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### Cover Page Footnote

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## NEW YORK CIVIL PRACTICE AND PROCEDURE AT THE THRESHOLD OF 1953\*

JOHN F. X. FINN†

SHORTLY after the New York Legislature reconvenes on January 7, 1953, it will receive for the third successive year a resolution which in effect asks each member this question:

"Is New York's procedural code a Brobdingnagian conglomeration of heterogeneous rules of law and practice?"<sup>1</sup>

However this resolution may fare, the 1953 legislative session will inevitably enact amendments of the Civil Practice Act and related procedural statutes. These may deal with existing procedural oddities<sup>2</sup> or

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1. N. Y. Leg. Index 683-4 (Assembly Resolution No. 114 1952) (Mr. Brook); N. Y. Leg. Index 627-8 (Assembly Resolution No. 30, 1951) (Mr. Brook). See Finn, *New Procedure for Old*, 4 FORD. L. REV. 228, 232 n. 11 (1935).

2. a) In connection with a proceeding to open a private road, Sections 306 and 307 of the Highway Law actually provide for a trial without a judge. Section 306 requires a Justice of the Peace to draw a jury of twelve persons who then serve as a jury, and

"The duties of the Justice of the Peace in connection with the proceeding shall end after the jury is sworn."

b) In the index to Jessup-Redfield's *Law and Practice in the Surrogates' Courts*, there is the following definition of a "Demurrer," preserved through at least eight editions: "Demurrer. None in Surrogate's Court. (See Treatise on Snakes in Ireland)."

c) Section 42 of the New York Civil Practice Act, unannotated for almost thirty years, calmly provides that the right of a person in possession of real property is not affected "by descent cast." To translate this, I have had to go back to Section 237(b) of Coke upon *Littleton* (1791), to the effect that when a person had acquired land by intrusion and died seized of the land, the descent of it to his heir took away or tolled the real owner's right of entry, so that he could only recover the land by action.

d) Section 348 (a) of the New York Civil Practice Act enacted in 1939 provides for the admissibility in evidence by reading from the cases on appeal, of testimony adduced in two actions, *Miner v. City of New York et al.*, 37 Super. (5 J. & S.) 171 (1874) and *Sherman et al. v. Kane et al.*, 86 N. Y. 57 (1881).

with procedural reforms which have been suggested in various quarters.<sup>3</sup>

Perhaps consideration will be given to the comparative merits of the eighty-six Federal Rules of Civil Procedure and the eleven hundred sections of the New York Civil Practice Act which cover the same subject-matter.<sup>4</sup>

Certainly there will be legislative reflection upon the first year's experience with New York's most recent attempt at "wide-open" examinations before trial.<sup>5</sup>

Whatever the scope or the depth of the procedural legislation of 1953, it is hoped that the legislature will take as its text Chief Judge Crane's great sentence in *Gucker et al. v. Town of Huntington et al.*: "The pathway to the courthouse is not as important as what happens when we get there."<sup>6</sup>

e) For statutes of limitation purposes, causes of action for breach of covenants of seizin or against encumbrances are not deemed to have accrued until there has been "an eviction, and not before" (N. Y. CIV. PRAC. ACT § 11). This is hardly a statute of repose.

f) The New York Civil Practice Act comprehensively grants to the Supreme Court the jurisdiction which was possessed and exercised by the Court of Chancery in England on July 4, 1776. N. Y. CIV. PRAC. ACT § 64.

3. a) Despite the tabling in 1947 of the project to extend the rule-making power of the courts, there are many interstices in the statutes where further judicial "knee-action" should be permitted by the enactment of statutory provisions comparable to Sections 247 and 277 of the New York Civil Practice Act.

b) The "unnecessary complexity" of Interpleader in New York is apparent. Frumer, *On Revising the New York Interpleader Statutes*, 25 N. Y. L. REV. 737 (1950).

c) The Judicial Council is preparing a comprehensive revision of practice and procedure in Replevin. Seventeenth Report of the New York Judicial Council 241-90 (1951)—hereinafter referred to as Seventeenth Report J.C.

d) And in Arbitration. *Id.* at 213-40.

e) Appellate practice needs a general overhauling. It is much too cumbersome, treacherous and abounding in sharp quilllets. For example, when an Appellate Division reverses "upon the law and the facts", without specifying the facts, the Court of Appeals will deem this a reversal upon *the law* only, and it may reverse the reversal if there was no error of law below. *Hart et al. v. Blabey*, 287 N. Y. 257, 39 N.E. 2d 230 (1942), construing N. Y. CIV. PRAC. ACT § 602.

f) Should the New York Civil Practice Act Sections 100 and 218 be amended to provide that an action is started upon filing a complaint?

4. Keefe, Brooks and Greer, *86 or 1100*, 32 CORN. L. Q. 253, 269 (1946). *Cf.* *Cohen et al. v. Beneficial Ind. Loan Corp. et al.*, 337 U.S. 541 (1949); Keefe, Gilhooley, Bailey and Day, *Weary Erie*, 34 CORN. L. Q. 494 (1949); Note, 35 CORN. L. Q. 420 (1950); Note, *Erie R.R. v. Tompkins and the Federal Rules*, 62 HARV. L. REV. 1030 (1949).

5. RULES CIV. PRAC. 121 (a), as amended July 1, 1952. See Peck, *The Pillar of Justice*, 127 N.Y.L.J. 179, 180 (Jan. 15, 1952). See also New Trial Term Rules X in N. Y. County and XIX in Bronx County, effective Jan. 1, 1952.

6. 268 N. Y. 43, 51, 196 N.E. 737, 740 (1935).

## THE ROOTS OF PROCEDURAL TRENDS

Trends have roots. And, paradoxically, roots frequently germinate in the ivory towers of scholarship. The roots of current New York procedural growth have been laid bare in such places as in Judge Medina's comprehensive articles of 1945<sup>7</sup> and 1947,<sup>8</sup> in the Annual Reports of the Judicial Council,<sup>9</sup> in the 1950 "Dissent and Protest" of Judge Charles E. Clark and Mr. Charles Alan Wright,<sup>10</sup> and in the 1951 Commentary of Messrs. Ilsen and Snyder.<sup>11</sup>

The "fireworks" of the Council-Clark-Ilsen debate are found first in the 1947 decision of the Judicial Council to abandon a proposal of the New York County Lawyers Association that the Court of Appeals be empowered to prescribe civil procedure by rules, subject to modification by the legislature. The Council's Report said, among other things:

"The present system of civil procedure presently employed in New York State works very well. . . . That New York possesses one of the most efficient systems of civil practice in the country is generally conceded."<sup>12</sup>

Dissenting, Judge Clark and Mr. Charles Alan Wright wrote:

"It seems to us that the quoted words contain about as many errors as can well be compressed into so brief a space. . . . The Council's continuous and praiseworthy attempts to secure enactment piecemeal in this State of the recognized best modern practice constitute a convincing demonstration that New York as yet does not have 'one of the most efficient systems' in the country. . . . If court control must remain thus limited and subordinated (by legislative pressures) then we fear that New York is destined to stay long in its present state of procedural darkness."<sup>13</sup>

7. Medina, *Current Developments in Pleading, Practice and Procedure in the New York Courts*, 30 CORN. L. Q. 449, 465 (1945).

8. Medina, *Recent Developments in Pleading and Practice in New York*, 32 CORN. L. Q. 313, 336 (1947).

9. These reports are "extremely persuasive on the question of legislative intent." *Interchemical Corp. v. Mirabelli et al.*, 269 App. Div. 224, 227, 54 N.Y.S.2d 522, 525 (1st Dep't 1945); *Fontheim v. Third Ave. Ry.*, 257 App. Div. 147, 12 N.Y.S.2d 90 (1st Dep't 1939); *Matter of Derry*, 161 Misc. 125, 291 N.Y.S. 22 (Surr. Ct. 1936).

10. Clark and Wright, *The Judicial Council and the Rule Making Power; A Dissent and a Protest*, 1 SYRACUSE LAW REVIEW 346-68 (1950).

11. Ilsen and Snyder, *Comments on the Civil Practice Act and the Judicial Council*, 23 N. Y. ST. BAR BULL. 122-40 (April, 1951). To these might be added Judge McCullen's excellent books, *Examinations before Trial* (rev. 2d ed. 1950) and *Bills of Particulars* (1942), as well as Mr. Samuel S. Tripp's fine *Guide to Motion Practice*, (rev. ed. 1949 and 1951-1952 supp.). See also Clark's ingenious Annotator-Digest of the New York Law Journal; the Law Report News; the new Law Review Digest, in handy Reader's Digest form; and the Index to Legal Periodicals.

12. Thirteenth Report J.C. 55, 56 (1947).

13. See note 10 *supra*.

The Ilsen-Snyder rejoinder of 1951 is to the effect that:

"We find a record of achievement and endeavor (in New York) which touches upon many branches of procedure. Indeed, it is to the New York Judicial Council that credit must chiefly go for introducing the many new methods adopted in this state during the past 15 years and for clarifying erroneous constructions which have sometimes grown up about old and established procedures."<sup>14</sup>

So much for the trend of "fireworks" or heat lightning or the sparking of flint upon flint. In this trend, at least, New York and its critics are not subject to Chief Justice Vanderbilt's observation that "One of the strangest phenomena in the law is the general indifference of the legal profession to the technicalities, the anachronisms and the delays in our procedural law."<sup>15</sup>

#### JURISDICTION OF COURTS AND CALENDAR CONGESTION

On January 1, 1952, the jurisdiction of the Municipal Court of the City of New York was increased to \$3000,<sup>16</sup> and that of the City Court of the City of New York was increased to \$6000.<sup>17</sup>

This accelerates a trend initiated in 1949 by Presiding Justice Peck when he induced the enactment of Civil Practice Act Section 110(b), providing for Removal on Consent from the Supreme Court to courts of limited jurisdiction and the new preference rules.<sup>18</sup> The Municipal Courts particularly have not been suffering from overloaded calendars. The Supreme Court is bogged down. The rationale of the trend manifest is to siphon as many litigations as possible out of or away from the Supreme Court. Cases which have not been preferred will not be pre-tried. Combine with this (a) the "opening up" of personal injury examinations before trial, (b) the "Clerk's call," (c) the new 2 P.M. calendar call in the Supreme Court for the purpose of inducing waivers of jury trial, (d) the new "perpetual ready calendar" of a "hard core" of old cases, inaugurated at the opening of the trial parts in September, 1952, and (e) the constant reprocessing of cases and "toughening" of judges in the pre-trial parts, and you have some idea of the effect that "pecking away" at the Supreme Court calendars inevitably will have in 1953.

14. See note 11 *supra*.

15. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION XVII* (1949).

16. N. Y. CITY MUN. CT. CODE § 6.

17. N. Y. CONST. Art. VI, § 15; N. Y. CITY CT. ACT § 16; Seventeenth Report J.C. 54 (1951). The civil jurisdiction of county courts outside New York City is still only \$3000, but the 1951 legislature proposed a constitutional amendment to amend N. Y. CONST. Art. VI, § 11 to increase the amount to \$6000 (N. Y. Leg. Index 61, 1951). This will undoubtedly be submitted to the legislature of 1953.

18. Rule V (5), Trial Term, N. Y. Sup. Ct.

Certainly the insurance companies will have to add substantially to their trial staffs at once, as apparently a very effective groundswell is now in motion to wash away the calendar judge's constant complaint that the nub of the law's delay is the holding of too many cases "subject" to the engagements of too few trial lawyers.

Another proposal for speeding up the calendars that is "in the wind" is one to permit the "cross-assignment" of judges from court to court. Thus, the 1951 legislature passed a proposed constitutional amendment toward this end.<sup>19</sup> The effect of this would be to permit the justices of the Appellate Divisions to make temporary assignments into the Supreme Court in New York City of judges of the County Courts in New York City and of the Court of General Sessions, which is in effect the County Court of New York County. Thus we would have criminal court judges once again trying civil cases within the City of New York. Similarly, City Court justices would be assignable into the Supreme Court, and Municipal Court justices, along with Special Sessions justices, would be assignable into the City Court. Another concurrent resolution passed in 1951 and similarly to be submitted to the legislature of 1953 (apparently as an alternative) would permit the assignment of Special Sessions justices into the Court of General Sessions and the County Courts within the City of New York.<sup>20</sup>

The jurisdiction of the Court of Appeals has been increased by eliminating the necessity of a stipulation for final order absolute when the Court of Appeals grants permission to appeal from a non-final order of the Appellate Division "in a proceeding instituted by or against one or more public officers, or a board, commission or other body of public officers of a court or tribunal."<sup>21</sup>

A comprehensive revision of the Civil Practice Act in relation to an action to recover a chattel is accomplished by an amendment to Section 1093 and following sections of the Civil Practice Act.<sup>22</sup>

Garnishee proceedings are principally governed by Civil Practice Act Section 684, which was amended in 1939 and 1950. There was then no comparable amendment to Justice Court Act Section 300. Now, by Chapter 44 of the New York Laws of 1950, conformity changes are made, so that "\$15 or more per week" is changed to "\$30 or more per week" and "\$12 per week" is changed to "\$25 per week". Also, there is a change from five days to fifteen days in the paragraph of Section 300

19. N.Y. Leg. Index 12 (Sen. Int. 121, Pr. 121, 1951), to amend N.Y. CONST. Art. VI, §§ 1, 2, and 16 and to add § 15 (a).

