

Fordham Law Review

Volume 7 | Issue 1

Article 2

1938

The Renaissance of Civil Practice in New York

Leonard S. Saxe

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Leonard S. Saxe, *The Renaissance of Civil Practice in New York*, 7 Fordham L. Rev. 45 (1938).

Available at: <https://ir.lawnet.fordham.edu/flr/vol7/iss1/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Renaissance of Civil Practice in New York

Cover Page Footnote

Executive Secretary, The Judicial Council of the State of New York, Lecturer on New York Practice, Harvard University, School of Law.

THE RENASCENCE OF CIVIL PRACTICE IN NEW YORK

LEONARD S. SAXE†

NEW YORK has always pioneered in law improvement, although its advances heretofore have been sporadic. Its contributions include the Revised Statutes of 1828-1830, on which statutes throughout the world were based; the veritable judicial revolution of 1846-1850, introducing the elective judiciary and code practice; the resurgence (although in some respects a retrogression) in civil procedure in 1876; the laborious and monumental consolidation of the general statutes from 1889 to the consummation of the Consolidated Laws of 1909; the judicial reorganizations of 1894 and 1925; the influences of Butler, Field, Throop, Fiero, Collin, Marshall, Rodenbeck and Root. All contributed to a modernization of the substantive law and to an increasing efficiency in the administration of justice.

Despite the valuable advances made during the past century the judicial system was subject to chronic breakdowns. Commissions and conventions all found the same evils—delay, uncertainty, complexity and expense. Temporary bodies, attempting to cope with these evils, were always handicapped by the lack of proper statistical data furnishing adequate factual information as to the problems presented. In 1929 a movement was begun for a thorough re-evaluation of the processes and functioning of the law.

A temporary State Legislative Commission, known as the Commission on the Administration of Justice in New York State, was organized in 1931 and charged with that task.¹ Its Report was published in January 1934² and summarized in a Main Report the Commission's chief findings and proposals, buttressing these by detailed exhaustive supporting studies.³

†Executive Secretary, The Judicial Council of the State of New York, Lecturer on New York Practice, Harvard University, School of Law.

1. N. Y. Laws 1931, c. 186. Continued annually and last continued to March, 1938 by N. Y. Laws 1937, c. 198. The members of the Commission on the Administration of Justice are: John L. Buckley, Chairman; Daniel J. Kenefick, Chairman Executive Committee; Harry D. Nims, Secretary; Charles K. Burdick, J. Edward Conway, Julius Frank, Ralph A. Gamble, Robert H. Jackson, Mrs. Henry Goddard Leach, William C. McCreery, Raymond Moley, Joseph D. Nunan, Jr., Leonard S. Saxe, Bruce Smith, C. Tracey Stagg, John J. Dunnigan, Perley A. Pitcher, Oswald D. Heck, Irwin Steingut. Joseph F. Higgins, Executive Secretary.

2. Report of the Commission on the Administration of Justice in New York State, Legis. Doc. (1934) 50—hereafter referred to as Report C. A. J.

3. The form of report has become the model for the annual reports of the Law Revision Commission and the Judicial Council. The report has been reviewed by Wickser, *Book Review* (1935) 23 *Geo. L. J.* 915; Carr, *Book Review* (1935) 4 *FORDHAM L. REV.* 156; Sunderland, *Book Review* (1935) 45 *YALE L. J.* 186, and others.

The Report was planned as a thorough diagnosis of the situation.⁴ Found and analyzed were those familiar evils—delay, uncertainty, complexity and expense. Detailed analyses of the facts led to the conclusion that regardless of past failures, these ills could not only be cured within a reasonable time, but that constant watchfulness could prevent their recurrence.⁵

The Commission introduced fundamental changes in the concept of law improvement, because it recognized the ultimate futility of temporary bodies attempting to solve isolated problems without adequate statistical data. The need was for permanence and complete information. To bring this about the Commission successfully recommended the establishment of a Law Revision Commission and a Judicial Council, two permanent bodies, for the continuous scrutiny of the whole field of substantive and adjective law respectively. As the result of the organization of these two bodies, in New York State perpetual vigilance to maintain the highest efficiency in the functioning of the judicial system, guided by full knowledge of the facts, has now replaced sporadic bolsterings of the system after chronic collapses.⁶

The recommendation for the Law Revision Commission of the State of New York composed of two law school teachers, two practicing lawyers and a fifth person of unrestricted qualifications, together with the Chairmen of the Legislative Judiciary Committees, was adopted and the Commission organized in 1934.⁷ Up to June 30, 1937, twenty-nine of its statutory proposals have been enacted into law. These are explained in the Commission's three annual reports.⁸

Except for the substantive law, the entire judicial field, court organization, jurisdiction, administration, procedure and evidence, remains

4. "This monumental report," writes Sunderland, *loc. cit. supra* note 3, "is one of the most significant contributions to the literature relating to judicial administration which has appeared in the United States since the time of David Dudley Field."

5. For the fifty-three constitutional and statutory measures proposed by the Commission on the Administration of Justice, see N. Y. Legis. Doc. (1935) 71; *id.* (1936) 80; *id.* (1937) 77.

6. For a picture of the difficulties previously confronting an attempt to institute reforms see Cardozo, *A Ministry of Justice* (1921) 35 HARV. L. REV. 113.

7. N. Y. Laws 1934, c. 597, adding new LEGIS. LAW §§ 70-72. The members of the Law Revision Commissioner are: Governor's appointees: Charles K. Burdick, Chairman; Warnick J. Kernan, Walter H. Pollak, Bruce Smith, Young B. Smith. By virtue of their office: Philip M. Kleinfeld, Chairman Senate Judiciary Committee; Harry A. Reoux, Chairman Assembly Judiciary Committee. John W. MacDonald, Executive Secretary.

