerk's office (579).
(N. Y. Co. Clerk's certificate attached.)

Plaintiff's Notice of Motion and Affidavits.

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN,
Plaintiff,

against

SELICK J. MINDES,
Defendant.

MEYER L. RHEIN, residing in the Borough of Manhattan, City, County and State of New York, says that:

(1) On December 7, 1927, he recovered a judgment against the defendant in the City Court of the City of New York, New York County, which is a Court of Record in the State of New York, for the sum of $1,144.35, after due personal service of the summons and complaint upon said Selick J. Mindes in the City, County and State of New York, whereby according to the laws of the said State, said court duly obtained jurisdiction over said defendant and of said action for the purpose of rendering judgment therein.

(2) Said defendant appeared in said action and upon a trial thereof, judgment of which an exemplified copy is hereto attached, marked A and hereby made part of the complaint, was rendered in favor of this plaintiff and against said defendant for $1,144.35 as by said copy appears.

(3) The plaintiff is still the owner and holder of the said judgment.

(4) No part of the said judgment has been paid and accordingly the said sum of $1,144.35

with interest thereon from December 7, 1927, is now due and payable to the plaintiff herein.

(5) Plaintiff demands damages against the defendant in the sum of $1,144.35, with interest thereon from December 7, 1927, with his costs and disbursements of this action.

HENRY CROFUT WHITE,
Attorney for Plaintiff, 1150 Rahway Road,
Plainfiled, N. J.

DEFENDANT'S AFFIDAVIT.

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN, *Plaintiff,*	*Action at Law.*
vs.	*On Motion to Strike Out.*
SELICK J. MINDES, *Defendant.*	*Affidavit.*

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

SELICK J. MINDES, being duly sworn according to law, upon his oath deposes and says:

I am the defendant named in the foregoing action. I have read the affidavits attached to the notice of motion served by the plaintiff upon me. I was present at the trial of the action in the City Court of the City of New York which is referred to in said affidavits annexed to said notice of motion. At the trial of said cause, the only issues before the Court and the only ones tried in said cause were as follows: whether or not the services alleged to have been performed by the plaintiff therein, who is the plaintiff in this suit, were reasonably worth the amount claimed by the plaintiff; and, whether or not payment had been made for such services in full. The questions of whether or not the services were performed in a skillful manner or whether or not the said plaintiff was guilty of negligence in the performance of said work were not at issue in said cause and were not tried.

SELICK J. MINDES.

Sworn and subscribed to before me,
this 18th day of July, 1928.

EMMA J. HUEBNER,
Notary Public of New Jersey.

ORDER FOR SUMMARY JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN, *Plaintiff,*	*Action at Law.*
vs.	*Order for Summary Judgment.*
SELICK J. MINDES, *Defendant.*	

It appearing by affidavits filed in the cause that the defense interposed by defendant's answer and counter-claim is frivolous and the defendant, after due notice, having failed to show such facts as entitle him to defend, and it further appearing that since the institution of the motion for this order, viz: on July 16, 1928, the plaintiff, Meyer L. Rhein, died, leaving a will which was, on or about August 13, 1928, duly admitted to probate by the Surrogate's Court of the County of New York, State of New York, of which state the said plaintiff was a resident, that thereafter, letters testamentary under said will were duly granted by said Surrogate's Court to Henry Crofut White, Harry Sammet and Elizabeth E. Rhein, that said executors have filed an exemplified copy of said will and of said letters in the office of the Register of the Pre-

rogative Court as provided by law, and that by order of this court, they have been substituted as plaintiffs in this cause in the place and stead of said Meyer L. Rhein, deceased,

It is on this 20th day of October, 1928, ORDERED that the said answer and counter-claim be stricken out and that final judgment be entered herein in favor of Henry Crofut White, Harry Sammet, Elizabeth E. Rhein as executors of the last will and testament of Meyer L. Rhein, deceased, and against the defendant, Selick J. Mindes, for the sum of $1,119.84 besides costs to be taxed.

WORRALL F. MOUNTAIN,
Judge.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ESSEX. }

46411
MEYER L. RHEIN,
Plaintiff,

vs.

SELICK J. MINDES,
Defendant.

Judgment against Selick J. Mindes.

Damages	$1,195.84
Costs	63.43
Amount	$1,259.27

Date when entered October 20, 1928.

Plaintiff's attorney, Henry Crofut White.

STATE OF NEW JERSEY, } *ss.*
ESSEX COUNTY CLERK'S OFFICE. }

I CERTIFY that the foregoing is a correct abstract from the Circuit Judgment Record Book 105, page 481, kept in Clerk's Office of a judgment rendered in the Circuit Court of Essex County.

IN WITNESS WHEREOF, I have hereunto set my hand and Official Seal this 8th day of November, A. D. 1928.

JOHN H. SCOTT.

Judgment.

46411

STATE OF NEW JERSEY.

Essex County

Circuit Court.

Meyer L. Rhein,

Plaintiff,

against

Selick J. Mindes,

Defendant.

TRANSCRIPT OF JUDGMENT.

Damages	$1,195.84
Costs	63.43
Amount	$1,259.27

STIPULATION TO CORRECT STATE OF CASE.

NEW JERSEY SUPREME COURT.

HENRY CROFUT WHITE, HARRY SAMMET and LIZBETH E. RHEIN, Executors of the Last Will and Testament of Meyer L. Rhein, deceased, *Plaintiffs-Respondents,* *vs.* SELICK J. MINDES, *Defendant-Appellant.*	*On Appeal.* *Stipulation to Correct State of Case.*

It is hereby stipulated and agreed that the State of Case as printed, filed and served shall be corrected and amended in the following particulars:

1. By changing the name "Elizabeth" as given in the order for summary judgment printed on pages 41 and 42 to read "Lizbeth" wherever the same occurs therein and by changing the figures $1119.84 on page 42 to read $1195.84.