20. N.Y. Leg. Index 108 (Sen. Int. 1378, Pr. 1408, 1951).

21. N.Y. Laws 1952 c. 251, effective Mar. 26, 1952, amending N.Y. CIV. PRAC. ACT § 589.

22. N.Y. Laws 1952, c. 829. See Seventeenth Report J.C. 79-80 and supporting study F, 241-90 (1951).

governing garnishment of wages of city, county and board of education employees.

County Courts outside New York City have been given jurisdiction of actions to compel the determination of a claim to real property under Article 15 of the Real Property Law.<sup>23</sup> Article 15 itself has been augmented by extending its use to cases where there has been a void or voidable mortgage foreclosure, even though reforeclosure may be barred by the statute of limitations.<sup>24</sup>

In the Municipal Court of the City of New York, since September 1, 1952, a chattel may be replevied at any time before the entry of final judgment whether or not issue has been joined.<sup>25</sup> Also, in that court the undertaking in replevin is hereafter to be filed with the clerk rather than delivered to the marshal.<sup>26</sup>

In the same Municipal Court, an action for conversion or to recover the possession of a chattel is permitted in addition to the present remedy of foreclosure of a lien on a chattel by a conditional vendor, lessor or chattel mortgagee.<sup>27</sup>

Justices of the Peace now have jurisdiction up to \$500 where they previously were limited to \$200 and up to \$100 where they were previously limited to \$50.<sup>28</sup>

Miscellaneous jurisdictional changes adopted in 1952 are found in the footnotes.<sup>29</sup>

23. N. Y. Laws 1951, c. 150, amending N. Y. CIV. PRAC. ACT § 67 (1).

24. N. Y. Laws 1951, c. 610, adding N. Y. REAL PROP. LAW §§ 500 (a), 506 (a) and 506 (b). See REPORT OF THE NEW YORK STATE LAW REVISION COMMISSION, N. Y. LEG. DOC. NO. 65K (1951). This eases the stringency resultant from the shortening in 1938 and 1941 of the periods of limitation from 20 to 6 years. See saving clauses, however.

25. N. Y. Laws 1952, c. 551, amending N. Y. CITY MUN. CT. CODE § 58.

26. N. Y. Laws 1952, c. 552. With respect to this chapter and the previous one, see Seventeenth Report J.C. 276 (1951).

27. N. Y. Laws 1952, c. 830. See Seventeenth Report J.C. 269-75 (1951).

28. N. Y. Laws 1951, c. 764, amending N. Y. JUST. CT. ACT §§ 3, 4, 109, 14, 264 and 267, effective Jan. 1, 1952.

29. An additional Supreme Court justice is authorized for the third judicial district. N. Y. Laws 1952, c. 788. Similarly there is an extra Supreme Court justice authorized for the fourth judicial district. N. Y. Laws 1952, c. 764. Queens County has been given four county judges in place of two. N. Y. Laws 1951, c. 832, amending N. Y. JUDIC. LAW § 189 (3).

The monetary jurisdiction of the City Court of Plattsburgh has been increased to \$1500. N. Y. Laws 1952, c. 429. That of the City Court of Long Beach has been increased to \$2000. N. Y. Laws 1952, c. 434. That of White Plains City Court is increased to \$3000. N. Y. Laws 1952, c. 711. As to the City Court of Norwich, see N. Y. Laws 1952, c. 812; and as to the City Court of Kingston, see N. Y. Laws 1952, cc. 813, 814. Courts of Special Sessions now have jurisdiction over violations of Articles 18 and 21 of the Tax Law. N. Y. Laws 1952, c. 204, amending N. Y. CODE CRIM. PROC. § 56 (35b).

Magistrates have been given jurisdiction (in a "Girls Term") of delinquent girls 16 to



## RENT CONTROL

Comprehensive revision has been enacted of both the Emergency Commercial Space Rent Control Law<sup>30</sup> and of the Emergency Business Space Rent Control Law.<sup>31</sup>

An apartment in a "co-operative" apartment house is deemed a "one-family house" for rent control purposes, so that its owner may evict a tenant from it without a showing of "immediate and compelling necessity."<sup>31a</sup>

## SUMMARY PROCEEDINGS

In proceedings to recover possession of premises occupied for dwelling purposes, the life of Civil Practice Act Section 435, subdivisions 4-9 inclusive, has been extended to July 1, 1953.<sup>32</sup>

An application to dispossess may now be made by "the lessee of the entire premises of which the demised premises form a part, provided his lease is for a term of not less than 10 years."<sup>33</sup>

Holdover tenants who do not pay rent may be dispossessed even if they hold over with the oral permission of the landlord, or with written permission which has been revoked.<sup>34</sup>

## CAPACITY TO SUE

1. *Foreign Executors and other Legal Representatives*

Heretofore, in order to protect New York creditors of foreign decedents, foreign legal representatives have lacked legal capacity to sue in New York courts unless they had obtained ancillary letters here. This rule has been changed. Now, Section 160 of the Decedent's Estate Law permits the foreign legal representative to sue here in like manner as a non-resident, upon complying with certain precautionary restrictions set forth in the statute.<sup>35</sup>

When considering suits *against* foreign legal representatives, it should be remembered that Section 160 does not apply. They may of course be

21 years of age, in proceedings to be deemed *civil* in character so far as practicable. N. Y. Laws 1951, c. 716.

Prisoners not under sentence of death may be ordered up to testify by county judges, special county judges and judges of General Sessions, as well as Supreme Court justices. N. Y. Laws 1952, c. 485.

30. N. Y. Laws 1952, c. 416.

31. N. Y. Laws 1952, c. 417.

31a. Matter of Wattlely, 305 N. Y. —, — N.E. 2d —. (decided Nov. 20, 1952).

32. N. Y. Laws 1952, c. 242.

33. N. Y. Laws 1952, c. 351, amending N. Y. CIV. PRAC. ACT § 1414 by adding new subdivision 9.

34. N. Y. Laws 1952, c. 495, amending N. Y. CIV. PRAC. ACT § 1410(2).

35. N. Y. Laws 1951, c. 522, adding N. Y. DEC. EST. LAW § 160.

sued in rem<sup>36</sup> or quasi in rem, upon an attachment of assets within the state,<sup>37</sup> and they may in certain cases be subjected to in personam jurisdiction, as where a nonresident motorist uses the highways of New York, causes an accident, and later dies. His legal representative may be sued here, in personam.<sup>38</sup> Judge Froessel's opinion in *Leighton v. Roper et al.*,<sup>39</sup> is an excellent textbook on this subject. Its highlight is a sentence at page 441 to the effect that "an action against an executor or administrator is not one purely in rem, and may therefore be founded on consent jurisdiction."

## 2. Civil Death

The law continues to whittle at the problem of "civil death." Capacity to sue in connection with matters not arising out of their arrest or detention is now granted to persons sentenced to imprisonment for life, while they are released on parole or when sentences are imposed upon them with the execution of the judgment suspended, and such execution of judgment remains suspended.<sup>40</sup>

## 3. Change of Name

On all applications for change of name by persons born in New York State there must be annexed to each petition, commencing September 1, 1952, either a birth certificate or a certified transcript thereof, or a certificate of the commissioner of the local Board of Health that none is available. The order must recite the date and place of birth of the applicant and if he was born in New York, the number of his birth certificate or that no birth certificate is available.<sup>41</sup>

If a resident of the City of New York petitions the City Court of the City of New York for a change of his name he may apply to any branch of that court in any borough of the city.<sup>42</sup>

### LIMITATIONS OF TIME

The trend is in the direction of repose.

True, as heretofore pointed out, we still have a cause of action for

36. *Holmes et al. v. Camp et al.*, 219 N.Y. 359, 372, 114 N.E. 841, 844 (1916).

37. N.Y. CIV. PRAC. ACT § 520. *Cf.* *Kirkbride v. Van Note*, 275 N.Y. 244, 9 N.E.2d 852 (1937); *Helme v. Buckelew*, 229 N.Y. 363, 367, 128 N.E. 216, 218 (1920).

38. N.Y. VEHICLE AND TRAFFIC LAW §§ 51, 51a. *Leighton v. Roper et al.*, 300 N.Y. 434, 91 N.E.2d 876 (1950). See also *Rogers et al. v. Gould et al.*, 206 App. Div. 433, 201 N.Y. Supp. 535 (1st Dep't 1923); *In re De Baun's Will*, 162 Misc. 111, 293 N.Y. Supp. 836 (Sur. Ct. 1937); *Ferguson v. Harder*, 141 Misc. 466, 252 N.Y. Supp. 783 (Sup. Ct. 1931).

39. 300 N.Y. 434, 91 N.E.2d 876 (1950).

40. N.Y. Laws 1952, c. 167, amending N.Y. PENAL LAW § 511.

41. N.Y. Laws 1952, c. 643.

42. N.Y. Laws 1952, c. 426, amending N.Y. CIV. RIGHTS LAW § 60.

breach of a covenant of seizin or freedom from encumbrances accruing upon eviction,<sup>43</sup> but we have come a long way in other directions.

In 1925, 1938 and 1941 we forthrightly shortened many periods of limitation from 30 years to 20 years,<sup>44</sup> or from 20 to 6 years.<sup>45</sup> In one respect we had to back-track slightly because of the constitutional mandate against a gift of state moneys.<sup>46</sup>

In other respects we have moved forward.

In 1949, Section 41 (a) was added to the Civil Practice Act, providing that where tenants in common occupy land, the occupancy of one is deemed to have been the possession of the other, even though the occupant has acquired another title or has claimed to hold adversely to the other—

“ . . . but this presumption shall not be made after the expiration of fifteen years of continuous occupancy by such tenant, . . . or after an ouster by one tenant of the other.”

This statute, recommended by the Law Revision Commission, thus limits to fifteen years a presumption that might otherwise run on and on unmercifully, to the confusion of real estate titles.

In 1951<sup>47</sup> amendments were made, again on recommendation of the Law Revision Commission, to Sections 43 and 60 of the Civil Practice Act. Section 43 deals with actions to recover real property or the possession thereof, and Section 60 deals with actions other than real property actions. These amendments endeavor to clarify situations such as the one presented in *Howell et al. v. Leavitt et al.*<sup>48</sup> It will be recalled that in the *Howell* case the court, per Finch, J., stated:

“The exception of the Code relates to the extension of the time limited, and puts restraint only upon that extension. It means that the disability shall not add more than ten years to the time limited after the disability has ended. Practically, in a case of infancy, it makes the extreme possible limitation a period of thirty-one years. If the cause of action accrues to an infant on the

43. N. Y. CIV. PRAC. ACT § 11. Note that in 1941 the indicated language was deleted from Civil Practice Action Section 47 (a), but transferred to Section 11. N. Y. LAWS 1941, c. 329. See N. Y. LEG. DOC. NO. 65M (1941). I am indebted to Professor Joseph McGovern for impressing upon me the anachronism of preserving this language.

44. N. Y. CIV. PRAC. ACT §§ 33-35.

45. N. Y. CIV. PRAC. ACT §§ 47, 47 (a).

46. N. Y. CIV. PRAC. ACT § 47 (b); REPORT OF THE NEW YORK STATE LAW REVISION COMMISSION, 193-219, N. Y. LEG. DOC. NO. 65 H (1950). See N. Y. CONST. ART. VII, § 8; ART. VIII, § 1; *Campbell et al. v. Holt*, 115 U. S. 620 (1885); *Gallewski v. Hentz*, 301 N. Y. 164, 93 N. E. 2d 620 (1950); *Williamsburgh Savings Bank v. State of New York*, 243 N. Y. 231, 153 N. E. 58 (1926).

47. N. Y. LAWS 1951, c. 263.

48. 95 N. Y. 617 (1884).

day of its birth for twenty-one years the running of the statute is suspended; then it begins to run; but the time limited—that is, the twenty years considered as a period—having in fact elapsed, it is an extension of that period which is in progress, and the exception limits that added time to not more than ten years after full age; that is until the expiration of thirty-one years. But for the exception the infant would have had forty-one years. . . .”<sup>49</sup>

The 1951 amendment to Section 43 generally *shortens* the extension of time heretofore provided after a disability ceases. That time is now extended five years after the disability ceases, *but only if the time expires less than five years after either the disability ceases or the person under disability dies*. Hence, if an infant is one year of age when an action for which the time limited is fifteen years accrues, the last age at which the action can be brought is twenty-six. If the infant is twelve years of age when the action accrues, his last age for commencing action would be twenty-seven, there being no extension of time, because the time limited would expire more than five years after the disability ceases. Prior to the 1951 amendments, the last ages for bringing the action in the example cited would be, respectively, thirty-one and thirty-six, according to Judge Finch’s statement just quoted from the *Howell* case. In the cases of insanity and imprisonment, moreover, the statute now includes a provision limiting the maximum time, as extended, to thirty years after the cause of action accrues.