8. First Report of the Law Revision Commission of New York State, N. Y. Legis. Doc. (1935) 60; Second Report of the Law Revision Commission of New York State, *id.* (1936) 65; Third Report of the Law Revision Commission of New York State, N. Y. Legis. Doc. (1937) 65. These reports will hereafter be referred to as the First, Second or Third Report L. R. G. See also (1935) 4 FORDHAM L. REV. 102; Shientag, *A Ministry of Justice in Action: The Work of the New York State Law Revision Commission* (1937) 22 CORN. L. Q. 183.

as the province of the Judicial Council of the State of New York, likewise established in 1934.⁹ For these purposes, the Council was given full administrative power to deal with the statistical data of the courts. The Council's personnel consists of the administrative heads of the Supreme Court (the four Presiding Justices of the Appellate Division), a representative lawyer from each of the four judicial departments appointed by the Governor, the chairmen and ranking minority members of the Judiciary Committees of the Senate and Assembly, and two citizens of the State of unrestricted qualifications appointed by the Governor. The Chief Judge of the Court of Appeals, Frederick E. Crane, is Chairman. Up to June 30, 1937, one hundred and three of the Council's proposals have been adopted. These are explained in the Judicial Council's three annual reports.¹⁰

Meanwhile the Commission on the Administration of Justice, although a temporary body, has been continued. It is devoting itself exclusively, through a special advisory committee, to completing a comprehensive revision of the Code of Criminal Procedure.¹¹ The first tentative draft of that revision has been published with detailed explanations and is available to those interested.¹²

In September, 1935, a quasi-official body came into being, known as the Governor's Conference on Crime, the Criminal and Society. Governor Lehman, taking advantage of the zeal for law improvement then

9. N. Y. Laws 1934, c. 128, adding new JUDICIARY LAW §§ 40-48. The members of the Judicial Council are: By virtue of their office: Frederick E. Crane, Chairman, Chief Judge of the Court of Appeals; Edward Lazansky, Vice Chairman, Presiding Justice, Appellate Division, Supreme Court, Second Department; Charles B. Sears, Secretary, Presiding Justice, Appellate Division, Supreme Court, Fourth Department; Francis Martin, Presiding Justice, Appellate Division, Supreme Court, First Department; James P. Hill, Presiding Justice, Appellate Division, Supreme Court, Third Department; Philip M. Kleinfeld, Chairman Senate Judiciary Committee; Harry A. Reoux, Chairman Assembly Judiciary Committee; Benjamin F. Feinberg, Member Senate Judiciary Committee; William C. McCreery, Member Assembly Judiciary Committee. Governor's appointees: Harry D. Nims, Herman S. Bachrach, William T. Byrne, Stephen W. Brennan, Bernard E. Finucane, Virginia C. Gildersleeve. Leonard S. Saxe, Executive Secretary.

10. First Report of the Judicial Council of the State of New York, N. Y. Legis. Doc. (1935) 48; Second Report of the Judicial Council of the State of New York, *id.* (1936) 48; Third Report of the Judicial Council of the State of New York, *id.* (1937) 48. These reports will be referred to hereafter as First, Second or Third Report J. C. See also Saxe, *Reviews of Laws Sponsored by the Judicial Council* (1935) 7 N. Y. ST. BAR BULL. 136; (1936) 8 N. Y. ST. BAR BULL. 193; (1937) 9 N. Y. ST. BAR BULL. 166.

11. The members of the Special Advisory Committee on the Revision of the code of Criminal Procedure are: Bruce Smith, Chairman; Leonard S. Saxe, Secretary; Felix C. Benvenega, Louis Fabricant, James E. MacDonald, Charles C. Nott Jr., Timothy N. Pfeiffer, Kenneth M. Spence. Joseph F. Higgins, Executive Secretary, Consultants: Edwin R. Keady, William S. Mikell.

12. N. Y. Legis. Doc. (1935) 70, 70(A) to 70(C); *id.* (1937) 70; *id.* (1938) 70; *id.* (1936) 80, p. 9 *et seq.*; *id.* (1937) 77, p. 7 *et seq.*

at its height, correlated such proposals as the Law Revision Commission, the Commission on the Administration of Justice and the Judicial Council, as well as others, which might have developed in the field of criminal justice. The resulting so-called "Sixty Point Program" included many of the legislative recommendations of the three official bodies. Over half of the Governor's recommendations were adopted. The complete proceedings of the Governor's Conference have been published.¹³

As the title of this paper indicates, I shall not discuss the improvements in substantive law or in criminal procedure but shall attempt to review briefly and to correlate the important changes brought about in civil practice.

The whole subject divides easily into six major categories; acquisition of jurisdiction, formulation of issues by the pleadings, preparation for the trial, the trial and evidence, judgment and its collection, and appeals. Before discussing the subject according to that general outline, I shall touch upon certain basic preliminary matters not ordinarily associated with problems of practice and procedure, but which to my mind are of the essence in dealing intelligently with these problems.