2. By correcting the abstract of judgment as given on page 43 by changing the words "Judgment against Selick J. Mindes" to read "Judgment in favor of Henry Crofut White, Harry Sammet and Lizbeth E. Rhein as Executors of the last Will and Testament of Meyer L. Rhein, deceased, and against Selick J. Mindes."

3. By adding to said State of Case the following affidavit which was read on the motion to strike out:

ESSEX COUNTY CIRCUIT COURT.

MEYER L. RHEIN, *Plaintiff,*		*Action at Law.*
vs.		
SELICK K. MINDES, *Defendant.*		*Affidavit.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } *ss.*

HARRY SAMMET, being duly sworn according to law, on his oath deposes and says:

I am one of the executors of the Will of Meyer L. Rhein, the plaintiff herein.

Upon the death of the said Meyer L. Rhein, the judgment recovered by him against the defendant in the City Court of the City of New York, New York County, was still unpaid and is still unpaid and constitutes one of the assets of the estate coming into our hands as executors.

Said judgment is in full force and effect, nothing having been paid thereon and there is now due from the defendant the principal sum of $1144.35 and interest thereon from December 7, 1927 amounting to $51.49, making a total of $1195.84.

HARRY SAMMET.

Sworn and subscribed to before me
this 1st day of September, 1928.

LILLIAN C. TRUEG,
Notary Public Queens Co.
N. Y. Co. Clk's ctf. attached.

Dated December 22, 1928.

HENRY CROFUT WHITE,
Attorney for Plaintiffs-Respondents.

COULT, SATZ & TOMLINSON
Attorneys for Defendant-Appellant.

OPINION OF SUPREME COURT.

Filed April 25, 1929.

NEW JERSEY SUPREME COURT.

No. 14 January Term, 1929.

HENRY CROFUT WHITE, *et als.*, *Plaintiffs-Respondents,* *vs.* SELICK J. MINDES, *Defendant-Appellant.*	*On Appeal.* *Action at Law.*

Submitted January Term 1929; Decided April 25, 1929.

In a suit on a judgment recovered in a New York Court, which acquired jurisdiction over the defendant by personal service in that State—(the judgment in the New York Court was obtained for professional services) the defendant cannot maintain a counter-claim for malpractice in a suit brought on the New York judgment, in the Courts of New Jersey.

Before Justices Black, Campbell and Case.

For the plaintiffs-respondents—Mr. Henry Crofut White.

For the defendant-appellant—Messrs. Coult, Satz & Tomlinson.

The opinion of the Court was delivered by BLACK, *J.*

This suit was brought on a judgment recovered in a Court of record in the City of New York, for the sum of $1,144.35. The complaint

alleges, that personal service was made upon the defendant in New York. An answer and counter-claim were filed. The counter-claim alleges, that the plaintiff was a physician, surgeon and dentist, and performed services on one Kate A. Mindes, the wife of the defendant, and by reason of malpractice claims $10,000 damages against the plaintiff, on the counter-claim.

The case coming on for hearing before the judge of the Circuit Court in Essex County; he ordered the answer and counter-claim stricken out and final judgment entered in favor of the plaintiffs for the sum of $1,195.84, the amount of the New York judgment with interest. This is the ground of appeal, which presents but a single point of law, viz: Can a counter-claim be maintained against the New York judgment in this suit. The precise point does not seem to have been considered in any of our reported cases. There is no point made about striking out the answer. The case of Jardine *v.* Reichert, 39 N. J. L. 165; in an opinion by Chief Justice Beasley, it was held, that a judgment rendered in another state, when sued on here, can be impeached only on the ground, that the adjudging court did not have jurisdiction over the person of the defendant or the subject matter. The application of that case, to the facts of the case under discussion, leads to the affirmance of the Essex County Circuit Court. Goldstein *v.* Siniscalco, 136 Atl. 593; The Evidence Act 2 Comp. Stat. p. 2225, Sec 16 provides, in suits upon a foreign judgment, or a judgment of any court out of this State, the defendant, or person sought to be affected by such judgment, may show that the defendant therein was not summoned, did not appear or was not within the jurisdiction of such foreign Court, notwithstanding it may be recited in the record

of such proceedings, that he was summons &c. and such recital shall not conclude said defendant, or estop him from proving that the same is not true. This subject was considered by the Court of Errors and Appeals in the case of Amith *v.* Swart, 134 Atl. 755. The conclusion reached in that case is in harmony with the decision in the case of Jardine *v.* Reichert, 39 N. J. L. 165; which is the leading case on this subject in our reports.

15 R. C. L. p. 915, Sec. 394; 23 Cyc. p. 1511 (E) Defences; 34 Corp. Juris p. 1131, Sec. 1606 (2); p. 1114, Sec. 1582.

It is argued, however, in the appellant's brief, that there is some authority to the contrary, which is stated in 23 Cyc. 1205;

Citing Jordahl *v.* Berry, 72 Minn. 119; 45 L. R. A. 54k; Sale *v.* Eichberg, 105 Tenn. 333; 52 L. R. A. 894; Ressequie *v.* Byers, 52 Wis. 650; 38 Am. Rep. 775. But these cases, so far as we have been able to examine them, involve controversies over judgments recovered in the same State, in which the controversy arose; such as, a suit for professional services, then, a second suit in the same State for malpractice. A different principle involved in those cases, from that to be applied, to the situation of the case under discussion; 15 R. C. L. p. 1043, Sec. 522.

For the reasons expressed in the opinion of Chief Justice Beasley, in the case of Jardine *v.* Reichert, 39 N. J. L. 165, applied to the facts of this case, the judgment of the Essex County Circuit Court is affirmed.

ORDER OF AFFIRMANCE.

NEW JERSEY SUPREME COURT.