Section 60, in cases of insanity or imprisonment, limits the maximum time as extended to fifteen years after the cause of action accrues instead of providing, as heretofore, for an extension of five years beyond the time otherwise limited. This is a provision of repose. On the other hand, the amendments to Section 60 somewhat lengthen the extension of time after the disability ceases, as a by-product of endeavoring to arrive at a reasonable and uniform formula. Thus, if the period of limitation is five years or more, such time is now extended five years after the disability ceases, but only if that time expires before the disability ceases or less than five years after the disability ceases. Hence an action for which the time limited is six years, accruing at the ages of 1, 16 and 20, may *in each of the three cases* be brought up to the age of 26, whereas formerly the last ages for bringing the actions would have been respectively 22, 22 and 26.

As to actions for which the time limited is less than five years, the time limited is extended by the period of disability. *E.g.*, an action for which the time limited is three years, accruing at any time during infancy, may be brought until the person reaches the age of twenty-four.<sup>50</sup>

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49. *Id.* at 623.

50. See REPORT OF THE NEW YORK STATE LAW REVISION COMMISSION, N. Y. LEG. DOC. No. 65 L (1951).

Turning back for a moment to Section 11 of the Civil Practice Act, we note that that section continues to provide that the statute of limitations is computed from the time of the accruing of a right to the time when the claim to relief "is actually interposed by a plaintiff or defendant in a particular action or special proceeding." Reading this together with Civil Practice Act Section 61 indicates that the statute of limitations continues to run against a defendant's counterclaim until the counterclaim is actually asserted in an answer.<sup>51</sup>

It is still useful to read Sections 13, 19 and 55 of the Civil Practice Act together. These deal with actions against non-residents, actions in which a cause of action arose outside of the state, and actions in which the defendant absents himself from the state or resides within it under a false name. Looking back upon the amendments of 1943, I think that they have been decidedly for the better.<sup>52</sup>

Civil Practice Act Section 17 continues to be a very valuable section where the statute of limitations is threatening to run out. Two recent cases illustrate this very neatly. In *Sauerzopf v. North American Cement Corp.*,<sup>53</sup> a federal statute colloquially known as the "Portal-to-portal Act"<sup>54</sup> provided that an "action shall be considered to commence *on the date when the complaint is filed.*" Judge Conway wrote that "We do not believe that Congress thereby intended to establish a rule of procedure for state courts." Accordingly the action was deemed started with the service of a summons. Again, in *Irons v. Michigan-Atlantic Corp.*,<sup>55</sup> the court held, per Piper, J., that:

"When an action is brought in the state court, the laws of the state are controlling in interpreting the provisions of a federal statute of limitations as to what constitutes the commencing of an action. (*Goldenburg v. Murphy*, 108 U. S. 162; see also *Herb v. Pitcairn*, 325 U. S. 77)."<sup>56</sup>

Section 27 of the Civil Practice Act has been amended so as to change

51. *Black v. Van Aiken*, 224 App. Div. 759, 230 N. Y. Supp. 803 (2d Dep't 1928); *Fish v. Conley*, 221 App. Div. 609, 225 N. Y. Supp. 27 (3d Dep't 1927).

52. See N. Y. LEG. DOC. No. 65 F (1943); and N. Y. LAWS 1943, c. 516.

53. 301 N. Y. 158, 93 N. E. 2d 617 (1950).

54. 61 STAT. 87, 29 U. S. C. 251 (1947).

55. 279 App. Div. 32, 108 N. Y. S. 2d 824 (4th Dep't 1951).

56. The action was one for wrongful death under the Jones Act, (41 STAT. 1007, 46 U. S. C. 688 (1920)) which requires that an action be "commenced within three years from the day the cause of action accrued." Decedent drowned on September 29, 1946. The summons was delivered to the sheriff of New York County on September 27, 1949. Service on an officer of defendant was made in New York County on October 19, 1949. In the federal court an action is started by the filing of a complaint. (FED. R. CIV. P. 3). Defendant claimed that Section 17 of the New York Civil Practice Act applies only to an action the limitation of time of which is governed by the Civil Practice Act. The court brushed this contention aside, as indicated by the quotation in the text.

the rule of *Nathan v. Equitable Trust Co.*<sup>57</sup> which held that a person disabled to sue by reason of enemy alienage was not entitled to additional time to sue unless the disability existed when his cause of action accrued. The statute now provides that the statute of limitations does not run against an alien subject or citizen of a country at war with the United States "where the cause of action arose during or prior to the period of such disability." A conforming amendment was made to Section 28 and a new Section 28 (a) was added by Chapter 759 of the New York Laws of 1950, effective April 17, 1950. The added section helps non-enemies in enemy country or enemy-occupied countries and it has been held constitutional as an express revival statute reviving a personal cause of action where exceptional circumstances would work an injustice.<sup>58</sup>

Civil Practice Act Section 30 continues to provide that the statute of limitations may be raised by answer or motion, apparently whether or not the defect appears upon the face of the complaint. In *Trans-America Development Corp. v. Leon*,<sup>59</sup> the plaintiff sued for \$368,543 for services rendered between 1936 and 1948. The defendant moved under Rule 107 for partial judgment dismissing so much of the plaintiff's cause of action as appeared on the face of the complaint to be barred by the statute of limitations. Special Term denied the motion with leave to plead the statute of limitations as a partial defense, but the Appellate Division reversed and granted the motion, Justice Dore writing as follows:

"In the absence of any evidentiary facts to avoid the statute, in the face of the showing made in support of part of the claim being barred, the manifest injustice of imposing upon defendant the expense of preparing for trial relating to events that go back 12 years is accentuated by the fact that many of the transactions relate to corporations in Roumania, which is now behind the Iron Curtain."<sup>60</sup>

Civil Practice Act Section 44 continues to provide that a final judgment or decree for a sum of money is presumed to be paid and satisfied after twenty years, but that a demand or acknowledgment of an indebtedness of some part of the amount within the twenty years will rebut the presumption. The acknowledgment must be in writing and signed by the person to be charged. A pretty question recently arose as to whether the exception included payments made under a garnishee execution as well as voluntary payments.<sup>61</sup>

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57. 250 N.Y. 250, 165 N.E. 282 (1929).

58. *Gallewski v. Hentz & Co.*, 301 N.Y. 164, 93 N.E.2d 620 (1950).

59. 279 App. Div. 189, 108 N.Y.S.2d 769 (1st Dep't 1951).

60. This opinion appeared in 127 N.Y.L.J. 139, col. 1 (January 11, 1952). See also LAW REP. NEWS (Dec. 27, 1951).

61. *Moran Towing et al. v. Fleming*, 287 N.Y. 571, 38 N.E.2d 231 (1941).

Civil Practice Act Section 48 continues to be an intriguing section for lawyers involved in stockholders actions. Subdivision 5 provides that in a fraud action the cause of action is not deemed to have accrued until discovery by the plaintiff. Subdivision 8, on the other hand, dealing with actions against directors, officers or stockholders of corporations, provides that the six year statute applies even if the action is for an accounting, and apparently entirely apart from the question of discovery. Further, if the action is for waste or an injury to property or for an accounting in connection therewith, the three year limitation of Section 49 (7) applies on the theory that such actions are actions "to recover damages for an injury to property."

It would be most difficult to pinpoint the law governing statutes of limitations in stockholders actions.<sup>62</sup> In such cases there is an interesting theory of action which assumes, *arguendo*, that the plaintiff's primary cause of action is barred by the statute of limitations and then claims that a secondary cause of action exists in that express and deliberate representations of the defendants concealed the cause of action from the corporation and its stockholders, in order to continue the running of the statute of limitations. Whether this constitutes a cause of action based on actual fraud which did not accrue until the discovery of the fraud poses an interesting problem. I have in mind such discussions as those found in *Druckerman et al. v. Harbord et al.*,<sup>63</sup> *Lifshutz v. Adams et al.*,<sup>64</sup> *American Cities Power & Light Corp. et al. v. Williams et al.*,<sup>65</sup> and *Alexander et al. v. Anderson et al.*<sup>66</sup> In the *Alexander* case the court said:

"As to the second cause of action, it is dependent upon the first; the gravamen thereof is that the defendants deliberately prevented the corporation from obtaining redress for the bonus mis-computation; that their objective was to accomplish the expiration of the applicable statute of limitations against some of the cause of action of the corporation, whereas, if they had been timely asserted the corporation would have recovered thereon.

62. Investigators in that field should start with such cases as *Mannaberg v. Klausner et al.*, 294 N. Y. 859, 62 N.E.2d 487 (1945); *Brundige et al. v. Bradley et al.*, 294 N. Y. 345, 62 N.E.2d 385 (1945); *Hastings v. Byllesby et al.*, 293 N. Y. 404, 57 N.E.2d 733 (1944); *Gobel, Inc. v. Hammerslough et al.*, 288 N. Y. 653, 42 N.E.2d 746 (1942); *Nasaba Corp. v. Harfired Realty Corp. et al.*, 287 N. Y. 290, 39 N.E.2d 243 (1942); *Frank v. Carlisle et al.*, 286 N. Y. 586, 35 N.E.2d 932 (1941); *Hearn 45 St. Corp. v. Jano et al.*, 283 N. Y. 139, 27 N.E.2d 814 (1940); *Brick et al. v. Cohn-Hall-Marx Co.*, 276 N. Y. 259, 11 N.E.2d 902 (1937); *Schmidt v. Merchants Despatch Trans. Co.*, 270 N. Y. 287, 200 N.E. 824 (1936).

63. 31 N.Y.S.2d 867, 871 (Sup. Ct. 1940).

64. 285 N. Y. 180, 185, 33 N.E.2d 83, 85 (1941).

65. 189 Misc. 829, 69 N.Y.S.2d 197 (Sup. Ct. 1947).

66. 267 App. Div. 984, 48 N.Y.S.2d 801 (1st Dep't 1944), *affirming*, 48 N.Y.S.2d 102 (Sup. Ct. 1943).

"Where the expiration of the statute of limitations results from a fraud or other wrong practised upon one having an enforceable legal right, a cause of action will lie for the loss sustained in consequence."<sup>66a</sup>

Section 50 (e) of the General Municipal Law has been amended to provide that service of notice of a tort claim made on a public corporation within ninety days, which is technically defective, (*e.g.*, which was not served personally or by registered mail on a person legally designated to receive service of a summons) shall nevertheless be valid if the notice was actually received by that person and the party against whom the claim is made causes an examination to be taken of the claimant or other interested person.<sup>67</sup>

The absolute exemption of certain Estate Tax proceedings and actions from the time limitations of the Civil Practice Act has been modified by providing that as to real property the tax shall cease to be a lien after the expiration of fifteen years from the date of accrual.<sup>68</sup>

Turning now to another subject, the statute of limitations has been held to run in favor of one spouse against another even while the spouses are living together.<sup>69</sup>

Parenthetically, a husband's agreement to pay his wife's state income taxes is unenforceable.<sup>70</sup>

A recent statute<sup>71</sup> waves immunity from certain suits against the Port of New York Authority with a one year period of limitation. This was enacted to become law upon the enactment by the State of New Jersey of legislation having an identical effect. The New Jersey Legislature of 1951 passed such legislation, and the Governor of New Jersey duly signed it.<sup>72</sup>

*Ravens Electric Co. v. Linzer et al.*<sup>73</sup> has been affected by Chapters 430 and 431 of the New York Laws of 1951, which raise a question as to whether an independent action may now be maintained (rather than a motion under Article 84) to set aside an award fixing rent, if brought within the ninety day time limit of the statute.<sup>74</sup>

66a. 48 N.Y.S.2d 102, 107 (Sup. Ct. 1943).

67. N. Y. Laws 1951, c. 393, subd. 3.

68. N.Y. Laws 1952, c. 205, effective Mar. 25, 1952, amending N.Y. TAX LAW § 249(j). This section appears in Article 10B, which is applicable only to decedents who died on or before September 1, 1930. It is to be compared with Section 245 of Article 10 and Section 248 (1) of Article 10A.

69. *Dunning v. Dunning*, 300 N. Y. 341, 90 N.E.2d 884 (1950).

70. N. Y. TAX LAW § 385; *Metcaef v. Metcaef*, 274 App. Div. 744, 87 N.Y.S.2d 722 (1st Dep't 1949), *affirming*, 82 N.Y.S.2d 209 (Sup. Ct. 1948); *Mahana v. Mahana*, 272 App. Div. 1013, 74 N.Y.S.2d 908 (1st Dep't 1947).

71. N. Y. Laws 1950, c. 301, § 7.

72. N. J. Laws 1951, c. 204.

73. 302 N. Y. 188, 97 N.E.2d 746 (1951).