Judicial Statistics

The foundation for improvement in the New York judicial system was made when systems for collecting comprehensive civil and criminal judicial statistics were established. The statute creating the Judicial Council in 1934 made effective for the first time an eight-year-old State constitutional requirement that civil judicial statistics be collected, compiled and published. It marked the culmination of a half century of effort toward that end. Theretofore legislative commissions and constitutional conventions always bewailed the fact that in order to make recommendations they had first to devote a large part of their labors to obtaining judicial statistics on which to predicate proposals. Since January 1st, 1935, that is no longer so. Today New York has an accurate and full picture of the work done by its civil judicial machine. The complete statistics are published annually by the Judicial Council and may furnish a simple, inexpensive, accurate and useful model upon which other States may base similar systems.¹⁴

In setting up the civil statistical reporting system the Judicial Council stated that its three-fold purpose was to obtain a clear picture of the business transacted in the courts from which to draw a quasi-balance sheet and profit and loss statement of business; second, to use this information

13. Proceedings of the Governor's Conference on Crime, *THE CRIMINAL AND SOCIETY* (1935); see Special Message of the Governor to the Legislature: Recommendations for the Improvement of Criminal Law Enforcement, N. Y. Legis. Doc. (1936) 57.

14. For more detailed discussion of this subject see the writer's *Civil Judicial Statistics in New York* (1935) 10 ST. JOHN'S L. REV. 1.

as a basis for better and more intelligent administrative control of the courts; third, to use this information when considering proposed changes in practice and procedure.

The system requires the clerks of each court to report monthly the amount of work entering the court, the amount disposed of and the amount left pending, together with the exact point of disposition in the courtroom each day; for example, on calendar call, during trial, by trial. The items on each form of report are placed in the logical order in which the normal dispositions would occur in the ordinary course of courtroom practice. Thus, so far as the manner of disposition is concerned, statisticians would refer to the reports as "mortality" reports.

The application of statistics to improvements in civil justice is aptly illustrated by a recent change, effective September 1, 1937, which permits verdicts in civil cases to be rendered by five-sixths of the jurors. Statistical data gathered by the Judicial Council indicated that six percent of all jury cases in the Supreme Court ended in disagreements. Further statistical data will make it possible to determine the effectiveness of the change in reducing disagreements and will indicate its effect on the average amount of verdicts.

The collection, compilation and publication of police and criminal judicial statistics was in 1928 made a function of the Department of Correction. Due largely to defects in the system employed, these duties had never been very successfully discharged. After a statutory change the way was cleared to the establishment on January 1st, 1937, of a new system, which correlates police and judicial data, not only within the State but also with the nationwide data collected and published by the Federal Bureau of Investigation and the Census Bureau of the Department of Commerce. This will render all police and criminal judicial statistics comparable on a national or statewide basis.

Consequently, New York State is now in a position where an analysis of problems in either its criminal or civil judicial systems may be based upon facts and not, as so frequently in the past, upon hypotheses.

There is hardly an aspect of the Civil Practice Act that a lawyer piloting a case through the courts will find untouched by improvements within the last few years. It seems fair to say that if a lawyer admitted to practice in January, 1934, but who had not followed the changes in the law, were given a case to litigate, he would be literally staggered at the number of changes, as I shall indicate.

The Judicial Council has endeavored generally to make the practice uniform in all courts as far as possible, and as simple, certain, speedy and inexpensive as possible. Scattered statutes and regulations have been coordinated, inconsistencies corrected, and anachronisms eliminated, as I shall presently show.

There has been no general reorganization of the courts, that vital subject having been deferred for the consideration of the State Constitutional Convention which meets in the spring of 1938. The only state-wide comprehensive revision pertaining to organization has been in regard to official referees.¹⁵ Under our system former judges are appointed as official referees with certain limited judicial powers, in order that the benefits of their experience on the bench should not be lost. In 1935 more work was made available to them, thus releasing judges almost entirely for trial work.¹⁶

One well publicized change in the substantive law deserves mention. This was the abolition of civil actions for breach of promise to marry and for alienation of affections¹⁷ which has been held constitutional.¹⁸ Civil actions for criminal conversation and seduction have also been abolished, but the constitutionality of these changes has not yet been passed upon. A prolific source of what was called "legalized blackmail" has thus disappeared. The remedies afforded by criminal prosecution are available for cases of real abuse.¹⁹

There has been a tendency to reduce the periods of the Statutes of Limitations to conform with the speedy transactions of the present day, to prevent loss of evidence, and in general to avoid injustice consequent upon lapse of time. Thus the limitation period for an action based on adverse possession has been reduced from twenty to fifteen years.²⁰ An action for property damage due to negligence must now be brought within three instead of six years.²¹ A libel action must now be brought within one year instead of two years as heretofore.²²

Much has been done in the cause of justice for the poor, who are now defined for purposes of suit as persons not worth \$300 instead of \$100 as heretofore. To such a poor person an attorney may be assigned who may be compensated out of the proceeds of any litigation, in the court's discretion. A poor person also may now appeal as such.²³ The Small Claims Parts of the Municipal Court of the City of New York,

15. N. Y. Laws 1935, c. 854, adding new N. Y. JUDIC. LAW §§ 115-125.

16. N. Y. Laws 1935, c. 629, amending N. Y. CITY MUN. CT. CODE §§ 7, 119, 180; see note 15, *supra*.

17. N. Y. Laws 1935, c. 263, adding new N. Y. CIV. PRAC. ACT §§ 61(a) to 61(l).

18. *Fearon v. Treanor*, 272 N. Y. 268, 5 N. E. (2d) 815 (1936) (breach of promise); *Hanfgarn v. Mark*, 274 N. Y. 22, 8 N. E. (2d) 47 (1937) (alienation of affections).

19. The statutes relating to adultery are comprised in N. Y. PENAL LAW (1909) §§ 100-103; those relating to seduction are in N. Y. PENAL LAW (1909) §§ 2175-2177.