HENRY CROFUT WHITE, HARRY SAMMET and LIZBETH E. RHEIN, Executors of the Last Will and Testament of Meyer L. Rhein, deceased, *Plaintiffs-Respondents,* *vs.* SELICK J. MINDES, *Defendant-Appellant.*	*On Appeal from Essex County Circuit Court.* *Order of Affirmance.*

This cause having been duly submitted on briefs at the January Term 1929 of this Court by Coult, Satz and Tomlinson and Joseph Coult, of counsel for defendant-appellant, and Henry Crofut White and Arthur Lovell, of counsel for plaintiffs-respondents, and the Court having inspected the record and judgment below, and considered the causes assigned for error and the grounds of appeal therein and finding no error in the judgment or proceedings in the Circuit Court

It is thereupon, on this 13th day of May, 1929, ORDERED that the said judgment of the Essex County Circuit Court be affirmed with costs and that the record and proceedings be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered May 13, 1929, on motion of

HENRY CROFUT WHITE,
Attorney for Plaintiffs-Respondents.

NOTICE AND GROUNDS OF APPEAL.

Filed May 27, 1929.

NEW JERSEY SUPREME COURT.

HENRY CROFUT WHITE, HARRY SAMMET and LIZBETH E. RHEIN, Executors of the Last Will and Testament of Meyer L. Rhein, deceased, *Plaintiffs-Respondents,* *vs.* SELICK J. MINDES, *Defendant-Appellant.*	*Action at Law. On Appeal from Supreme Court.* *Notice and and Grounds of Appeal.*

To Henry Crofut White, Esq., attorney for plaintiffs-respondents.

PLEASE TAKE NOTICE, that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following ground:

1. The Supreme Court erred in affirming the judgment of the Essex County Circuit Court.

COULT, SATZ & TOMLINSON,
Attorneys for Defendant-Appellant.

Service of copy of the within notice and grounds of appeal is hereby acknowledged this 24th day of May, 1929.

HENRY CROFUT WHITE,
Attorney for Plaintiffs-Respondents.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HENRY CROFUT WHITE, HARRY SAMMET and LIZBETH E. RHEIN, Executors of the Last Will and Testament of Meyer L. Rhein, deceased, *Plaintiffs-Respondents,* *vs.* SELICK J. MINDES, *Defendant-Appellant.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF FOR DEFENDANT-APPELLANT.

Statement of Facts.

This action was brought by Meyer L. Rhein against the above-named defendant in the Essex County Circuit Court on a judgment which he had recovered against the defendant on December 7, 1927, in the City Court of the City of New York for the sum of $1,114.35 for dental services rendered to the wife of the defendant. The complaint appears in the State of Case, pages 4 to 27. The defendant's answer (S. C., pp. 28, 29, 30) admitted the recovery of the judgment and the jurisdiction, denied the judgment was due and payable and by way of counter-claim set up a separate cause of action against the plaintiff for damages sustained by reason of the negligence of the plaintiff in certain dental work performed on the wife of the defendant, between March 3, 1920, and December 4, 1923.

The plaintiff moved for an order striking out the answer and counter-claim and for summary judgment against the defendant, under Rule 80 of the Supreme Court Rules of 1913. The trial

court, having heard the arguments, made such an order and judgment was entered in the Circuit Court in favor of the plaintiff (S. C., p. 43).

During the pendency of the motion, the plaintiff died and the death being suggested on the record, his executors were substituted as party plaintiffs. The judgment, however, was actually entered in favor of Meyer L. Rhein and the notice of appeal so entitled. By stipulation annexed to the State of Case, p. 45, it was consented that the judgment be amended, substituting the names of the executors for that of the deceased.

An appeal was taken from the Essex County Circuit Court to the New Jersey Supreme Court, to review the legality of the judgment.

The Supreme Court in its opinion (S. C., pp. 49-51) affirmed the judgment of the Essex County Circuit Court. This is an appeal from the judgment of the Supreme Court.

ARGUMENT.

It is contended by the defendant that the judgment rendered in the City Court of New York was not *res adjudicata* of the action set up by the defendant in the counter-claim. We feel that it is important at the outset to point out that this controversy does not involve the legality of the action of the trial court in giving summary judgment, but only involves the legality of the action of the trial court in striking out the counter-claim of the defendant.

The Supreme Court decision in this case was based upon the case of *Jardine* v. *Reichert*, 39 N. J. L. 165. That case stands for the principle, as the Court pointed out, that when a judgment

rendered in another state is sued on here it can be impeached only on the ground that the adjudging court did not have jurisdiction over the person of the defendant, or over the subject matter (S. C., p. 50, l. 25).

We contend that the Supreme Court erred in applying the holding of the Jardine case to the case at bar. In the first place, the defendant is not attempting to impeach the judgment rendered in the foreign state. The existence of the judgment is admitted in the defendant's answer (S. C., p. 28). The defendant only seeks to interpose by way of counter-claim a cause of action which is entirely separate and distinct from the cause of action of the plaintiff. This action only became related to the action of the plaintiff, because of the fact that the defendant availed himself of an opportunity to obtain jurisdiction over the plaintiff in this state, by filing a counter-claim to the plaintiff's action. This opportunity was denied him until the plaintiff brought himself within the jurisdiction of New Jersey by instituting a suit on the judement rendered in the City Court of New York. We concede that if the facts contained in our counter-claim were set up by way of defense to the judgment sued on in New Jersey we would then fall within the rule of *Jardine* v. *Reichert*. We further concede that in that event the Court would be obliged to strike out our answer. This, however, is not the case. We do not set these facts up by way of defense. We admit the judgment, and we understand that the plaintiff has a right to summary judgment on his cause of action regardless of whether the determination of the issues embraced by the counter-claim, result favorably to the defendant or not.

Our position, therefore, briefly stated, is not that we desire to offer evidence to impeach the judgment rendered in the City Court of New York, but that we desire to maintain a separate and distinct cause of action, now that the plaintiff has brought himself within the jurisdiction of a New Jersey Court.