74. N. Y. CIV. PRAC. ACT § 1463.



The Workmen's Compensation Law Section 29 (2) was amended by Chapter 527 of the New York Laws of 1951, to provide that failure of an employee to commence an action within the time limited shall not operate as an assignment of his cause of action to the insurance carrier unless the insurer gives notice thereof at least thirty days prior to the expiration of such time, and if such notice is not given the time limited shall be extended to thirty days after notice is given. In the Supreme Court of Kings County, Mr. Justice Moss has held that this is a "new or additional remedy."<sup>75</sup>

In Workmen's Compensation and other "administrative tribunal" cases a vital question of res judicata is passing through the courts. One judge has held that despite a paucity of authority, the determination of an administrative tribunal is never res judicata upon a court.<sup>76</sup> Other cases are to the contrary.<sup>77</sup>

I throw this thought in here to let you know that discussion of the dry-as-dust statutes of limitation has now been concluded and that we are in transition to the subjects of Process, Pleading, Trial and Judgment, through which each ordinary action runs a normal course.

Space does not permit touching upon the distinction between Civil Practice Act Sections 96 and 96 (a), the apportioning of damages permitted by Civil Practice Act Section 97 (a), the availability of an application under Section 98 for an extension of time even though the time has run out, the "hip-pocket" filing system of Section 100 and the majestic Article 9 (Sections 105-112) which so forthrightly deals with Mistakes, Defects and Irregularities. Sections 110 (a) and 111 should be required reading for every refresher course in New York Practice. And one of the crowning glories of the Civil Practice Act is the series of sections (112a, b, c, d, e, f, g and h) which so thoroughly jettisoned the technicalities of election of remedies, the distinction between mistake of fact and mistake of law, and the necessity for physical tender in actions for rescission or restitution.

Civil Practice Act Section 113 abolished the unjust doctrine of *Low*

75. *Olker v. Salomone*, 128 N.Y.L.J. 282, col. 4 (Sup. Ct. Aug. 20, 1952).

76. *Holtzoff, J.*, in *Segal v. Travelers Ins. Co.*, 94 Fed. Supp. 123 (D.C. Dist. 1950).

77. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Lunn v. Andrews et al.*, 268 N.Y. 538, 198 N.E. 393 (1935); *Meaney v. Keating*, 200 Misc. 308, 102 N.Y.S.2d 514 (Sup. Ct. 1951), *aff'd*, — App. Div. —, 113 N.Y.S.2d 240 (2d Dep't 1952); *Ogino v. Black et al.*, 278 App. Div. 146, 104 N.Y.S.2d 82 (1st Dep't 1951). As this note is written, the *Meaney* case is awaiting decision by the Court of Appeals. The *Ogino* case was affirmed in a per curiam opinion handed down by the Court of Appeals, December 9, 1952. Another case, *Doca v. Federal Stevedoring Co. Inc.*, is en route to the Court of Appeals from the Appellate Division, Second Department, — App. Div. —, 116 N.Y.S.2d 25 (2d Dep't 1952), *reversing on other grounds*, — Misc. —, — N.Y.S.2d — (unreported).

et al. v. *Bankers Trust Co.* et al.,<sup>78</sup> which held that a motion is not "made" until it is returnable in court. The contrary is now the law, and a motion is "made" when the notice of motion or order to show cause is duly served.

Sections 132 and 66 of the Civil Practice Act providing that an *ex parte* order may be reviewed by the Appellate Division or one of its justices (upon motion papers without a formal appeal) became living things for me after I read a study of them prepared by my good friend and former student Mr. Leonard Feldman.<sup>79</sup> He cites one case which appears to indicate that after adversaries have appeared on notice before a justice at Special Term and procured a ruling from him, and thereafter one of the counsel goes back into chambers, and procures a *repetition* of the ruling (but now *ex parte*) such *ex parte*, though repetitious, ruling may be reviewed upon application to the Appellate Division under Sections 66 and 132.<sup>80</sup>

Rulings at Special Term, Part II, upon objections made in examination before trial are not appealable.<sup>81</sup> Apparently they are not even reviewable under Section 132 or under Civil Practice Act Section 66, for public policy reasons against "flooding" the Appellate Division. If such rulings sustain your adversary's objection you may move at Special Term, Part I, either (1) to resettle the order of examination<sup>82</sup> or (2) to reopen the examination for the purpose of permitting questions to be answered.<sup>83</sup>

If the Special II rulings overrule your objection, then either move to resettle the order to make it clear that it was not intended that such a question be answered, or let the witness answer and move at Special Term, Part I, to suppress the deposition,<sup>84</sup> lest you be deemed to have waived your objection.<sup>85</sup> Mr. Justice Walter soundly infers in the *Gottfried*<sup>86</sup> case that an order denying a motion to suppress enables the point "to get to the Appellate Division" without "some very cumbersome and circuitous procedure of getting it up as an incident of an appeal from a final judgment." On the other hand, there is law to the effect that an

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78. 265 N.Y. 264, 192 N.E. 406 (1934).

79. 127 N.Y.L.J. 1286, 1306, 1328 (editorials, Apr. 1, 2, 3, 1952).

80. Application of New Rochelle Trust Co., 273 App. Div. 1030, 79 N.Y.S.2d 210 (2d Dep't 1948).

81. *Dworkow v. Bachrack et al.*, 274 App. Div. 1057, 85 N.Y.S.2d 214 (2d Dep't 1949) and cases cited therein; *Oppenheimer v. Duophoto Corp.*, 271 App. Div. 1005, 69 N.Y.S.2d 309 (1st Dep't 1947).

82. *Le Blanc et al. v. Duncan et al.*, 260 App. Div. 953, 23 N.Y.S.2d 648 (2d Dep't 1940).

83. *Kogel et al. v. Trump et al.*, 271 App. Div. 890, 66 N.Y.S.2d 899 (2d Dep't 1946).

84. *Gottfried et al. v. Gottfried et al.*, 197 Misc. 562, 95 N.Y.S.2d 561 (Sup. Ct. 1950).

85. *Sturm v. Atlantic Mutual Ins. Co.*, 63 N.Y. 77, 87 (1875).

86. See note 84 *supra*.

order denying a motion to suppress is not appealable.<sup>87</sup>

I hope that the Judicial Council will do something to help the lawyer whose objection to the disclosure of trade secrets in examination before trial is overruled. He may urge upon the court the thought that there being no contumacity but rather a sincere effort to protect a legal right, the court in its discretion may properly enter an appealable order, as suggested by the dictum in *Harrison v. Miller et al.*<sup>88</sup> If this is not done, he definitely cannot appeal, under the *Oppenheimer* and *Dworkow* cases.<sup>89</sup> For him to disclose, move to suppress, and then win is small comfort once the secret is out of the bag. And if the motion to suppress is denied there is doubt as to the appealability of the order of denial. This doubt should be removed.<sup>90</sup>

Last year the Judicial Council sponsored an excellent amendment to Section 132. Presiding Justice Peck was in Europe and a lawyer seeking to invoke Section 132 found that under the section as it then read only the court or the presiding justice could act. A letter was written to the Judicial Council that "there ought to be a law." Chapter 161 of the New York Laws of 1951 eventuated, after a careful study, allowing action by any Appellate Division justice.<sup>91</sup>

Another important "trend" sponsored by the Judicial Council is Section 163 (a), which permits deposit in "any" post office depository, such as a mail box, to comply with a mailing statute.<sup>92</sup> In *Mandel v. Brodsky*,<sup>93</sup> a judgment obtained fourteen years earlier was set aside because the order permitting substituted service provided for deposit of a copy of the summons in a mail box rather than in a general or branch post office. It is thoroughly understandable why Mr. Justice Carlin stated in his opinion that "the Court reluctantly so holds."

Section 192 of the Civil Practice Act provides that no action or special proceeding shall be defeated by the non-joinder or misjoinder of parties except as provided in Section 193. This language induced an interesting observation by Judge Finch in *Cohen v. Dana et al.*<sup>94</sup> In that case a stockholders' derivative action was instituted against directors for alleged misconduct to the detriment of a dissolved corporation. It was

87. *Wallach v. Siegelson et al.*, 105 N.Y.S.2d 35, 36 (1st Dep't 1951).

88. 190 App. Div. 184, 179 N.Y. Supp. 331 (1st Dep't 1919).

89. See note 81 *supra*.

90. *Cf. Drake v. Herman et al.*, 261 N.Y. 414, 185 N.E. 685 (1933); *Hyman et al. v. Revlon Products Corp. et al.*, 277 App. Div. 1118, 100 N.Y.S.2d 937 (2d Dep't 1950); *Gehm v. Countess Moritza Cosmetic Co. et al.*, 196 Misc. 785, 95 N.Y.S.2d 754 (Sup. Ct. 1949).

91. Seventeenth Report J.C. 74 (1951).

92. N.Y. Laws 1951, c. 554.

93. 199 Misc. 8, 102 N.Y.S.2d 555 (N.Y. City Ct. 1950).

94. 287 N.Y. 405, 40 N.E.2d 227 (1942).

impossible to serve the corporation with a summons in New York. At the end of his opinion Judge Finch stated: "It may become necessary to consider also to what extent the statutory direction is applicable that no action shall be defeated by the non-joinder of parties. Civil Practice Act Section 192." Consider with this suggestion the doctrine of *Keene et al. v. Chambers et al.*,<sup>95</sup> to the effect that when an indispensable party is outside the jurisdiction his or its presence in the action may be dispensed with.

Section 193 defines indispensable and conditionally necessary parties. In a nutshell, indispensable parties are defined as persons "whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court." An example of an indispensable party is a joint obligee on a contract. A conditionally necessary party is a party who is not indispensable but one who "ought to be a party if complete relief is to be accorded between those already parties." A partial assignee is a good example of a conditionally necessary party. All other parties are proper parties, as for example, joint tortfeasors who are liable jointly and severally. In the case of proper parties, of course, the plaintiff has the option to sue one, any, or all.

A whole treatise could be written on Section 193 (a), dealing with "Third-party practice." The principal function of this statute is to abolish the rule of *Nichols et al. v. Clark, MacMullen and Riley, Inc. et al.*<sup>96</sup> It is now squarely provided by statute that a "claim over" need not arise out of the same cause of action or the same ground as the claim asserted against the third-party plaintiff by the plaintiff in that action.

A great body of law is growing up under this section in tort cases. The fulcrum of the discussion is the decision in *Fox v. Western New York Motor Lines, Inc. et al.*<sup>97</sup> to the effect that a joint tortfeasor cannot bring another joint tortfeasor into an action unless there is a liability over "by contract or status." If A sues B in tort alleging that B was actively negligent, B, may not claim over against C, a joint tortfeasor, because if both parties are *in pari delicto* there can be no contribution between them and no "claim over" of any kind under the *Fox* doctrine.<sup>98</sup>

95. 271 N.Y. 326, 3 N.E.2d 443 (1936).

96. 261 N.Y. 118, 184 N.E. 729 (1933).

97. 257 N.Y. 305, 178 N.E. 289 (1931).

98. *Middleton v. City of New York*, 300 N.Y. 732, 92 N.E.2d 312 (1950), *affirming*, 276 App. Div. 780, 92 N.Y.S.2d 656 (2d Dep't 1949); *Schwartz et al. v. Merola et al.*, 290 N.Y. 145, 156, 48 N.E.2d 299, 304 (1943) (no contract of indemnity; secondary wrongdoer allowed to claim over upon common law principles); *Iacono v. Frank Contracting Co. et al.*, 259 N.Y. 377, 381, 382, 182 N.E. 23, 24 (1932) (no duty resting upon an owner to inspect the machinery or tools furnished by a subcontractor); *Phoenix Bridge*

If the theory of the plaintiff's complaint is such that when A sues B the plaintiff may recover from B on the theory of *either* B's active negligence or B's passive negligence, then B may bring in C as a third-party under Section 193(a) because it may be that on the trial the jury will find that B's liability to A arose solely out of passive negligence.<sup>99</sup> Further, while an act of omission may be "active" negligence, it may be so tiny that the "disparity of facts" induces the court to regard it as *de minimis*.<sup>100</sup>

A few additional commentaries on Section 193(a) and Rule 54:

Impleader is accomplished according to the statute by service by *a defendant* of a summons and verified complaint. He needs no order of a court or judge permitting this, the practice being in this respect comparable to the assertion of a counterclaim under Civil Practice Act Section 271. Two judgments in the one action are permitted. The third-party defendant may assert against the plaintiff defenses of the third-party plaintiff, thus to this extent taking the defense "strategy" away from the defendant. The third-party defendant may also counterclaim against the plaintiff if the complaint in the action is amended to assert a claim against such third-party defendant. And once the third-party defendant has appeared, *the plaintiff* in the action may move to dismiss the third-party complaint. Further, the third-party defendant may bring in a fourth or fifth party. Similarly, a plaintiff, if counterclaimed against, may himself bring in a third-party defendant. Rule 54 makes it clear that any third-party "action" is an "action-within-an-action," which must be started by the service of at least four papers, viz., the third-party summons, the verified third-party complaint, the complaint of the plaintiff and defendant's answer thereto. There is one answer to two complaints, but apparently there is no penalty for the failure of the third-party

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Co. v. Creem, 185 N. Y. 580, 78 N. E. 1110 (1906), *affirming*, 102 App. Div. 354, 92 N. Y. Supp. 855 (2d Dep't 1905); Coughlin v. Bisceglia & Sons, Inc., *et al.*, 100 N. Y. S. 2d 738 (Sup. Ct. 1950) (complaint based solely on active negligence; third-party complaint not based on right to indemnification. Third-party complaint dismissed). In one interesting case, Tipaldi v. Riverside Memorial Chapel, Inc., *et al.*, 298 N. Y. 686, 82 N. E. 2d 585 (1948), *affirming*, 273 App. Div. 414, 78 N. Y. S. 2d 12 (1st Dep't), a plaintiff sued two *passive* "wrongdoers," an owner and a general contractor. The court found them not *in pari delicto*, and held that the general contractor must indemnify the owner on the basis of the "relative delinquency" of the parties. Cf. Logan v. Bee Builders, 277 App. Div. 1040, 100 N. Y. S. 2d 483 (2d Dep't 1950) and Foreman v. Udell, 267 App. Div. 823, 45 N. Y. S. 2d 813 (2d Dep't 1944).