20. N. Y. Laws 1932, c. 261-265, amending N. Y. CIV. PRAC. ACT §§ 34-37, 41.

21. N. Y. Laws 1936, c. 558, amending N. Y. CIV. PRAC. ACT § 49 (6).

22. N. Y. Laws 1936, c. 327, amending N. Y. CIV. PRAC. ACT §§ 50, 51.

23. N. Y. Laws 1935, c. 722, amending N. Y. CIV. PRAC. ACT §§ 196-199, 558, 1493, 1522; RULES CIV. PRAC. 35, 36, as amended 1935. N. Y. Laws 1936, c. 166, amending N. Y. CIV. PRAC. ACT § 1493; N. Y. Laws 1937, c. 612, adding new N. Y. CIV. PRAC. ACT § 198 (a).

established in 1934 for the determination of claims up to \$50,²⁴ have been singularly successful and are now disposing of over 25,000 claims per year. The features of the special procedure set up are service of process by registered mail at a total disbursement of 25¢ for wage claims and a fee of \$1.25 for other claims,²⁵ and the absence of other expenses, of a jury, and of formal procedure. This procedure is intended for individuals of small means and it cannot be resorted to by corporations, partnerships, or assignees.

Acquisition of Jurisdiction

The use of registered mail in small claims leads me to certain improvements in simplifying and making less expensive the acquisition of jurisdiction, a field in which few defects remain. A definite proposal for service by registered mail as an alternative to other methods of service is at present under consideration by the Judicial Council.²⁶ Domestic corporations,²⁷ business trusts and joint stock associations²⁸ are now required to designate the Secretary of State to receive service of process. Along the same lines the clerk of the court is named as designee to receive service of process in an incompetent's state.²⁹ All sections dealing with service of process other than personal service have been conformed to require filing of proof of service within a set period, the service becoming complete within ten days after the filing of the proof thereof.³⁰ Service upon a non-resident motorist has been clarified and codified.³¹

Pleading

In the field of pleading great progress has been made in avoiding multiplicity of actions.³² Formerly causes of action could be joined in the same complaint only if they belonged to one of eleven enumerated groups or arose out of the same transaction. In addition they were required to be consistent with each other. But these artificial requirements have been abolished. Any types of causes of action, instead of having to be pleaded in separate complaints, may be joined in the same

24. N. Y. Laws 1934, c. 598, adding new N. Y. CITY MUN. CT. CODE §§ 179-187.

25. N. Y. Laws 1935, c. 726, amending N. Y. CITY MUN. CT. CODE § 181.

26. See Third Report J. C. p. 277, *et seq.*

27. N. Y. Laws 1934, c. 908, amending N. Y. CIV. PRAC. ACT §§ 228, 229, adding new N. Y. STOCK CORP. LAW § 25; N. Y. Laws 1935, c. 475 and 549, amending N. Y. STOCK CORP. LAW §§ 86, 91.

28. N. Y. Laws 1937, c. 66, amending N. Y. GEN. ASSOC. LAW §§ 2, 18, 19; see Third Report L. R. C., p. 249 *et seq.*

29. N. Y. Laws 1935, c. 155, amending N. Y. CIV. PRAC. ACT § 1358.

30. N. Y. Laws 1935, c. 623, amending N. Y. CIV. PRAC. ACT §§ 231, 233, 235.

31. N. Y. Laws, c. 94, amending N. Y. VEHICLE AND TRAFFIC LAW § 52.

32. See Legis. (1937) 37 COL. L. REV. 462.

complaint subject to severance by the court and limited only by standards of justice and convenience.³³ The modern trend to dispose of all matters at one time so far as convenient has been furthered by permitting the interposition of any type of counterclaim in the discretion of the court.³⁴ However, the previous restrictions on a counterclaim where the complaint is based upon an assigned cause of action have been retained.

Multiplicity of actions is further decreased and the fusion of law and equity strengthened by conforming the practice concerning supplemental pleadings in actions at law to that existing in equity. The trial of an action at law may now proceed upon the facts as they existed at the date of the trial as shown in any supplemental pleadings,³⁵ for example, in an action on instalments under a lease. Further, complaints, originally defective, may be corrected by the supplemental facts pleaded.³⁶

An order of interpleader may now be granted at any time in the court's discretion. Heretofore, a defendant having no interest in the litigation but acting merely as a stakeholder, could not interplead claimants and withdraw from the case if he had answered the plaintiff's complaint. Instead he had to bring an independent action of interpleader and move to consolidate the two actions. Such circuitry is now avoided by permitting a defendant to apply to the court for an order of interpleader at any time during the course of the action.³⁷

Preparation for Trial

Cases are now permitted to be placed upon the calendar regardless of joinder of issue, forty days after service becomes complete, and it is no longer profitable to attempt to delay such joinder of issue in the hope of delaying the trial.³⁸ Even though delay exists, a case will be working

33. N. Y. Laws 1935, c. 339, adding new N. Y. CIV. PRAC. ACT § 258. In *Epp v. Title Guarantee & Trust Co.*, 160 Misc. 554, 289 N. Y. Supp. 896 (Sup. Ct. 1935), the court construed the new section § 258 as permitting inconsistent causes of action to be joined. Cf. *Dickler v. National City Bank*, 160 Misc. 317, 289 N. Y. Supp. 810 (Sup. Ct. 1935), where the court stated that the new section § 258 did not supersede rule 102 of the Rules of Civil Practice, and that mutually exclusive causes of action could not be joined.

34. N. Y. Laws 1936, c. 324, amending N. Y. CIV. PRAC. ACT §§ 262, 267, 278, 245(a), adding new N. Y. CIV. PRAC. ACT § 266, repealing N. Y. CIV. PRAC. ACT § 270, amending N. Y. CITY CT. ACT §§ 18, 18(a); N. Y. Laws 1937, c. 525, amending N. Y. CIV. PRAC. ACT § 1168. See Second Report J. C., p. 117 *et seq.*

35. N. Y. Laws 1935, c. 486, adding new N. Y. CIV. PRAC. ACT §§ 245(a), 245(b).

36. Cf. *Watson v. Seafoam*, 235 App. Div. 234, 256 N. Y. Supp. 891 (2d Dep't 1932), wherein the court held that under § 117 of the Civil Practice Act, a supplemental complaint cannot give validity to an insufficient amended complaint.