That obtaining permission to file a counter-claim in this matter, is of extreme importance to the defendant may be seen from a reading of the affidavits in the state of the case. It will be observed that the plaintiffs, original action in the City Court of New York was brought after the New York statute of limitations governing suits based on malpractice had run (S. C., p. 37, l. 18). By the terms of this statute it is provided that an action to recover damages for malpractice must be commenced within two years after the cause of action has accrued. If the plaintiff had brought the action in New Jersey to recover for the reasonable value of his services the defendant would not have been barred by the statute of limitations from setting up the counter-claim. Faced with this bar, the defendant, has been obliged to wait until the plaintiff should sue on the judgment in this state in order to assert his claim. If the defendant, now that the time has come, is not to be permitted to file his counter-claim he is stripped of his last remaining remedy against the plaintiff, and the plaintiff will have gained a double benefit by having brought his suit in New York. By virtue of the New York statute above referred to he was afforded a complete bar to the cause of action of the defendant, and now, when he comes into the New Jersey Courts to sue on the judgment he is permitted to strike out the counter-claim of the defendant on the ground that the litigation concerning the value of his services, necessarily litigated the

very cause of action which the defendant was barred from asserting in New York. In effect he has used the New York statute both as a shield and a sword.

The negligence complained of in the counterclaim was involved in the performance of the work which formed the basis of the suit brought by Ryan in the City Court of New York.

It is our contention that the issue framed in this cause presents a well recognized and clearly defined exception to the elementary rule that matters which *might* have been litigated in the original suit, cannot be set up in defense of a judgment when suit is brought upon that judgment. The rule applicable to cases within this exception is stated in 23 Cyc. 1205:

> "C. Action for Services and Cross Action for Negligence. Although there are some decisions to the contrary, the probable weight of authority is that a recovery of judgment for the value of services rendered is no bar to a subsequent action for damages for the negligent or unskilful performance of the same services; as where a physician or surgeon recovers for his professional services and is afterwards sued for malpractice."

We can find no case in New Jersey which is precisely in point. The weight of authority in the State of New York is contrary to the above general rule, but the New York decisions have been subjected to severe criticism. In other jurisdictions (except for New York) there are many cases dealing with the precise situation here presented. It is to be borne in mind that no defense was interposed to the judgment and that we seek only to assert an independent right of action just as if that right of action were the basis of a separate suit in New Jersey. There-

fore, the sole question is whether the plaintiff can plead the judgment in New York as *res judicata* of the claim of negligence set up as a cause of action in the counter-claim. As has been pointed out, the weight of authority opposes the interposition of such a defense. In some courts a distinction is drawn between the force and effect of judgments which are permitted to go by default and those which have been fully litigated as in *Jordahl* v. *Berry*, 72 Minn. 119; 45 L. R. S. 541.

But, in *Sale* v. *Eichberg*, 105 Tenn. 333; 52 L. R. A. 894, a judgment confessed by the defendant as a condition imposed by the Chancellor to granting an injunction to prevent the prosecution of an action to recover compensation, pending a suit against a physician for malpractice, was held not to operate as an estoppel against the action.

The opinion discusses at length the views taken in similar cases and those held by the text writers. Justice McAllister, who delivered the opinion, analyzes (52 L. R. A. 897) the many authorities and criticizes the distinction between a default judgment and one which is defended, and concludes from careful reasoning that the true test is whether or not the issue of negligence was in fact litigated or could conveniently have been litigated. The Court said, among other things, discussing *Jordahl* v. *Berry*, *supra:*

> "The syllabus of that case is that a judgment by default in an action by a physician against his patient to recover for personal services is not a bar to an action by the patient against the physician for damages caused by malpractice in the performance of such services. The court in that case dissented from the New York rule, and was

of opinion the other view was safer, more convenient and more equitable in practice. Judge Mitchell (the writer) stated that the conflict of opinion among courts gave rise to an extended and somewhat energetic dispute among text writers. Mr. Bigelow discusses the subject at some length, and earnestly insists that the New York doctrine is wrong. Bigelow, Estoppel, p. 174. Mr. Van Fleet takes the same side of the question. Van Fleet, Former Adjudications, Sec. 168. Mr. Black, while not discussing the matter at any great length, indorses the doctrine opposed to that of New York as being much better supported by legal reason and the best considerations of convenience and justice. 2 Black, Judgm. Sec. 769. Mr. Browne in his note to Ressequie *v.* Byers (Wis.) 38 Am. Rep. 775, says of the New York doctrine that, while unquestionably right in theory, it may well be doubted whether it is convenient or safe in practice; that such estoppels are odious at best, and are founded on a technicality, and probably promote more injustice than they prevent. On the other side, Mr. Herman argues with great earnestness that the New York doctrine is sound, and the courts which have come to an opposite conclusion violate every principle upon which the doctrine of *res judicata* is founded. Herman, Estoppel, Secs. 231 *et seq.* The writer does not say in the course of that opinion, illustrating the injustice of the New York rule, if plaintiff had appeared and defended the action brought by the physician for his fee, he would have been put to the alternative of alleging the malpractice as a mere defense, or of setting it up as a cross claim. In either case the judgment would be a bar or estoppel on that issue. If he had adopted the latter course, he could never have recovered any more in another suit, because he would not be allowed to split a single cause of action. On the other hand, had he set up the malpractice merely as a defense, and the claim

> of defendant for services was less than $15,- the issue involving a claim of $5,000, would have been conclusively determined by the judgment of the justice, etc. Counsel for Dr. Sale, in criticising this case, says Eichberg was not hampered by any question of justice's jurisdiction; that his case was in the second circuit court, where he could, in a cross action, have recovered whatever a jury might have given him. But in this position counsel are mistaken. The case having originated before a justice of the peace, the circuit court, in trying the cause on appeal, would be limited to the same jurisdiction as to amount that limited the justice of the peace, to wit, $500. The illustration given by the Minnesota court demonstrates how utterly impracticable as well as inequitable the New York rule necessarily is."