99. Cf. Shass v. Abgold, 277 App. Div. 346, 100 N. Y. S. 2d 121 (2d Dep't 1950); Bonn v. Jacob Kotler Co., 107 N. Y. S. 2d 283 (Sup. Ct. 1951) (all defendants joint tortfeasors *in pari delicto*. Claim over under N. Y. CIV. PRAC. ACT § 264 not allowed); Pugni v. Lanning, 196 Misc. 335, 92 N. Y. S. 2d 21 (Sup. Ct. 1950).

100. McFall v. Campagne Maritime Belge, 304 N. Y. 314, 107 N. E. 2d 463 (1952).

defendant to answer plaintiff's complaint, which, however, he is expected and required to answer.

A distinction between Section 193(a) and Section 264 is apparent from the decision in *Deneau v. Beatty et al.*<sup>101</sup> There a defendant successfully asserted against his co-defendant under Section 264 an affirmative claim for his own damages. This cannot be done under Section 193(a).<sup>102</sup>

An unusual case is *Clark v. Halstead*,<sup>103</sup> in which, in an "*Ader v. Blau*" situation, the defendant tortfeasor was permitted to bring in a malpractising physician under Section 193(a), on the theory of subrogation. The court indicates that if there is an \$11,000 verdict for plaintiff, the jury may determine *the percentage* of the \$11,000 which is represented by the aggravation of the injury by the physician's malpractice.<sup>104</sup> This principle is to be viewed as a trend away from the established doctrine that a jury ordinarily may not apportion damage among joint tortfeasors liable on the same cause of action.<sup>105</sup> Another such "trend away" is found in libel cases<sup>106</sup> and in cases involving possessory estates.<sup>107</sup>

Incidentally, the doctrine of *Ader v. Blau*<sup>108</sup> has been removed from our law, root and branch. It had held that despite the "unifying center" of the death of a single human being, a cause of action against a fence-owner for negligence in maintaining the fence could not be joined with a cause of action against a physician whose malpractice contributed to the same death, inasmuch as the two causes of action, forsooth, were not "connected with the same subject of action." The case might have been distinguished by the plaintiff's specific allegations that each of the two acts was the "sole" cause of death. It was severely criticized for conceiving a "cause of action" in terms of legal right rather than factual events.<sup>109</sup> In any event, the doctrine of *Ader v. Blau* has passed from obscurity to oblivion by the amendment of Civil Practice Act Section 258 and by such decisions as *Great Northern Tel. Co. v. Yokohama Specie*

101. 195 Misc. 649, 91 N.Y.S.2d 190 (Sup. Ct. 1949).

102. *Victory v. Miller*, 198 Misc. 196, 101 N.Y.S.2d 350 (Sup. Ct. 1950).

103. 276 App. Div. 17, 93 N.Y.S.2d 49 (3d Dep't 1949).

104. See Note, 49 MICH. L. REV. 292 (1950).

105. *Klepper v. Seymour House Corp. et al.*, 246 N.Y. 85, 158 N.E. 29 (1927); *Polsey v. Waldorf-Astoria*, 216 App. Div. 86, 214 N.Y. Supp. 600 (1st Dep't 1926), *appeal dismissed*, 243 N.Y. 533, 154 N.E. 602 (1926). Cf. *Sherlock v. Manwaren*, 208 App. Div. 538, 203 N.Y. Supp. 709 (4th Dep't 1924).

106. N.Y. CIV. PRAC. ACT § 97(a).

107. N.Y. CIV. PRAC. ACT § 193(c).

108. 241 N.Y. 7, 148 N.E. 771 (1925).

109. CLARK, CODE PLEADING 448-9 (2d ed. 1947). Cf. *Hurn et al. v. Oursler et al.*, 289 U.S. 238 (1932); *Dioguardia v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Abrams v. Maryland Cas. Co.*, 300 N.Y. 80, 89 N.E.2d 235 (1949).

*Bank Ltd.* et al.,<sup>110</sup> and *Ikle v. Ikle*.<sup>111</sup> Both causes of action may today be joined, apparently even if pleaded in inconsistent fashion by repeated use of the word "solely."<sup>112</sup>

In passing, I suggest to the Judicial Council that with Section 258 permitting joinder of inconsistent causes of action in a complaint, the time has come for a re-examination of the doctrine of "departure" of a reply from the theory of the complaint.<sup>113</sup> If a plaintiff may be inconsistent with himself in his own complaint, why must his reply set forth new matter "not inconsistent with the complaint?" The time appears to be at hand for excision of the quoted language from Section 272.<sup>114</sup>

A word, in passing also, about Contribution among Joint Tortfeasors. Section 211(a) permits contribution only where plaintiff has joined joint tortfeasors as defendants and recovered judgment against them jointly and one of them has paid more than his "pro rata share." In nine jurisdiction statutes have been enacted providing for a *right* of contribution among joint tortfeasors which is not dependent upon the whim of the plaintiff as to whom he will sue.<sup>115</sup> Three states have established the right by decisional law.<sup>116</sup> The right exists in admiralty. And the District of Columbia has established it by construction of Federal Rule of Civil Procedure 14(a). In addition, the Supreme Court of the United States has held that the Federal Tort Claims Act gives sovereign consent of the United States to be sued for contribution either in a separate action or by way of third-party procedure.<sup>117</sup> Despite this "background", and whether or not there is a trend in the direction of

110. 297 N.Y. 135, 76 N.E.2d 117 (1947).

111. 257 App. Div. 635, 14 N.Y.S.2d 928 (1st Dep't 1939). For a remarkable pre-Ikle law review article, see *Election of Remedies: A Delusion?*, 38 COL. L. REV. 292 (1938).

112. But see the following cases as to inconsistent allegations which are "mutually destructive": *Condon v. Associated Hospital Service et al.*, 287 N.Y. 411, 415, 40 N.E.2d 230, 232 (1942); *Olsen et al. v. Bankers Trust Co.*, 205 App. Div. 669, 199 N.Y. Supp. 700 (1st Dep't 1923); *Herman v. First Merrick Corp. et al.*, 99 N.Y.S.2d 119 (Sup. Ct. 1950).

113. N.Y. CIV. PRAC. ACT § 272.

114. Cf. *Rosen v. Rosen*, 267 App. Div. 770, 45 N.Y.S.2d 216 (2d Dep't 1943).

115. Arkansas, Delaware, Hawaii, Kentucky, Maryland, New Mexico, North Carolina, Rhode Island, South Dakota.

116. Minnesota, Pennsylvania, Wisconsin.

117. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951). The reasoning against contribution is that it allows defendants who could distribute the loss over society "to cast it back instead onto the shoulders of individuals who cannot distribute it at all." James, *Contribution Among Joint Tort Feasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941). I prefer the contrary rationale of Gregory, *Defense*, 54 HARV. L. REV. 1170 (1941) and of such authorities as *George's Radio Inc. v. Capital Transit Co.*, 126 F.2d 219 (D. C. Cir. 1942); PROSSER, TORTS, 1111 (1941); and 1 COOLEY, TORTS, 297, 298 (4th ed. 1932).

finding a right of *complete indemnity* in favor of a passive tortfeasor,<sup>118</sup> a contribution bill introduced in the New York Legislature of 1952 failed of passage.<sup>119</sup>

#### DECORUM AT AND NEAR COURTROOMS

##### 1. *Picketing*

Picketing within 200 feet of a courthouse in disorderly fashion or with reference to the character of a court or jury therein or commenting upon the conduct of a trial therein is made a criminal contempt of court under an amendment to Section 600 of the Penal Law effective July 1, 1952.<sup>120</sup>

##### 2. *Televising of Court and Other Proceedings*

The televising, broadcasting or taking of motion pictures within New York State of "proceedings" in which the testimony of witnesses by subpoena or other compulsory process is or may be taken is now a misdemeanor, whether the "proceedings" are conducted by a court, commission, committee, administrative agency or other tribunal.<sup>121</sup>

In passing, it may be noted that a Temporary State Commission on the use of Television for Educational Purposes has been created.<sup>122</sup>

#### PROCESS

A Supreme Court summons must state the county in which plaintiff resides.<sup>123</sup>

The granting of a provisional remedy is deemed the commencement of an action.<sup>124</sup>

Partners may sue or be sued in their partnership name.<sup>125</sup>

In actions or proceedings against a public body or officer it is now permissible merely to name the body or officer without naming the individual incumbents of such public office, body, board, commission or agency.<sup>126</sup>

In an accounting proceeding in the Surrogate's Court it will be no longer necessary to cite any infant or incompetent whose legacy in a fixed

118. N. Y. LEG. DOC. NO. 65H (1952).

119. N. Y. LEG. INDEX 6 (Sen. Int. 42, Assembly Int., 1952).

120. N. Y. LAWS 1952, c. 669.

121. N. Y. LAWS 1952, c. 241, amending N. Y. CIV. RIGHTS LAW by adding a new section 52.

122. N. Y. LAWS 1952, c. 479.

123. Rule 45, N. Y. SUP. CT.

124. *Arnold v. Mayal Realty Co.*, 299 N. Y. 57, 85 N. E. 2d 616 (1949); *Schram v. Keane*, 279 N. Y. 227, 18 N. E. 2d 136 (1938).

125. N. Y. CIV. PRAC. ACT § 22(a). Cf. N. Y. CIV. PRAC. ACT §§ 1197, 1198.

126. N. Y. LAWS 1952, c. 481, adding new N. Y. CIV. PRAC. ACT § 262.



amount of \$500 or less was paid to his parent or to a competent person with whom he resides, or who has some interest in his welfare pursuant to an order under Section 271 of the Surrogate's Court Act.<sup>127</sup>

An unincorporated association is regarded as an entity for the purpose of permitting suits by it for libel.<sup>128</sup> But an unincorporated labor union may not be sued in tort.<sup>129</sup>

And its members, who did not authorize the union's tort, may not be sued individually.<sup>130</sup>

Persons are not "parties" just because "named" in a summons. They are not parties until process has been served.<sup>131</sup>

Service of a thirty day landlord-tenant notice on Sunday is void.<sup>132</sup>

For a foreign corporation to be deemed to be "doing business" here, "continuity of action from a permanent locale is essential."<sup>133</sup>

Section 227 (a) of the Civil Practice Act is novel. A non-resident who sues here is deemed to designate his attorney as his agent to receive process, during the pendency of the action, in *any* New York court, "provided the cause of action or claim is one which could have been interposed by way of counterclaim had the action of proceeding been brought in the Supreme Court."<sup>134</sup>

Section 229(b), entitled "Service of summons on nonresident natural person doing business in this state" is now pretty well understood,<sup>135</sup> and it has been held constitutional.<sup>136</sup> However, a labor union or an unincorporated association is not a "natural person" and thus not subject to it.<sup>137</sup>

Substituted service, service by publication, and service outside the state without an order are passed over here because the entire subject

127. N. Y. Laws 1952, c. 348, amending N.Y. Surr. Ct. Act § 262.

128. *Kirkman v. Westchester Newspapers Inc.*, 287 N. Y. 373, 39 N. E. 2d 919 (1942).

129. *Martin v. Curran*, 303 N. Y. 276, 101 N. E. 2d 683 (1951).

130. *Ibid.*

131. *Emmons v. Hirschberger*, 270 App. Div. 1025, 63 N. Y. S. 2d 48 (2d Dep't 1946); *Bennett v. Bird*, 237 App. Div. 542, 261 N. Y. Supp. 540 (2d Dep't 1933).

132. *Di Perna et al. v. Black*, 187 Misc. 437, 62 N. Y. S. 2d 69 (Sup. Ct. 1946).