37. N. Y. Laws 1937, c. 109, amending N. Y. CIV. PRAC. ACT § 287.

38. N. Y. Laws 1936, c. 30, amending N. Y. CIV. PRAC. ACT § 433; new RULES CIV. PRAC. § 150, effective March 15, 1935, as amended 1936.

its way up the trial calendar regardless of preliminary motions. As a result, there is no longer any incentive to delay the joinder of issue by unnecessary motions and appeals.

In the same field the Sword of Damocles hanging over the defendant in the form of an action begun but not placed upon the calendar, has been removed by allowing a party six months and no longer (unless good reason is shown) to place a case upon the calendar for trial.³⁹ Formerly the defendant could not move for the dismissal of a complaint until all cases of equal age had been tried. In some courts this took as long as three years.

In the field of preparation for trial, bills-of-particulars practice has been completely revised and unified throughout the State.⁴⁰ The former dozen or so methods for obtaining a bill of particulars, differing not only in various cities but also in courts within the same city, have been replaced by two procedures only; one for the Supreme Court and the larger inferior courts, and the other for the Justices' Courts and small inferior courts. The new practice is intended to relieve the courts of a deluge of unnecessary motions by making the granting of a bill of particulars as nearly automatic as possible. At present, as in examination before trial, a bill of particulars may be obtained on demand only. The burden rests on the party objecting to giving the bill. He must make a motion to modify or vacate. Under the former practice a demand for a bill of particulars could be made, but if it was not satisfied, a motion for the bill had to be made. If the bill was still not furnished, the moving party then was required to make a motion for a preclusion order. Furthermore, under the former practice, affidavits in support of or in opposition to bills of particulars, motions were required to be made by the party. Actually, such affidavits were merely formalities. Now the use of affidavits is entirely optional but if deemed desirable may be made by the attorneys instead of the parties. Last but not least, is the standardization of the particulars required in personal injury actions. Each party now knows beforehand what information he is entitled to receive or what information he must furnish. Since negligence cases constitute approximately 75 percent of the litigation of the New York Supreme Court and the City Court of the City of New York,⁴¹ this provision was expected to do away with many unnecessary motions. This expectation has been realized and there has been a considerable decline in the number of motions since September 1, 1936, when the change went into effect. In general, the comprehensive revision of bills

39. NEW RULES CIV. PRAC. 156, effective March 15, 1935.

40. N. Y. Laws 1936, c. 241, amending N. Y. CIV. PRAC. ACT §§ 246, 247; new RULES CIV. PRAC. 115, 116, 117, effective Sept. 1, 1936; N. Y. Laws 1936, c. 630-648, amending special statutes of local courts. See Second Report J. C. 48(G).

41. Report C. A. J., p. 43.

of particulars practice has saved time for the courts and the lawyers and money for the litigants.

The scope of summary judgments was extended to unliquidated demands and to certain equitable actions in 1932, and in 1933 and 1936 was further extended to include the dismissal of complaints on the defendant's motion.⁴² This highly important and successful procedure, an application of the principle of discovery, that is, of revealing one's evidence, was intended for types of cases where controversial issues of fact need not necessarily be anticipated.

As a major step in the general improvement of the administration of justice, the sanctions of perjury were made more effective by reducing the formerly extreme penalties and by making false swearing on immaterial matters a misdemeanor.⁴³ As with a good many of these changes, it may be some time before this weapon becomes fully effective.

Trial

With respect to trial, one of the most important changes was a large reduction in the number of exemptions from jury service.⁴⁴ The former mandatory exemptions covered fifteen classes of citizens, while at present they cover only six classes. These include clergymen, lawyers, doctors and dentists, firemen and policemen, soldiers, sailors and marines, and merchant sailors. It has been said that 75 percent of the citizens in New York City, prior to the change, were exempt from jury service. The elimination of half of these exemptions will improve the calibre of petit juries and will insure the representation of a true cross-section of the community in every jury.

To the same end, a proposal that women be permitted to serve as trial jurors under similar qualifications as men, has in part been adopted.⁴⁵ Although women have been given the privilege of exemption upon request, it is believed to be a decided step forward toward the general objective of a perfected single petit jury system.

Struck and foreign juries have been abolished. They were found to be obsolete and unnecessary because of the more convenient device of change of venue.⁴⁶ Where protracted trials seem likely, provisions

42. RULES CIV. PRAC. 113 (1932), 114 (1936).

43. N. Y. Laws 1935, c. 632, amending N. Y. PENAL LAW §§ 1620, 1632, 1633, adding new §§ 1620(a), 1620(b), 1632(a). N. Y. Laws (1936) c. 93, amending N. Y. PENAL LAW § 1633. See Report C. A. J., p. 829 *et seq.*; First Report L. R. C., 60(F).