In *Ressequie* v. *Byers* (Wis.), 38 Am. Rep. 775; 9 N. W. 779; an action was brought against a physician for malpractice. The defendant pleaded the recovery of a judgment for services rendered; the plea was held bad on demurrer. The opinion states our position in the present case so clearly and serves as so excellent an argument in favor of our contention that we shall at the risk of prolixity quote most of the opinion at length. After stating the facts, Chief Justice Cole said:

> "There are cases which distinctly hold that a judgment in a justice's court, in favor of a physician or surgeon for professional services, is a bar to any action by the defendant therein against such physician or surgeon for malpractice in rendering such services. Gates *v.* Preston, 41 N. Y. 113; Blair *v.* Bartlett, 75 N. Y. 150; Bellinger *v.* Craigue, 31 Barb. S. C. 534. There is, however, some conflict of authority on this subject, and as the question is now presented to this court for the first time,

we feel at liberty to adopt a rule which seems to us founded on sound principle, and is most in accord with reason and convenience in practice. The courts in New York in effect say that the question of the proper care and skill on the part of the physician or surgeon is one necessarily involved in, and adjudicated upon, in an action by him to recover compensation for his services rendered; therefore, a judgment in his favor should estop the parties to such suit from ever after questioning that fact in any other action. And the courts of that state even apply the rule to a case where, though the defendant at first appeared in the justice's court, put in an answer which he afterwards withdrew, and did not contest the plaintiff's claim, yet the judgment was held to be a bar to a subsequent action by him against the physician for malpractice. Blair *v.* Bartlett, *supra.* But the doctrine of the New York courts has not escaped criticism.

Mr. Bigelow, in his learned work on Estoppel (2nd Ed.), p. 98, *et seq.*, reviews these decisions, as well as the adjudications of other courts in strictly analogous cases, and questions the soundness of the New York rule 'unless the distinctions taken in New Hampshire, between a judgment by confession and one by default or on trial without alleging the defence, be correct. Page 107. It may sometimes be difficult to draw a line of distinction between a judgment which will operate as a bar to an action for a specific claim, and one which leaves the claim outstanding to be enforced by a cross-action' (Church, *C. J.*, in Dunham *v.* Bowen, 77 N. Y. 79), but where, as in this case, the defendant makes default in a justice's court, and does not even attempt to contest the value of the services rendered, or raise the question of their proper performance, it is more difficult to perceive any solid ground for holding that he is concluded from showing, in another action, that the plaintiff in

that case was guilty of negligence in his professional treatment. It was certainly not necessary, in order to entitle the plaintiff in the justice's court to a judgment, that he should prove he was not guilty of any negligence. 'It was enough to show simply that he performed the services at the defendant's request, and their value, and the fact that the amount was due.' Hagana, *J.*, Syes *v.* Bonner, 1 Cin. Sup. Ct. Rep. 464. It is very doubtful whether the defendant, in the action before the justice, under his answer, could have shown that the plaintiff was guilty of malpractice (Crawford *v.* Earl, 38 Wis. 312), certainly, he did not attempt to raise that issue, or litigate any such question. And if this action is barred by the recovery in the justice's court, it is because the question as to the care and skill of the defendant herin was involved by implication in that suit, not because any such facts or issue was actually litigated between the parties. This court has said that a judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it. Hardy *v.* Mills, 35 Wis. 141; Lathrop *v.* Knapp, 37 Wis. 314.

According to this rule of law it is apparent the supplemental answer states no defence; for the issue in this action was not necessarily involved in the justice's suit, and the plaintiff may maintain it notwithstanding the defendant recovered for his services in that court. The plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case. He was not compelled to make the defence before the justice that the defendant's services were of no value in order to save his rights. He had his election either to recoup his damages pro tanto in the justice's court or go for his entire claim in this. It seems

to us that this is the better and more convenient rule to lay down upon the subject. If the plaintiff were compelled to make his defence in the justice's court that the professional services were of no value, and that he had been injured by the defendant's negligence, then it would follow that he must either split up his demand so that there might be two suits instead of one upon it, or content himself with merely defeating the claim for services, or limit his damages to $200, the extent of the jurisdiction of the justice. We are not inclined to adopt a rule which would lead to any such inconvenient consequences. We say, in the language of Mr. Bigelow: 'Every cause of action carries with it the right to put it into judgment; and that there is a separate and independent cause of action given to each party results necessarily from the fact that either party may sue the other for a breach. No suit can be maintained except upon a legal ground of action. Now, as one cause of action cannot in itself alone, when merged in judgment, carry another and independent cause of action with it, it is difficult to understand how a judgment for the plaintiff, without plea, can extinguish a counter-right of action by the defendant, however closely connected the two claims may be. Every one has the right to try his own case.' Bigelow on Estoppel, 104 *supra.*

The New York authorities are more or less in conflict with the doctrine laid down or recognized in the following cases: Bodurtha *v.* Phelan, 13 Gray 413; O'Connor *v.* Varney, 10 Gray 231; Bascom *v.* Manning, 52 N. H. 132; Barker *v.* Cleveland, 19 Mich. 230; Mandel *v.* Steel, 8 Mees. & W. 858; Riggs *v.* Burbridge, 15 Mees. & W. 598; Davis *v.* Hodges, L. R. 6 Q. B. 687. It is needless to remark that if the plaintiff in this suit had set up the defence of malpractice in the action before the justice an

> adjudication upon that issue would then have been a bar. The case then would come within a very familiar principle. Howell *v.* Goodrich, 69 Ill. 556. But upon the facts stated in the supplemental answer we are inclined to hold that the recovery in the justice's court is no bar. The question is very fully examined in the authorities to which we have referred, and further discussion of it seems unnecessary."

In the case at bar it is our contention that it is a mixed question of law and fact whether this counter-claim is tenable. If the defendant should plead *res judicata* the New York judgment and issue is joined, that the judgment is not a bar, we expect to prove that the City Court in which the original judgment was rendered is a court of limited jurisdiction and that the defendant was there confronted with the situation similar to that commented upon in *Ressequie* v. *Byers, supra.*

We shall expect to show also (as alleged in our affidavits on the motion) that the question of the plaintiff's negligence was not adjudicated in the action in New York and that that issue was determined solely upon the propriety of the charges made by the physician and the defense set up in the answer in the New York suit (S. C., p. 13, l. 30) that the payments amounting to $1,146.00 which this plaintiff had already received was in full payment for the services rendered.