133. *Sterling Novelty Corp. v. Frank & Hirsch Dist. Co.*, 299 N. Y. 208, 209, 86 N. E. 2d 564 (1949). Cf. *International Shoe Co. v. Washington et al.*, 326 U. S. 310 (1945).

134. See REPORT OF THE NEW YORK STATE LAW REVISION COMMISSION, LEG. DOC. NO. 65 B (1949); *Adam v. Saenger*, 303 U. S. 59 (1938); *Frank L. Young Co. v. McNeal-Edwards Co.*, 283 U. S. 398 (1931).

135. See LEG. DOC. NO. 65 D (1940); No. 65 N (1941); *Yeckes-Eichenbaum Inc. v. McCarthy*, 290 N. Y. 437, 49 N. E. 2d 517 (1943).

136. *Interchemical Corp. v. Mirabelli et al.*, 269 App. Div. 224, 54 N. Y. S. 2d 522 (1st Dep't 1945). Cf. *International Shoe Co. v. Washington et al.*, 326 U. S. 310 (1945); *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623 (1935); *Flexner v. Farson*, 248 U. S. 289 (1919); 28 YALE L. J. 512 (1919).

137. *Amon v. Moreschi*, 296 N. Y. 395, 73 N. E. 2d 716 (1947).

matter is charted in a detailed diagrammatic summary which was published in the *Fordham Law Review* under the title "Constructive Service of Process in New York."<sup>138</sup>

Outstanding recent cases on the subject hold that in personam jurisdiction is acquired over New York domiciliaries who are served outside the state without an order and without an attachment;<sup>139</sup> that in equity actions service by publication upon a New York domiciliary results in in personam jurisdiction;<sup>140</sup> that in *in rem* equity actions service by publication is valid even against a nonresident, and of course, without an attachment, since there is no attachment in equity cases;<sup>141</sup> that in matrimonial actions sequestration may occur at any time before judgment and even after the order of publication is signed;<sup>142</sup> that the provisional remedy of attachment is available against "colossus corporations" present in New York even where plaintiff's claim arose entirely outside New York,<sup>143</sup> and that the Supreme Court has power to enjoin a resident of New York from departing to a foreign jurisdiction to institute a matrimonial action there.<sup>144</sup>

An extraordinary matrimonial case is *Johnson v. Muelberger*<sup>145</sup> in which the Supreme Court reversed a unanimous New York Court of Appeals.<sup>146</sup>

*Feuchtwanger v. Central Hanover Bank*<sup>147</sup> presents a thought-provoking puzzle, since it has been said that "you can't legislate a debt into a res," and that that is why we have the complicated interpleader schemes found in Civil Practice Act Sections 287(a-i) and 51(a). On the face of the opinion in the *Feuchtwanger* case it could be argued that the court judicially legislated a debt into a res for service-by-publication purposes and held that "an intangible res is so far capable of explicit designation as to be *specific* personal property within the meaning of Civil Practice Act Section 232."<sup>148</sup> If this were true, then although ordinary inter-

138. 18 FORD. L. REV. 244 (1949).

139. *Milliken v. Meyer*, 311 U.S. 457, 462-3 (1940); Fifteenth Report J. C. 60-2 (1949). Cf. N. Y. CIV. PRAC. ACT § 520.

140. *Dirksen v. Dirksen*, 72 N. Y. S. 2d 865 (Sup. Ct. 1947). Cf. N. Y. CIV. PRAC. ACT § 520.

141. *Feuchtwanger v. Central Hanover Bank & Trust Co. et al.*, 288 N. Y. 342, 43 N. E. 2d 434 (1942); *Garfein v. McInnis*, 248 N. Y. 261, 162 N. E. 73 (1928).

142. *Geary v. Geary*, 272 N. Y. 390, 6 N. E. 2d 67 (1936). Cf. *Dimmerling v. Andrews et al.*, 236 N. Y. 43, 139 N. E. 774 (1923).

143. *Morris Plan Industrial Bank v. Gunning et al.*, 295 N. Y. 324, 67 N. E. 2d 510 (1946).

144. *Garvin v. Garvin*, 302 N. Y. 96, 96 N. E. 2d 721 (1951), *reversing*, *Goldstein v. Goldstein*, 283 N. Y. 146, 27 N. E. 2d 969 (1940).

145. 340 U. S. 581 (1951). See also, *Cook v. Cook*, — U. S. — (1952).

146. *In re Johnson's Estate*, 301 N. Y. 13, 92 N. E. 2d 44 (1950).

147. 288 N. Y. 342, 43 N. E. 2d 434 (1942).

148. *Id.* at 345, 43 N. E. 2d at 435. (Italics added).

pleader is in personam, and service by publication is not possible in connection with it.<sup>149</sup> The adroit pleader who fashioned his "cause of action" into one *in rem* by transforming a simple creditor-debtor cause of action against a bank into an "action to impress a trust" upon the bank account would enable the bank to achieve valid interpleader jurisdiction based upon service by publication. My good friend, Mr. William Harvey Reeves, who specializes in such matters, insists that the *Feuchtwanger* case is to be carefully limited to the facts revealed in its Record on Appeal, viz., to a situation in which there was truly *a specific res* and not a mere debtor-creditor relationship between the bank and its customer.

#### APPEARANCE

A corporation must appear in an action by an attorney.<sup>150</sup>

A foreign ambassador who has not waived sovereign immunity is quite immune from suit even if he appears.<sup>151</sup>

The doctrine of *Mushusky v. Lehigh Valley Coal Co.*,<sup>152</sup> has been abolished by amendment of Civil Practice Act Section 257.

The whole field of Special Appearance has been reworked and revamped. First, Rule 106(1) and Rule 107(1), permitting motions to dismiss for lack of jurisdiction of the person of defendant, have been rescinded and the rules renumbered.<sup>153</sup> Second, out of a *Fordham Law Review* article<sup>154</sup> and a study by the Judicial Council<sup>155</sup> has come new Section 237(a) of the Civil Practice Act, which is best explained by the following excerpt from three paragraphs of the 1951 (Seventeenth) Report of the Judicial Council, at page 58 thereof:

"Although a special appearance has been permitted in New York for over 100 years, there is at present no statute or rule permitting or regulating such appearance.

"For some problems confronting the New York attorney, no solution is to be found in the cases. The outstanding example is that involving nonresidents

149. *Hanna v. Stedman*, 230 N. Y. 326, 130 N. E. 566 (1921).

150. N. Y. CIV. PRAC. ACT § 236.

151. 62 STAT. 927, 28 U. S. C. 1251 (1948); *Friedberg et al. v. Santa Cruz et al.*, 274 App. Div. 1072, 86 N. Y. S.2d 369 (2d Dep't 1949); *De Simone v. Transportes Maritimos do Estado*, 200 App. Div. 82, 191 N. Y. Supp. 864 (1st Dep't 1922). Cf. *Herman et al. v. Apetz et al.*, 130 Misc. 618, 224 N. Y. Supp. 389 (Sup. Ct. 1927).

152. 225 N. Y. 584, 122 N. E. 461 (1919).

153. Effective September 1, 1951. See 126 N. Y. L. J. 383, col. 3 (Sept. 6, 1951).

154. Frumer and Graziano, *Jurisdictional Dilemma of the Non-resident Defendant in New York*, 19 FORD. L. REV. 125 (1950). Cf. *Brainard v. Brainard*, 272 App. Div. 575, 74 N. Y. S.2d 1 (1st Dep't 1947), *aff'd on other grounds*, 297 N. Y. 916, 79 N. E.2d 744 (1948).

155. Fifteenth Report J. C. 62 (1949); Sixteenth Report J. C. 66-9, 185-217 (1950); Seventeenth Report J. C. 58-64 (1951).

against whom in rem and in personam claims have been stated in one complaint, with the court having jurisdiction in rem, but not, allegedly, jurisdiction in personam. It has been repeatedly held in such a situation that a motion to vacate the service of process will not prevail. The defendant must raise his objection to the court's jurisdiction over his person by motion, but precisely what motion he is to make in such a situation has not been indicated.

"Once it is agreed that it is desirable to permit a defendant to come into court to object to its jurisdiction over his person (and, as herein recommended, over the subject matter) without thereby submitting his person to the court's jurisdiction for all purposes, a simple, direct, and clear-cut statement of the procedure to be followed in making such an appearance should be at hand. The books are replete with evidence that it is not."

Hence the new Section 237(a). The objection of lack of jurisdiction of the person "must" be raised by a motion *to set aside service of process* or *to strike out* part of the complaint. Otherwise it "shall be deemed waived." No objection to the merits may be joined with it, either, except an objection that the court lacks jurisdiction of the subject matter. If the motion is denied, defendant may litigate the merits without waiving the objection to the court's jurisdiction over his person.

#### PLEADING

It is significant that not only is there a statutory mandate for liberal construction of the Civil Practice Act in Section 2, but that there is a double mandate for liberality in pleading, since pleadings "must be liberally construed."<sup>156</sup>

Hence, although a cause of action by a salesman for the *unknown* balance of his commissions, in the sum of "at least" \$12,000, is a cause of action at law, and not one in equity for an accounting, a complaint for an accounting will not be dismissed after answer. Rather the action will be transferred for trial from Special Term to Trial Term.<sup>157</sup>

Causes of action may be pleaded in the alternative, whether or not there is doubt as to "who" is liable.<sup>158</sup>

Section 265 of the Civil Practice Act has been repealed, but only because repetitious of Decedent's Estate Law Section 131. Hence in a death action the burden of pleading and proving the contributory negligence of the decedent is still on the defendant.<sup>159</sup> In a proper case, such a defendant may even have to provide a bill of particulars of the defense.<sup>160</sup>

156. N. Y. CIV. PRAC. ACT § 275.

157. *Terner v. Glickstein & Terner Inc.*, 288 N. Y. 299, 28 N. E. 2d 846 (1940); *Casey v. Nye Odorless Incinerator Corp.*, 238 App. Div. 242, 264 N. Y. Supp. 207 (1st Dep't 1933).

158. N. Y. CIV. PRAC. ACT § 258.

159. N. Y. DEC. EST. LAW § 131.

160. *McGann v. Adler*, 241 App. Div. 726, 270 N. Y. Supp. 915 (1st Dep't 1934)

In the average negligence action, despite an occasional dictum to the contrary,<sup>161</sup> I think that the better view is that although the plaintiff must prove his freedom from contributory negligence, he need not plead it.<sup>162</sup>

If a plaintiff sues in his own right and not as assignee, the defendant may go out and "buy up" a claim against plaintiff for the express purpose of counterclaiming it.<sup>163</sup> This is not so if plaintiff is an assignee.<sup>164</sup>

Parallel claims are not counterclaims.<sup>165</sup>

A recent case, to my consternation, has allowed a reply to a reply.<sup>166</sup> I trust that this is not a trend back to the seven pleadings of the common law.<sup>167</sup>

#### MOTION PRACTICE

I need say little about Motion Practice, since Mr. Samuel S. Tripp, former President of the Queens County Bar Association, has so ably summarized the topic in his excellent *Guide to Motion Practice*, the 1951-1952 Supplement which I find terse, readable and invaluable.

The necessity for many cross-motions is disappearing<sup>168</sup> and much of the doctrine of *Bernard v. Chase National Bank*<sup>169</sup> has been discarded from our procedure. But cross-motions have not been abolished.<sup>170</sup>

Here is a problem: Suppose an action upon an oral contract for the sale of land. The vulnerability of the complaint because of the Statute of Frauds is apparent on the face of the pleading. Rule 107 permits a motion whether the defect appears on the face or not. Suppose the motion is not made, and defendant desires to plead the Statute of Frauds. Has he waived the objection by failing to move against the objection appearing

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(plaintiff unfamiliar with facts. Bill allowed). *Cf.* *Egan v. Tishman & Sons Inc.*, 222 App. Div. 141, 144, 225 N.Y. Supp. 631, 634 (1st Dep't 1927) (plaintiff familiar with the facts. Bill denied).

161. *Rafferty v. State of New York*, 172 Misc. 870, 16 N.Y.S.2d 685 (Ct. Cl. 1939).

162. *Lee v. Troy Citizens' Gaslight Co.*, 98 N.Y. 115, 119 (1885); *Klein v. Burseson*, 138 App. Div. 405, 122 N.Y. Supp. 752 (4th Dep't 1910). *Cf.* *Rafferty v. State of New York*, 261 App. Div. 80, 24 N.Y.S.2d 689 (3d Dep't 1940), *affirming*, 172 Misc. 870, 16 N.Y.S.2d 685 (Ct. Cl. 1939); *Zaepfel v. Parmass*, 140 Misc. 539, 250 N.Y. Supp. 740 (Sup. Ct. 1931).

163. *Scientific, etc. Corp. v. Board of Education*, 172 Misc. 770, 16 N.Y.S.2d 91 (N.Y. Munic. Ct. 1939); *Bricken Constr. Corp. v. Cushman*, 163 Misc. 371, 297 N.Y. Supp. 194 (Sup. Ct. 1937).