44. N. Y. Laws 1936, c. 890, amending N. Y. JUDIC. LAW §§ 545-547, 631, 635, 636, 717, 720-722, repealing §§ 544, 544(a), 548, 630, 637, 716. See Second Report J. C.; p. 175 *et seq.*

45. N. Y. Laws 1937, c. 513, amending N. Y. JUDIC. LAW §§ 502, 546, 598, 635, 686, 720.

46. N. Y. Laws 1937, c. 532, repealing N. Y. JUDIC. LAW §§ 538(a), 749(a)(g), and N. Y. CIV. PRAC. ACT § 449; N. Y. Laws 1937, c. 531, amending N. Y. Laws 1897, c. 346, § 22. See Third Report J. C., p. 121 *et seq.*

are now made for alternate jurors.⁴⁷ The practice of inquests where defendants default in appearance upon the trial has been very much simplified and juries have been practically eliminated in this type of determination.⁴⁸

Evidence

Changes in the rules of evidence are few but important. Under the former rule, a witness was considered the witness of the party who placed him upon the stand or who made the witness his own. Under the new rule, in criminal as well as civil actions, a party may contradict his own witness by a prior statement of that witness which had been made in writing or under oath.⁴⁹

An attorney or his employee may now testify to the preparation and execution of any will sought to be construed or the preparation and execution of any instrument affecting the construction of the will, whether or not the attorney or his employee is one of the subscribing or attesting witnesses.⁵⁰

A seal is no longer conclusive or even presumptive evidence of consideration.⁵¹ In fact, the value of the seal has been eliminated except in so far as it leaves the time limitation on a sealed instrument twenty years instead of six years.

Newspaper reports of stock exchange prices and quotations have been made *prima facie* evidence of value.⁵²

Very interesting is the new law which submits an individual to a blood grouping test and then permits the results to be admitted in evidence. Under these blood grouping tests paternity of a child may definitely be negated.⁵³

After fully a half century of effort, a change was adopted in 1934 that a party adversely affected by a ruling of the court during trial

47. N. Y. Laws 1935, c. 314, adding new N. Y. CIV. PRAC. ACT § 449(a).

48. N. Y. Laws 1934, c. 567, amending N. Y. CIV. PRAC. ACT § 490; N. Y. Laws 1936, c. 306, adding new N. Y. CIV. PRAC. ACT § 494(a).

49. N. Y. Laws 1936, c. 191, adding new N. Y. CIV. PRAC. ACT § 343(a), and new N. Y. CODE CRIM. PROC. § 8(a); N. Y. Laws 1937, c. 307, amending N. Y. CIV. PRAC. ACT § 343(a), and N. Y. CODE CRIM. PROC. § 8(a). See Second Report J. C. 48(I).

50. N. Y. Laws 1934, c. 305; N. Y. Laws 1935, c. 200; N. Y. Laws 1936, c. 493; all amending N. Y. CIV. PRAC. ACT § 354.

51. N. Y. Laws 1936, c. 685, adding new N. Y. CIV. PRAC. ACT § 342; N. Y. Laws 1937, c. 180, amending N. Y. CIV. PRAC. ACT § 342. See Second Report L. R. C., p. 65 *et seq.*

52. N. Y. Laws 1934, c. 324, adding new N. Y. CIV. PRAC. ACT § 375(a).

53. N. Y. Laws 1935, c. 196, adding new N. Y. CIV. PRAC. ACT § 306(a); N. Y. Laws 1935, c. 197, amending N. Y. CITY INF. CRIM. CT. ACT § 67; N. Y. Laws 1935, c. 193, adding new N. Y. DOM. REL. LAW § 126(a); N. Y. Laws 1936, c. 440, amending N. Y. CIV. PRAC. ACT § 306(a); N. Y. Laws 1936, c. 439, amending N. Y. CITY INF. CRIM. CT. ACT § 67; N. Y. Laws 1936, c. 604, amending N. Y. DOM. REL. LAW § 126(a).

would be permitted to appeal from the ruling without taking an exception.⁵⁴ In 1936 this change was modified.⁵⁵

Verdict, Decision and Judgment

Since September first of last year a verdict in a civil case may be rendered by five-sixths of the jurors.⁵⁶ This is expected to have two results; first, to reduce disagreements and be an improvement in the administration of the courts with an economic saving to the State; and more important, to bring forth a fairer expression of the juror's opinion than heretofore. As I indicated before, statistical data as to the number of disagreements and as to the average amounts of verdicts will make it possible to observe the results of the change.

The form of decisions in cases tried without a jury, either in equity or in jury waived law cases, has been unified.⁵⁷ The judge may state the essential facts upon which he bases his judgment either dictating his decision orally or writing a more formal opinion, or in the old form of separate findings of fact. It is no longer necessary in these cases tried without a jury to file exceptions to the decision, but these are deemed to have been taken, and an unnecessary step in the process of litigation is entirely removed.⁵⁸

Partial retrial after disagreement by a jury is now permitted. Instead of requiring a case to be tried over again in its entirety, the court may order a retrial of any severable matter upon which disagreement occurred, thus saving considerable time and expense.⁵⁹

Collection of Money Judgments

A whole line of measures⁶⁰ has been enacted to insure the collection of money judgments from debtors able to pay.⁶⁰ Far the most important is a complete revision of forty-three sections of the Civil Practice Act dealing with examinations supplementary to the judgment. Intended to reveal any assets of judgment debtors, this change plugged up literally scores of loopholes that had accumulated for a century. The ineffectiveness of the procedure in the past had resulted in money judgments being considered as mere scraps of paper. Perjury in supplementary

54. N. Y. Laws 1934, c. 566, amending N. Y. CIV. PRAC. ACT, § 446.

55. N. Y. Laws 1936, c. 915, amending N. Y. CIV. PRAC. ACT §§ 446, 583.

56. N. Y. Laws 1937, c. 120, adding new N. Y. CIV. PRAC. ACT § 463(a) N. Y. CONST. art. I, § 2, amended 1935.

57. N. Y. Laws 1936, c. 915, amending N. Y. CIV. PRAC. ACT §§ 440, 442, 445, 471, 583, repealing N. Y. CIV. PRAC. ACT § 440 (a). See (1936) 8 N. Y. ST. BAR BULL. 143; *cf.* Second Report J. C., p. 199 *et seq.* and Legis. (1937) 22 CORN. L. Q. 285.