We shall expect to show also, that the defendant's cause of action for malpractice was barred by the statute of limitation in New York when the suit was brought (see affidavit of Harry Sammet, p. 37, ll. 18-22) though his right to maintain such a cause of action would be available to him in New Jersey provided the

plaintiff in the New York action should submit himself to the jurisdiction of this state within six years after the relationship of patient and physician was terminated.

To preclude the defendant in this case from asserting his counter-claim at this time, is in effect to penalize him by depriving him of a separate and distinct cause of action because he availed himself of defenses to the suit in New York which were only collaterally related to the substance of his separate cause of action.

We concede that if the defendant had set up in mitigation of the plaintiff's damages in the New York suit, those damages which he has suffered, that he would now be barred. In the New York suit, however, as we have pointed out previously, he was sued in a court of limited jurisdiction where a recoupment, had it been permitted, would have been confined to a lesser amount than he claims in damages and where he was barred from setting up even such a recoupment by reason of the running of the statute of limitation. In this situation, he availed himself of the defense of payment, which certainly cannot be said to be inconsistent with his separate cause of action; and further, he avails himself of the defense that the work done was not reasonably worth the amount claimed for the alleged services. The defendant's affidavit (S. C., p. 40) indicates that the question of the skill or lack of skill in doing the work was not raised and it can be easily seen that under the latter defense the question of skill or lack thereof might not enter.

A situation identical in that respect to the case at bar, is presented in the case of *Rigge* v. *Burbridge,* 15 Mees. & W. 598. The plaintiff in that case alleged that he employed the defendant

to construct a kitchen range for him for which he agreed to pay forty-two pounds and that it became the duty of the defendant to use due and proper skill in the construction of the range and that the defendant failed in this duty to the plaintiff's damage. The defendant pleaded that he had previously sued the plaintiff for the price of the range and that the plaintiff had paid the agreed sum into court, which sum defendant took in full satisfaction. In holding that this plea did not constitute a bar to the action, Rolfe, *B.*, said:

> "It does not at all appear that the defense of the present plaintiff to the former action for the price of these goods included the damage sustained by him for the improper working of the range."

It would seem in the cited case, that the plaintiff, who had been the defendant in the previous matter, waived every defense and admitted his liability to pay the agreed price. Nevertheless, this did not preclude him from asserting an independent cause of action analogous to that which we attempt to set up in the case at bar. The only distinction between the two cases is that in our case we litigated by defense an alleged cause of action which the plaintiff held, while in the Rigge case the defendant in the prior suit admitted that the plaintiff held a meritorious cause of action. To preclude this defendant from setting up his separate cause of action because of this distinction would be manifestly unfair and would open the way to the perpetration of grave injustice. We do not believe it can well be said that the defense of payment could ever be held a bar to a subsequent suit based upon negligence in the performance of the services for which payment is demanded and previous payment alleged by

way of defense. To prevent a person to contest the reasonableness of the sum demanded for the services at the price of waiving his independent cause of action for damages resulting from the unskillful manner in which the services were performed, would be to say that any person who had performed services for which no price in payment was agreed upon, could demand in payment a sum which he knew when he sued for it, was many times as large as the sum to which he felt he was entitled; yet, if the defendant contested his claim and sought to show by competent proof that the services were only worth $100, whereas the sum demanded was $1,000, then the defendant because of this offer and because of an adjudication of that issue, would be precluded from later recovering for the damages resulting from the unskillful manner in which the services were performed, which damages might greatly exceed the amount recovered by the plaintiff.

This proposition is embodied in the case of *Whitesell* v. *Hill,* 70 N. W. 750. The parties in that case are in a converse position to that occupied by the parties in this case. In the Whitesell case the plaintiff sued the defendant, a doctor, for malpractice. The defendant set up a claim for the reasonable value of the services. The Court held that an instruction to the jury that the jury might set off whatever they found to be due to the physician against the recovery that they might find that the plaintiff was entitled to, was legally correct. The Court said in effect that a valid claim for malpractice and a valid claim for services which resulted on the alleged malpractice could co-exist. The Court further held that the damage to the plaintiff as the result of the alleged malpractice might be slight and the damage suffered by the

counter-claimant might be substantial. If in fact this situation existed, then the plaintiff's claim being a lesser one, could only avoid the defendant's claim *pro tanto*. We cite this case for the purpose of showing the separate identity of the cause of action for malpractice from that for the value of services rendered. Since they were separate causes of action co-existing, it seems only reasonable to say that if the plaintiff tried this case through to final judgment and effected a recovery and the defendant for some reason other than one involving the merits of the case was precluded from going to the jury, then the defendant at a subsequent trial could sue for the value of the services despite the existence against him of a judgment based on malpractice arising from the services.

The rule in Massachusetts governing the situation in the case at bar is that the defendant can only be prevented from later setting up his cause of action if he has previously offered in mitigation of the damages the cause of action which he subsequently attempts to recover upon.

In the case of *Burnett* v. *Smith*, 4 Gray 50, the plaintiff's suit was based upon fraudulent representations made by the defendant in effecting a sale of stock for which $1,000 promissory note was given; the defendant proved that he had previously sued upon the note and the plaintiff, who had been the defendant below, had pleaded want of consideration. In that previous suit there was a judgment for $418. In that case Justice Dewey, in holding that the subsequent suit was barred because of the defense in the previous suit, said in effect that Burnett at the trial of the previous suit had a right of election between setting up the fraud in mitigation of damages or filing a cross-action

based upon the fraud. Having set it up in defense, he was barred from bringing the subsequent action.