164. N. Y. CIV. PRAC. ACT § 267.

165. *Binon v. Boel et al.*, 271 App. Div. 505, 66 N.Y.S.2d 425 (1st Dep't 1946).

166. *Rosner v. Globe Valve Corp.*, 276 App. Div. 462, 95 N.Y.S.2d 531 (1st Dep't 1950).

167. Declaration, plea, replication, rejoinder, surrejoinder, rebutter, surrebutter. *CARMEODY, MANUAL OF NEW YORK CIVIL PRACTICE* 317 (1946).

168. *RULES CIV. PRAC.* 109 (6), 112, 113.

169. 233 App. Div. 384, 253 N.Y. Supp. 336 (1st Dep't 1931).

170. N. Y. CIV. PRAC. ACT § 117.

on the face? Civil Practice Act Sections 278, 279, 280 do not mention the Statute of Frauds, and the "waiver rule" of *Gentilala v. Fay Taxicabs Inc.*<sup>171</sup> is not clearly applicable. Perhaps, a more comprehensive "waiver rule" should be worked out by statute, rule of civil practice, or case, in order to clarify the subject.<sup>172</sup>

Rule 113 requires an evidentiary "affidavit." Would a *deposition* do? Civil Practice Act Sections 303 and 307 and Rule 120 permit the use of a deposition upon a motion. But conflicting cases say that a deposition is an affidavit,<sup>173</sup> and that it is not an affidavit.<sup>174</sup> This should be clarified and Rule 113 should be amended to permit the use of a deposition if an affidavit is not practicable.

A counterclaim may be stricken out as sham under Rule 103.<sup>175</sup>

A negligence bill of particulars must always be verified.<sup>176</sup> And a bill of particulars, while not a pleading, may nevertheless be used upon a motion for judgment on the pleadings under Rule 112. Indeed, there are at least two cases that permit use of an affidavit upon a Rule 112 motion, not to adjudicate issues, but to show the existence of issues of fact, such as the tolling of the statute of limitations.<sup>177</sup>

Another interesting motion rule is Rule 65. A moving party need not serve copies of papers which are in the possession of his adversary. A notice to produce upon the motion, moreover, may be served with the motion papers. Under this rule, if the opposition's income is material in the litigation, he can be compelled to produce his retained copies of his Income Tax Returns.<sup>178</sup> Indeed, the late Mr. Justice Shientag, of blessed memory, wrote in *Leonard v. Wargon et al.*,<sup>179</sup> that:

171. 214 App. Div. 255, 212 N.Y. Supp. 101 (1st Dep't 1925), *rev'd on other grounds*, 243 N.Y. 397, 153 N.E. 848 (1926).

172. *Cf.* Brauer v. Oceanic Steam Navigation Co., 178 N.Y. 339, 343-4, 70 N.E. 863, 865 (1904); and Blessington v. McCrory Stores Corp. *et al.*, 195 Misc. 710, 91 N.Y.S.2d 73 (Sup. Ct. 1949).

173. Wallace v. Baring *et al.*, 2 App. Div. 501, 37 N.Y. Supp. 1078 (1st Dep't 1896); McQuade v. Prudential Ins. Co., 166 Misc. 524, 2 N.Y.S.2d 647 (N.Y. Munic. Ct. 1938).

174. Zinner *et al.* v. Louis Meyers & Son Inc., 181 Misc. 344, 43 N.Y.S.2d 319 (Sup. Ct. 1943).

175. Gould v. Parker, 122 N.Y.L.J. 1378, col. 3 (N.Y. City Ct. Nov. 25, 1949). *Cf.* Esteves v. Swobodzien, 195 Misc. 956, 90 N.Y.S.2d 844 (Sup. Ct. 1949).

176. RULES CIV. PRAC. 117.

177. Chance *et al.* v. Guaranty Trust Co. *et al.*, 256 App. Div. 840, 9 N.Y.S.2d 478, 480 (2d Dep't 1939); Union Equities Inc. v. Silk *et al.*, 73 N.Y.S.2d 450 (Sup. Ct. 1947).

178. Fidelity & Casualty Co. v. Tar Asphalt Trucking Co., *et al.*, 30 Fed. Supp. 216 (D. C. N. J. 1939); Ocean A & G Ltd. v. Marcus Contr. Co., 234 N.Y. Supp. 854 (1st Dep't 1929); Schacht v. Schacht, 58 N.Y.S.2d 54, 62 (N.Y. Dom. Rel. Ct. 1945); Leonard v. Wargon *et al.*, 55 N.Y.S.2d 626 (Sup. Ct. 1945). *Cf.* Bishop v. Bishop, 195 Misc. 183, 91 N.Y.S.2d 207 (Sup. Ct. 1949) (deposition of husband's employer as to husband's earnings).

179. 55 N.Y.S.2d 626 (Sup. Ct. 1945).

"There is nothing in the Internal Revenue Code (26 U. S. C. A.) which confers upon a judgment debtor any privilege against disclosure by him of the contents of such returns."

#### EXAMINATIONS BEFORE TRIAL AND DEPOSITIONS

The great gift of 1952 to deposition practice was a new Rule X of the Trial Term Rules of New York County which is numbered Rule XIX in Bronx County, followed by new Rule 121(a), which became effective on July 1, 1952, and which reads as follows:

"Rule 121 (a). Testimony by deposition in an action; notice. In any action, at any time after the service of an answer, any party may cause to be taken by deposition before trial, the testimony of any other party, his agent or employee as prescribed by sections 288 and 289 of the Civil Practice Act, regardless of the burden of proof.

"At least ten days' notice of such examination shall be served in accordance with the provisions of section 290 of the Civil Practice Act. Notice of at least five days may then be served by the party to be examined for the examination of any other party, his agent or employee, such examination to be noticed for and to follow at the same time and place.

"The notice of taking testimony by deposition shall contain the title of the action and be subscribed with the name and address of the person giving the same. In an action to recover damages for personal injuries or brought pursuant to section 130 of the Decedent Estate Law, or to recover damages for an injury to property brought in connection therewith, it shall be sufficient if, as to matters upon which a person is to be examined, the notice shall state 'all of the relevant facts and circumstances in connection with the accident, including negligence, contributory negligence, liability or damages.'"

The trend, of course, is toward the "wide open" practice of the Federal Rules of Civil Procedure, although New York is still sparing in its authorization of examinations before trial of mere witnesses who are not parties.

The "ice-breaker" in New York was *Marie Dorros, Inc. v. Dorros Bros. Inc. et al.*,<sup>180</sup> abolishing the need for the affirmative in commercial litigations.

That was followed by Rule 129(a), explicitly permitting cross-examination on examination before trial.

Now, Rule 121(a). It may readily be seen that law offices will be busy, reporters will prosper, and that calendars may crumble. Such is the trend that may cause our generation to go down in history as that of the Golden Era of the conquering of the law's delay, even in a metropolis.

Under Section 288, the testimony may be taken of agents or employees of partnerships and of individuals conducting business under their

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180. 274 App. Div. 11, 80 N. Y. S. 2d 25 (1st Dep't 1948).

own names or under trade or assumed names. Under Section 289, where an action is against a corporation (*e.g.*, Brooklyn-Manhattan Transit Corp.), and the action is defended by a transferee or assignee (*e.g.*, the City of New York), the testimony may be taken (by order only, not by notice) of any former officer, director, agent or employee of the transferor corporation.

Under Section 300, a person to be examined may generally be compelled to attend only in the county where he resides or has an office, and, if a non-resident, only in a county in which he is served with a subpoena. An order served upon him personally may otherwise direct. An order served upon his attorney may only direct one other place, *viz.*, the county where the action is pending.

The general subject of the use of books and records upon an examination before trial is usually dealt with by the motion judges by simply citing Civil Practice Act Section 296 and *Beeber v. Empire Power Corp.*<sup>181</sup> Section 296 is not too clear.

A subpoena *duces tecum* will bring a party's books to the examination. It will not permit their use in evidence if they are not used by the party to refresh his recollection.<sup>182</sup> By order, however, the court may direct otherwise.<sup>183</sup> It has even been suggested that the court can *require* a witness to read from a book.<sup>184</sup> Now suppose that a party, whose books have been subpoenaed, consults page 77 of this ledger to refresh his recollection. Is page 77 for that reason admissible in evidence? No. Even on a trial the mere fact that a witness uses a paper to refresh his recollection does not make it admissible in evidence on that account.<sup>185</sup> Now, upon an examination before trial, may the examiner inspect the paper which the witness uses to refresh recollection? Apparently not,<sup>186</sup>

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181. 260 App. Div. 68, 20 N. Y. S. 2d 784 (1st Dep't 1940).

182. *Raleigh et al. v. City of New York*, 264 App. Div. 776, 34 N. Y. S. 2d 685 (2d Dep't 1942); *Singer v. National Gum & Mica Co.*, 211 App. Div. 758, 208 N. Y. Supp. 1 (1st Dep't 1925); *Redmond v. Stoneham et al.*, 182 App. Div. 307, 169 N. Y. Supp. 239 (1st Dep't 1918); *Ortman v. Beiley*, 160 App. Div. 258, 145 N. Y. Supp. 541 (1st Dep't 1914); *Marsh v. Russeks Fifth Ave. Corp.*, 78 N. Y. S. 2d 64 (Sup. Ct. 1942); *Dastis v. Sydell Realty Corp.*, 76 N. Y. S. 2d 569 (Sup. Ct. 1948).

183. *Beeber v. Empire Power Corp., et al.*, 260 App. Div. 68, 20 N. Y. S. 2d 784 (1st Dep't 1940); *Zeltner v. Fidelity & Deposit Co.*, 220 App. Div. 21, 220 N. Y. Supp. 356 (1st Dep't 1927).

184. *Harrison v. Miller et al.*, 190 App. Div. 184, 179 N. Y. Supp. 331 (1st Dep't 1919).

185. *Mattison v. Mattison*, 203 N. Y. 79, 96 N. E. 359 (1911). *Cf. Goldman v. United States*, 316 U. S. 129 (1942). Although see *Bata et al. v. Chase Safe Deposit Co. et al.*, 99 N. Y. S. 2d 535, 579 (1950).

186. *Sasson et al. v. Lichtman et al.*, 277 App. Div. 368, 100 N. Y. S. 2d 297 (1st Dep't 1950); *Raleigh et al. v. City of New York*, 264 App. Div. 776, 34 N. Y. S. 2d 685 (2d Dep't 1942); *Michel Cosmetics Inc. v. Tsirkas et al.*, 251 App. Div. 742, 296 N. Y. Supp. 96 (2d Dep't 1937); *Royce v. Ziegfeld*, 224 App. Div. 651, 229 N. Y. Supp. 22 (2d Dep't 1928); *Clark v. American Press Ass'n. et al.*, 166 Misc. 471, 2 N. Y. S. 2d 672 (Sup. Ct. 1938).



even though upon a trial inspection is authorized to test credibility, *e.g.*, to show that the paper could not honestly refresh recollection.<sup>187</sup>

The moral would appear to be (if the rules are not harmonized) to procure an order combining examination before trial with discovery and inspection.<sup>188</sup>

There is authority for the proposition that a witness who is not a party to the action should not be required to produce any of his books or papers.<sup>189</sup>

A witness may make changes in his deposition before signing it, but only if he makes it manifest whether he is challenging the accuracy of the stenographer.<sup>190</sup>

If a plaintiff examines a defendant before trial, and the defendant appears at the trial but does not take the stand, *the defendant* may nevertheless read into evidence his own deposition, taken by plaintiff.<sup>191</sup>

Section 306(a), permitting blood-grouping tests to establish exclusion, is of interest as the possible fore-runner, in civil cases, of the use of lie-detector evidence. Lie detector evidence was once admitted<sup>192</sup> but later excluded.<sup>193</sup> Dr. Joseph Kubis of Fordham University is continuing the

187. *Matter of Hewett's Will*, 271 App. Div. 1054, 70 N.Y.S.2d 3 (4th Dep't 1947). Assurance of offer in evidence, moreover, *need not* be given as a condition precedent to the right to inspect. *Miller v. Greenwald Petticoat Co.*, 192 App. Div. 559, 562, 183 N.Y.Supp. 97, 99 (1st Dep't 1920); *Tibbetts v. Sternberg*, 66 Barb. 201 (N.Y. 1870).

188. *Guardian Life Ins. Co. v. Hartstein et al.*, 256 App. Div. 917, 10 N.Y.S.2d 859 (1st Dep't 1939); *Fey v. Wissner*, 206 App. Div. 520, 202 N.Y.Supp. 30 (2d Dep't 1923); *In re Dimon's Estate*, 155 Misc. 311, 280 N.Y.Supp. 526 (Surr. Ct. 1935).