58. N. Y. Laws 1934, c. 505, and N. Y. Laws 1936, c. 915, amending N. Y. CIV. PRAC. ACT § 445.

59. N. Y. Laws 1937, c. 613, amending N. Y. CIV. PRAC. ACT § 463.

60. N. Y. Laws 1935, c. 630, amending N. Y. CIV. PRAC. ACT §§ 773-810.

proceedings was rife. The offense was punishable only through criminal prosecution as a felony and the penalty was so far out of proportion to the offense that few perjurers were ever punished. The concealment of assets was thus made easy. Family corporations were used as a device to avoid the application of funds to the payment of a judgment. Many other abuses became firmly entrenched because of the inadequacies of the procedure. The present law has been most effective in combating these infractions and in correcting what was called an inexcusable and scandalous condition. One of the most important provisions is that deliberate perjury in these supplementary proceedings is punishable as a contempt of court. In addition, the new general perjury provisions, mentioned above, also apply. Since the punishment is now suited to the crime, prosecution for false testimony has now become an easier matter. Close in importance is a provision authorizing the court to order the judgment debtor to pay the judgment in instalments, the size of which may be fixed by the court on the basis of the judgment debtor's actual earning ability as disclosed in the examination. Since the proceedings are supplementary to judgment rather than subsequent to execution as formerly, the useless expenditure and delay in issuing executions are eliminated. All types of money judgments have been brought under the proceeding; whether service of process was obtained personally or whether the amount was less than \$25 is now immaterial. Moreover, the time within which the proceeding may be brought from the date of judgment in a court of record has been extended from ten to twenty years. Attorneys are given much greater power to originate the proceeding by subpoena and the subpoena issued by the attorney is permitted to contain an injunction against the transfer of a judgment debtor's property. The efficacy of these and the many other changes in the revision has been greatly felt in the profession. No longer are money judgments considered mere scraps of paper in New York.

A further improvement in the collection of money judgments was brought about by permitting a warrant of attachment to be made on a debt owed by and to a non-resident or a foreign corporation if service of the attachment papers can legally be made upon the foreign debtor of the foreign defendant.⁶¹ This enlarged jurisdiction in attachment against foreign defendants has harmonized the New York law with the law in all the other states.

Then too, levy of execution is now permitted upon shares of stock, promissory notes, checks, and certain other readily saleable choses in action, correlating the law with levy of attachment.⁶²

61. N. Y. Laws 1936, c. 818, amending N. Y. CIV. PRAC. ACT § 916; *Harris v. Balk*, 198 U. S. 215 (1905). On the whole topic, see Rothschild, *A Strange Instance of Procedural Self-Denial* (1935) 10 ST. JOHN'S L. REV. 26.

62. N. Y. Laws 1936, c. 153, amending N. Y. CIV. PRAC. ACT § 687.

Appeals

The most important change with respect to appellate practice, designed to reduce the cost of appeals, was to make clear to attorneys by a revision of the language of the Rule of Civil Practice that only that part of the record need be printed which pertained to the questions to be raised upon appeal.⁶³ This amendment removed any doubt as to the permissibility of a shortened record as against the printing of the complete minutes of an action verbatim. Effective use of this provision depends in large measure on the education of the profession as to its benefits.

Replevin procedure has been much strengthened.⁶⁴ The court in a replevin action may now order the defendant to be examined before trial as to the location of the chattel sought to be replevied and may permit the replevin of the chattel at any time up to the entry of judgment, instead of only to the time of service of the defendants answer. This extension of the time within which to replevy makes the practice similar to that in provisional remedies.

An important change has been the shackling of the labor injunction.⁶⁵ Except for this, changes with respect to provisional remedies have been few. Flexibility has been brought about by provisions facilitating consolidation of cases and transfer of cases from court to court as occasion may demand.⁶⁶

Special Proceedings against a Body or Officer

One of the most important single revisions effected is the abolition of the separate forms and procedures required in the special proceedings of *certiorari* to review, *mandamus* and prohibition and the substitution therefor of a uniform mode of proceeding.⁶⁷ The forms of action were abolished as long ago as 1846 but the forms of special proceedings continued virtually unchanged. The emphasis by the courts on the separateness of the three forms created an almost impossible situation. It was often very difficult under the decisions to determine which of the

63. RULES CIV. PRAC. 232, as amended 1935.

64. N. Y. Laws 1937, c. 512, adding new N. Y. CIV. PRAC. ACT § 1094(a), amending N. Y. CIV. PRAC. ACT §§ 289, 1094, 1111.

65. N. Y. Laws 1935, c. 298, adding new N. Y. CIV. PRAC. ACT § 882(a); N. Y. Laws 1935, c. 299, adding new N. Y. JUDIC. LAW § 753(a), amending N. Y. PENAL LAW § 600; N. Y. Laws 1935, c. 477, adding new N. Y. CIV. PRAC. ACT § 876(a).

66. N. Y. Laws 1935, c. 626, amending N. Y. CIV. PRAC. ACT § 96; N. Y. Laws 1935, c. 627, adding new N. Y. CIV. PRAC. ACT § 96(a); N. Y. Laws 1932, c. 605, adding new N. Y. CIV. PRAC. ACT § 110(a).