In *O'Connor* v. *Varney,* 10 Gray 231, the plaintiff sued on contract to recover damages for defendant's failure to build certain additions to a house according to the terms of a written contract. It appeared that in a previous suit by the defendant against the plaintiff to recover the price agreed, the plaintiff had used in defense the cause of action upon which he later sought to recover. In this case, the latter suit was barred. Chief Justice Shaw held:

> "A party against whom an action is brought on a contract has two modes of defending himself. He may allege specific breaches of the contract declared upon and rely them in defense. But if he intends to claim by way of damages for non-performance of the contract more than the amount for which he is sued, he must not rely on the contract in defense but must bring a cross action."

It will be seen that the basis of the above decisions is that the plaintiff in each attempted to avail himself twice of the same cause of action. It will also be seen that if he had confined himself, in the Burnett case, to a defense which did not involve his cause of action against the suit on the note, then following the reasoning of the court, there would be nothing to prevent his later recovering upon his own cause of action. In the O'Connor case, the court clearly indicates that the plaintiff was only foreclosed from his recovery because he had once gained the benefit in defense of what he subsequently attempted to make the basis of his own suit.

In the case at bar, the defense to the suit in New York did not embody the gravamen of

our separate cause of action but was concerned solely with the questions of whether or not payment had been made of the amount demanded and whether or not the charges of the plaintiff were reasonable ones.

We submit that the judgment of the Supreme Court should be reversed.

COULT, SATZ & TOMLINSON,
Attorneys for Defendant-Appellant.

JOSEPH COULT,
GERALD T. FOLEY,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS

HENRY CROFUT WHITE, HARRY SAMMET and LIZBETH E. RHEIN, Executors of the Last Will and Testament of Meyer L. Rhein, deceased, Plaintiffs-Respondents, vs. SELICK J. MINDES, Defendant-Appellant.	Action at Law. On Appeal From New Jersey Supreme Court.

BRIEF FOR PLAINTIFFS-RESPONDENTS.

This is an appeal from a judgment of the Supreme Court, which affirmed a judgment of the Essex County Circuit Court, entered upon an order striking out the answer and counterclaim interposed by the defendant and directing the entry of final judgment.

The suit was brought by Meyer L. Rhein against the defendant, Selick J. Mindes, above named, on a judgment for $1,144.35 recovered, December 7, 1927, by said Rhein against said Mindes in the City Court of the City of New York, a court of record (S. C., pp. 4 to 27). An answer and counterclaim were filed which admitted the jurisdiction of the City Court in the original suit and the recovery of the judgment sued on, but denied that the judgment was

due and payable, and, by way of counterclaim, set up a separate cause of action against the plaintiff for damages sustained by reason of the plaintiff's negligence in the performance of certain dental work on defendant's wife between March 5, 1920, and December 4, 1923, laying such damages at the sum of $10,000.

The plaintiff moved for an order striking out the answer and counterclaim and for summary judgment against the defendant. The motion was granted and Rhein having died pending the motion, judgment was entered in favor of his executors and against the defendant for $1,195.84 besides costs (S. C., pp. 41-43). From this judgment an appeal was taken by the defendant to the Supreme Court which affirmed the judgment of the Circuit Court.

I.

The real point at issue.

The defendant contends, as he contended before the Supreme Court, that he seeks only to maintain an independent cause of action against the plaintiff just as though such cause of action were the basis of a separate suit in New Jersey. We are perfectly willing to meet him on that issue and we do so later in this brief, but we respectfully submit that the question of the defendant's right to maintain an independent action is not now before this Court. The defendant in his brief, page 3, admits that the plaintiff had a right to summary judgment on his cause of action. The question, presented by

this appeal, then, is whether a plaintiff concededly entitled to enter judgment at once against a defendant, by reason of said defendant's failure to interpose any real defense, can be subjected to the delay of months or a year by the interposition of a counterclaim.

Defendant, in his brief, argues that he is not seeking to impeach the New York judgment and that, therefore, the rule laid down by Chief Justice Beasley in *Jardine vs. Reichert,* 39 N. J. L. 165, as to the invulnerable status of foreign judgments, is not applicable. He is, however, doing just that thing. He seeks, through the expedient of a counterclaim, to prevent the plaintiff from entering and enforcing the judgment which plaintiff is admittedly entitled to enter and enforce immediately.

II.

The cause of action here pleaded as a counterclaim was necessarily involved in the New York action, was available there either as a defense or by way of counterclaim and is therefore now barred.

In the New York action the plaintiff sought to recover, not on a special contract but on a *quantum meruit.* The defendant in his answer interposed a general denial (S. C., pp. 11-14). He might have set up in his answer the negligence of the plaintiff by way of defense or as a counterclaim.

It is not true, as stated by defendant in his brief, page 4, that he was barred by the New

York statute of limitations. Section 49 of the New York Practice Act, Subdivision 6, provides that an action to recover damages for a personal injury resulting from negligence must be commenced within three years after the cause of action accrued. The New York Court of Appeals has held that this provision, rather than the two years' statute relating to actions to recover damages for malpractice, applies to a cause of action by a husband for loss of services of his wife because of personal injuries to her caused by defendant's negligence.

Mason vs. D., L. & W. R. R. Co., 112 N. Y. 559.
Goodier vs. National Surety Co., 125 Misc. 65, p. 67.
Fish vs. Conley, 221 App. Div. 609.

The New York action was begun January 22, 1926, when personal service of the summons and complaint was made on the defendant (S. C., p. 10). The alleged negligence of the plaintiff complained of in defendant's counterclaim covered the period from March 20, 1920, to December 4, 1923, and defendant was not barred until three years thereafter, viz, December 4, 1926.

Even though the defendant failed to allege the plaintiff's negligence either as a defense or by way of counterclaim in the New York action he could have presented evidence of the plaintiff's malpractice as a defense to the action under his general denial. The New York decisions expressly hold that under a general denial in an action to recover for the value of a physician's services, evidence may be introduced by the defendant of the plaintiff's mal-

practice or misconduct as a defense to the action.

Chatfield vs. Simonson, 92 N. Y. 209.
Schopen vs. Baldwin, 83 Hun 234.

Appellant's counsel relies upon the Wisconsin case of *Ressequie vs. Byers,* 38 Am. Rep. 775, and says (on page 10 of his brief) that "if the defendant should plead *res adjudicata* the New York judgment and issue is joined, that the judgment is not a bar, we expect to prove that the City Court in which the original judgment was rendered is a court of limited jurisdiction and that the defendant was there confronted with the situation similar to that commented upon in *Ressequie vs. Byers, supra,*" and again—"We concede that if the defendant had set up in mitigation of the plaintiff's damages in the New York suit, those damages which he has suffered, that he would now be barred. In the New York suit, however, as we have pointed out previously, he was sued in a court of limited jurisdiction where a recoupment, had it been permitted, would have been confined to a lesser amount than he claims in damages and where he was barred from setting up even such a recoupment by reason of the running of the statute of limitation."

Counsel has in mind, we presume, the limited jurisdiction of the City Court, which, at the time the New York action was brought (1926), precluded the entry of judgment in favor of the plaintiff for an amount exceeding $2,000 (now $3,000). Counsel is doubtless unaware of the fact that a *counterclaim* can (and could then) be interposed in an action brought in that court *without respect to the amount thereof,* and that

judgment thereupon, in favor of the defendant, may be rendered *for any sum.* New York City Court Act (Laws 1920, Chap. 935), Section 60.

It appears, then, that the defendant was neither precluded by the statute of limitations nor by the supposed limited jurisdiction of the City Court from setting up by way of counterclaim and recovering in the New York action damages to any amount against the plaintiff arising out of said plaintiff's alleged negligence in treating Mrs. Mindes.

We hardly need point out that in any event defendant was at liberty *at any time* within the three years' period to bring an independent action for negligence against plaintiff and to bring such an action in the New York Supreme Court, whose jurisdiction is unlimited both as to plaintiff and defendant, and in which action a judgment for any amount might have been recovered against the plaintiff and such judgment unquestionably enforced.

What force is there then in the suggestion of appellant's counsel that his client is being penalized by being deprived of the opportunity now, six years since the relationship of physician and patient has been terminated and after the doctor has passed away, of litigating an issue which was fully available to him in the trial of the New York action?

In this connection we would like to quote from the opinion of the late Justice (afterwards Chancellor) Magie, rendered in the case of *National Bank vs. Wallis,* 59 N. J. L. 46 (Supreme Court, 1896). In that case the plaintiff sued on a judgment theretofore obtained by him in the

Supreme Court of the State of New York. The defendant filed a plea setting up matters which were available as a defense against the notes upon which the original judgment was recovered. On a demurrer filed to this plea Justice Magie said:

> "If the matters set up in the plea demurred to availed as a defense against the notes whereon the judgment now sued on was recovered it is obvious that they could have been interposed as a defense in that action. That fact is decisive of the question raised by this demurrer. For nothing is better settled than that the validity of judgments cannot be impeached for any supposed defect or irregularity in the transaction on which they were founded, and therefore no defense can be interposed to an action on a judgment upon matters existing before its recovery. That this doctrine is applicable to all judgments recovered in the same state or in any other state of the Union has never been questioned."

The foregoing opinion was quoted with approval by this Court in the recent case of *Walter vs. Keuthe,* 98 N. J. L. 823.

III.

The New York judgment is *res adjudicata* of the cause of action set up in the counterclaim.

In re Walsh's Estate, 80 N. J. Eq. 565 (Ct. of Err. 1912).
City of Paterson vs. Baker, 51 N. J. Eq. 49 (Chan. 1893).
McMichael vs. Horan, 90 N. J. L. 142.

The doctrine of *res adjudicata* as stated by this Court in the *Walsh* case is this:

> "The judgment of a court of competent jurisdiction on a question of law or fact or on a question of mixed law and fact, once litigated and determined, is, so long as it remains unreversed, conclusive upon the parties and their privies, not only as to the particular property involved in the suit in which it is pronounced, but as to all future litigation between the same parties or their privies, touching the subject-matter, though the property involved in the subsequent litigation is different from that which was involved in the first * * *. All that is necessary is that the right of relief in the one suit shall rest upon the same point or question which in essence and substance, was litigated and determined in the first suit, and in such a case the parties and those in privity with them are concluded not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose."

Judged by this rule the cause of action set up in the counterclaim is undoubtedly barred. We have shown under Point II that under his general denial the defendant might have offered in the New York action evidence of malpractice and negligence in defense of the action.

The New York action took more than three days to try and was hotly contested. The defendant attempted to prove by his witnesses that the plaintiff's services were unsatisfactory and not worth the amount sued for (S. C., p. 35). The appellant concedes in his brief, page 5, that

the negligence complained of in the counterclaim was involved in the performance of the work to recover for which the New York action was brought. The defendant, in his answering affidavit in the case at bar, concedes that the value of the plaintiff's services was passed upon in the New York action. In that action the plaintiff contended and the defendant denied that the services rendered by the doctor were worth $1,144.35, the amount demanded in the complaint. Manifestly if the plaintiff was negligent in performing these services, resulting in injury to his patient, as alleged in the counterclaim (S. C., p. 29), then his services were not only not worth the amount sued for as the jury found they were but were worth nothing at all. How can it be said then that the issue attempted to be raised by the counterclaim was not involved in the New York action?

Counsel for the appellant, in his brief, contends that the recovery of judgment for the value of services rendered is no bar to a subsequent action for damages for the negligent performance of the same services and that this constitutes an exception to the doctrine of *res adjudicata* above quoted that matters which might have been litigated in the original suit cannot be set up in defense of a judgment when suit is brought upon that judgment. There is no basis in the decisions of this state to support any such contention and the New York decisions are flatly opposed, as conceded by counsel for the appellant. Moreover, even the cases from other states cited by appellant in support of his contention involve controversies over judgments recovered in the same state in which

the controversy arose and do not apply to the instant case which involves a judgment of a sister state to which full faith and credit must be given under the Federal Constitution.

IV.

The judgment of the Supreme Court should be affirmed.

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