67. N. Y. Laws 1937, c. 526, repealing N. Y. CIV. PRAC. ACT §§ 1283-1312, 1313-1340, 1341-1355, adding new N. Y. CIV. PRAC. ACT §§ 1283-1306; N. Y. Laws 1937, c. 508, amending N. Y. CIV. PRAC. ACT § 140, repealing N. Y. CIV. PRAC. ACT § 631(3), adding new N. Y. CIV. PRAC. ACT § 634(a).

three proceedings was adapted to the relief sought by the petitioner, the principal distinction being between administrative and quasi-judicial matters. If a petitioner was unfortunate enough to choose a form of proceeding which the courts regarded as inappropriate for the particular case, his only recourse was to begin again, using one of the other forms. In some instances the petitioner was deprived of all remedy because the applicable Statute of Limitations had run during the time that he was learning of his error. This was particularly unfortunate since the three remedies overlapped to some extent, and many cases could have been disposed of equally well, no matter what name was given to the proceeding. The courts themselves were not always clear as to which remedy was the proper one, as illustrated by the cases of *People ex rel. Sims v. Collier*,⁶⁸ and *People ex rel. Schau v. McWilliams*.⁶⁹ In the *Sims* case, the Court of Appeals ruled that *mandamus* was not the proper remedy to review the action of the State Civil Service Commission in classifying a certain civil service position. The Court of Appeals decided that the action of the Commission was quasi-judicial and reviewable by *certiorari*, and that it could not sanction the use of *mandamus* in such a case. Three years later, in the *Schau* case concerning a similar question, *certiorari* was invoked in accordance with the *Sims* case. The court, however, reversing itself, overruled the *Sims* case and quashed the writ of *certiorari* declaring that the action of the Commission was not quasi-judicial and that *mandamus* was the proper remedy. Such reversals happened more than once.

In addition to these problems of form, there were the problems presented by the various procedures involved, which were often unreasonable. In all three proceedings the petitioner was required to obtain a preliminary order compelling the respondent to file a return to the petition. In *mandamus*, before the filing of a return, the petitioner then had to decide whether questions of law or issues of fact were involved requiring respectively application for a peremptory order in the first instance or for an alternative order. In *certiorari*, the respondent might defeat the return by making a false or inaccurate return, the only remedy being a separate action for damages on a false return. In *mandamus*, the court to which issues of fact were sent for trial could not pass on issues of law; and after the issues of fact were decided, a motion for a final order had to be made in the part of the court where the preliminary order was made. On many points the three proceedings were the same while on other points, without apparent justification, they were different.

These problems and complexities no longer exist. The chief advan-

68. 175 N. Y. 196 (1903).

69. 185 N. Y. 92 (1906).

tage of the very comprehensive revision and correlation which resulted in one form of special proceeding and one method of procedure has been to make certain that a litigant need not at his peril select the particular proceeding regarded by the courts as the proper one. Hereafter, a litigant need only set forth his facts and the proper relief may be given him. In addition the procedure is now straightforward and in many respects the same as in an ordinary action.

This survey of recent developments in New York practice would not be complete without a mention of some of the proposals which were recommended but failed of adoption. These include the temporary transfer of judges from courts where there is no delay to congested courts, the extension of examination before trial to permit any party to examine any other party on any matters relevant to the issues as framed by the pleadings and a daily pretrial hearing of cases upon the trial calendars approximately two weeks before the cases are likely to be reached, in order to define and narrow to a minimum questions of law and issues of fact.

Although some of the above changes are purely procedural and to a layman may seem minor, nevertheless the constant correction of defects as they appear is giving to New York well-rounded, rational and efficient methods of adjudication.

Reduction in delay, the greatest of our evils, can be accurately measured. Statistical information shows that the delay in New York, once a by-word throughout the country, has fallen before the attack. After three years of concentrated effort the elimination of delay in the courts of New York has been substantially achieved. Today there is no delay in obtaining a trial of a commercial or equity case or in the hearing of appeals in any court of the State. The sole remaining delay, in the trial of tort cases, is confined to six counties in the metropolitan area of New York City.

Delay in the Municipal Court of the City of New York, which has jurisdiction over civil cases involving up to \$1,000, has been completely eliminated except in tort jury cases in two of the five divisions of the court where the delay is seven and nineteen months respectively. There has been a reduction of 66% in the number of cases on the calendars of the court.

In the City Court of the City of New York, which has jurisdiction over civil cases involving sums up to \$3,000, delay exists in tort jury cases in three of the five divisions of the court. In two of these the reductions in delay have been from thirty-three and fifty-two months to sixteen and fourteen months respectively. In one of the other divisions a delay of forty-five months which existed three years ago has been completely eliminated. In tort non-jury cases, delay exists only in one division of

the court where it has been reduced from thirty-three to eleven months. As in the Municipal Court of the City of New York, there has been a reduction of 69% in the number of cases on the calendars of the court.

In the Supreme Court of the State of New York, which has jurisdiction over all civil cases but is resorted to principally in cases involving more than \$3,000, delay of over six months existed in the trial of jury tort cases in fourteen counties of the sixty-one counties where the Supreme Court operates. Today this delay has been confined to six counties in the metropolitan area of New York City, and even there a delay of two years is definitely an exception.

Further substantial inroads will undoubtedly be made upon such delay as presently exists in these few tort calendars. It may be said that the problem of delay is no longer acute.

The accomplishments of the past few years, as indicated above, speak for themselves. Of course, these accomplishments could not have been consummated without the fullest cooperation of the Legislature, the Bench and the Bar. But on the other hand, neither could they have been brought about without the assistance of modern research methods. These results substantiate the idea that continued scrutiny of the functioning of the judicial system according to complete and accurate current knowledge of the facts by properly qualified and representative bodies, sincerely interested in their work, adequately staffed and financed, is the proper method for attaining and maintaining a more perfect administration of justice.