189. *Mausser v. Sclar*, 278 App. Div. 661, 102 N.Y.S.2d 565 (2d Dep't 1951); *Wildermuth v. Keating*, 269 App. Div. 783, 55 N.Y.S.2d 110 (2d Dep't 1945). *Cf. Jaffe v. City of New York*, 196 Misc. 710, 94 N.Y.S.2d 60 (Sup. Ct. 1949).

190. *Columbia v. Lee et al.*, 239 App. Div. 849, 264 N.Y.Supp. 423 (2d Dep't 1933); *Van Son v. Herbst et al.*, 215 App. Div. 849, 264 N.Y.Supp. 272 (1st Dep't 1926); *Harrison v. Miller et al.*, 190 App. Div. 184, 179 N.Y.Supp. 331 (1st Dep't 1919); *Hayes v. City of New York*, 98 N.Y.S.2d 424 (Sup. Ct. 1950); *Dworkow v. Bachrack*, 193 Misc. 52, 84 N.Y.S.2d 492 (Sup. Ct. 1948); *Mansbach v. Klausner*, 179 Misc. 952, 40 N.Y.S.2d 647 (Sup. Ct. 1943).

191. *Berdell v. Berdell*, 86 N.Y. 519, 521, (1881); *Goell v. United States Life Ins. Co.*, 265 App. Div. 735, 40 N.Y.S.2d 779 (1st Dep't 1943); *Redfield et al. v. National Petroleum Corp.*, 211 App. Div. 152, 206 N.Y.Supp. 827 (1st Dep't 1924); N.Y. CIV. PRAC. ACT §§ 303, 304.

192. *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (Queens County Ct. 1938). See Summers, *Science Can Get the Confession*, 8 FORD. L. REV. 334 (1939). *Cf. Commissioner of Welfare v. Castonie*, 277 App. Div. 90, 97 N.Y.S.2d 804 (1st Dep't 1950).

193. *People v. Forte*, 167 Misc. 868, 4 N.Y.S.2d 913 (Kings County Ct. 1938). See also *People v. Ford*, 304 N.Y. 679, 107 N.E.2d 595 (1952), where Desmond, J., observes that lie detector evidence is not "yet" accepted by our courts. He also observes that the court's investigation confirms the standard medical acceptance of "truth serum" tests with sodium amytal. The results of such tests, however, are likewise not yet admissible in evidence. See Note, 23 A.L.R.2d 1292, 1310 (July 1952). Similarly, with other narcosis

work of the late Father Walter Summers, S.J., with an electro-dermal lie detector or "Pathometer." Other investigators are using "multipin" instruments, such as the Keeler "Polygraph" and the Stoelting "Deceptograph," which simultaneously measure blood-pressure and respiratory changes as well as electro-dermal resistance. The results are impressive and in my opinion well warrant new test litigation seeking to give lie-detector evidence in civil cases the status of fingerprint evidence in criminal cases.<sup>193a</sup> The possibilities of the lie detector in "pre-trial" hearings are apparent, but not yet availed of.<sup>193b</sup> Recently, moreover,

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and hypnosis results. *Ibid.* Cf. *Quercia v. United States*, 289 U.S. 466, 468 (1933); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949); *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 533 (1951); *People v. Esposito et al.*, 287 N.Y. 389, 39 N.E.2d 925 (1942); Fourteenth Report J.C. 266 (1948). For the history of lie-detector evidence, see INBAU, LIE DETECTION AND CRIMINAL INTERROGATION (1942); INBAU, SELF-INCRIMINATION (1950); IV WIGMORE, EVIDENCE § 2265 (2d ed. 1923).

193a. The only reported case on the admissibility of lie detector evidence in civil cases is *Stone v. Earp*, 331 Mich. 606, 50 N.W.2d 172 (1951). An ideal civil case for use of the device is a case such as *Garippa v. Wisotsky et al.*, 108 N.Y.S.2d 67 (Sup. Ct. 1951), *aff'd*, 280 App. Div. 807, 113 N.Y.S.2d 772 (2d Dept. 1952), in which a non-jury court awarded a verdict of \$75,194.25 in a "hit-run driver" case, where there were no eye-witnesses whatever at 5:30 A.M. on a rainy morning. In that case Horn, the defendant's driver, was placed upon the stand by plaintiff and swore that he never had any accident whatever on the day in question, that he never passed any traffic lights, and that on three occasions an "unknown man" accosted him and accused him (some days after the accident) of being the "hit-run driver," whereupon the "unknown man" disappeared. The learned trial court's opinion states, that "Horn's story of his encounters with the unknown man is a conscious figment, fabricated to meet the exigencies of the situation, evincing a guilty conscience born of the knowledge of his misfeasance. It was manufactured in the fear that he might have been seen, and is rank perjury. . . . His resort to perjury and fabrication is tantamount to an admission of his guilt and is evidence of his consciousness of that guilt. . . . The fabrication of testimony raises a presumption against the party guilty of such practice." (Italics supplied). (Cf. *Quercia v. United States*, 289 U.S. 466, 468 (1933)). Horn is still alive. I should like to see a lie detector recording of his answers to three questions: "(1) Did you hit the man? (2) Did you pass a traffic light? (3) Was there really an unknown man who spoke to you?" Certainly, had I been the pre-trial judge in that case, I would have ordered a lie-detector test for Horn, to guide me in recommending settlement or ordering a preference for trial.

193b. At a "Conference on Criminal Interrogation and Lie Detection" held at Vanderbilt Hall on November 8, 1952, under the auspices of the New York University Graduate Division of Public Service, I urged the use of lie detector in pre-trial conferences in order to assist in expediting the tort jury calendar. I also proposed two new Sections, 306(b) and 353(a), of the Civil Practice Act to read as follows:

**"306b Deception Tests**

Wherever it shall be relevant to the prosecution or defense of an action, or to a pre-trial hearing therein, or wherever it shall be relevant in any proceeding pending in a court of competent jurisdiction, or a pre-trial hearing therein, the court, by order, shall direct any party to the action or proceeding, and any person or witness involved in the controversy to submit to one or more tests for the detection of deception. Such tests shall be made by duly qualified experts approved by the court and under such restrictions and directions as to the court or judge shall seem proper. The designation of an expert as qualified by the

I offered in evidence in an administrative hearing the lie detector testimony of Dr. Fabian Rouke, and it was received, despite strenuous objection after competent and rigorous examination of the doctor on the *voir dire*. I have heard of a plan to compel alleged "drunken drivers" to undergo police-station medical tests to determine the quantity of alcohol in their blood. Of course the constitutional considerations of the recent "stomach contents" decision will have to be given careful consideration in criminal cases.<sup>194</sup> And in any event the report of the test may be challenged by evidence tending "to show the procedure followed, its accuracy, whether any margin of error may exist in the conduct or results of the tests and the conclusiveness of lack of conclusiveness of the findings."<sup>195</sup>

Letters rogatory<sup>196</sup> may be used where an ordinary commission is unavailable. Soviet Russia virtually compels their use in matters Russian, as they are processed through the diplomatic channel.<sup>197</sup>

Notices to admit pursuant to Section 322 of the Civil Practice Act may not be vacated or modified at Special Term.<sup>198</sup> If Section 322 is not complied with by admission or otherwise, the facts are "deemed admitted."

Appellate Division of the Supreme Court in the department of trial shall be *prima facie* proof of his qualification. Whenever such test is ordered and made, the results thereof shall be receivable in evidence as *prima facie* proof of the facts found. All circumstances surrounding the taking of such tests, including the skill and quality of the expert, may be shown to affect the weight of the results of the tests, but they shall not affect their admissibility."

"353a. *Experts who Administer Deception Tests Pursuant to Court Order.*

An expert who administers or supervises a test for the detection of deception pursuant to order of a court in any action or proceeding or a pre-trial hearing therein shall not be allowed to disclose a communication made to him by the person tested, except to the extent relevant to the action or proceeding and to the particular inquiry with respect to which the test was ordered. Nor shall any clerk, stenographer, technician or other person employed by such expert be allowed to disclose any such communication except to the same extent."

194. Frankfurter, J.: "We put to one side cases which have arisen in the State courts through the use of modern methods and devices for discovering wrongdoers and bringing them to book." *Rochin v. State of Cal.*, 342 U.S. 165 (1952). *Cf. Holt v. United States*, 218 U.S. 245, 252-3 (1910); N.Y. VEHICLE AND TRAFFIC LAWS § 70 (5); *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913); *Schmidt v. District Attorney of Monroe County et al.*, 255 App. Div. 940, 8 N.Y.S.2d 787 (4th Dep't 1938).

195. *Rochin v. State of Cal.*, note 194 *supra*.

196. N.Y. CIV. PRAC. ACT § 309.

197. *Ecco High Frequency Corp. v. Amtorg Trading Corp.*, 276 App. Div. 827, 93 N.Y.S.2d 178 (1st Dep't 1949), *affirming*, 196 Misc. 405, 94 N.Y.S.2d 400 (Sup. Ct.); *Matter of Grauds*, 180 Misc. 558, 45 N.Y.S.2d 318 (Surr. Ct. 1943). *Cf. RULES CIV. PRAC. 126 and TRIPP, A GUIDE TO MOTION PRACTICE* (rev. ed. 1949), at pp. 76-80 of 1951-1952 Supp.

198. *Langan v. First Trust & Dep. Co. et al.*, 296 N.Y. 1014, 73 N.E.2d 723 (1947), *affirming*, 270 App. Div. 700, 62 N.Y.S.2d 440 (4th Dep't 1946); *Belfer v. Dectograph Products Inc.*, 275 App. Div. 824, 89 N.Y.S.2d 125 (1st Dep't 1949).

And these formal admissions may be used on a motion for judgment on the pleadings pursuant to Rule 112 and Civil Practice Act Section 476.<sup>199</sup>

#### EVIDENCE

The tersest textbook on New York Evidence is Article 33 of the Civil Practice Act.

A 1951 amendment to Section 412 permits photographic copies of hospital records to constitute compliance with a subpoena *duces tecum*. This elimination of the nuisance of transcription saves the hospital infinite expense and permits quicker response to lawyers' requests.

I call attention to a well-written article by Mr. C. Bedford Johnson, Jr., which he has entitled "Admissibility of Photographic Reproductions of Writings."<sup>200</sup> It has served the basis for new legislation giving legal recognition to the commercial world's acceptance of photographic reproductions as primary evidence (*e.g.*, a bank's "Recordak" system).<sup>201</sup>

In death actions evidence of dependency is now admissible to enable the Surrogate or other court having jurisdiction to determine the incidence of pecuniary loss. Thus a widow with two children may receive 40% or even 60% of a recovery where normal distribution of her husband's estate upon intestacy would give her only 33 1/3%.<sup>202</sup>

In annulment actions, Section 1143 of the Civil Practice Act has been amended to codify the decision in *DeBaillet-Latour v. DeBaillet-Latour*.<sup>203</sup> The amendment makes it clear that in any annulment action, whether contested or not, the declaration or confession of either party to the marriage must be corroborated.<sup>204</sup>

Since September 1, 1952, in New York City proceedings to review tax

199. *Stevenson v. News Syndicate Co.*, 302 N.Y. 81, 96 N.E.2d 187 (1950); *Lloyd v. R. S. M. Corp.*, 251 N.Y. 318, 167 N.E. 456 (1929); *Kidder v. Hesselman*, 119 Misc. 410, 196 N.Y. Supp. 837 (Sup. Ct. 1922).

200. 23 N.Y. ST. BAR BULL. 452-7 (Dec. 1951).

201. See Brief for Manton, pp. 72-7, and Brief for Spector, pp. 35-7, *United States v. Manton et al.*, 107 F.2d 834, 844 (2d Cir. 1938); MODEL STATE BANKING CODE §§ 2, 111 (F). *Cf. Myres v. United States* 174 F.2d 329 (8th Cir. 1949); *United States v. Cipullo*, 170 F.2d 311 (2d Cir. 1948); *United States v. Karbney, et al.*, 155 F.2d 795 (2d Cir. 1946). *Cf. United States v. Kushner*, 135 F.2d 668 (2d Cir. 1943). Since September 1, 1952, N.Y. CIV. PRAC. ACT § 374(b) permits photographic and photostatic reproductions and microfilm records of original records made in the regular course of business to be deemed originals from the standpoint of admissibility in evidence. N.Y. Laws 1952, c. 791. See also RULES CIV. PRAC. 10.

202. N.Y. DEC. EST. LAW § 133; *In re Sinyago's Estate*, 198 Misc. 776, 100 N.Y.S.2d 556 (Surr. Ct. 1950); *Matter of Kaiser*, 198 Misc. 582, 100 N.Y.S.2d 218 (Surr. Ct. 1950). The formulae of these cases are hardly conclusive. Dependency of crippled children, for example, may extend far beyond majority.

203. 301 N.Y. 428, 94 N.E.2d 715 (1950).

204. See Eighteenth Report J.C. 73 (1952).

assessments of real property, the justice or referee before whom such proceedings shall be heard "may inspect the real property which is the subject of the proceeding."<sup>205</sup>

Experts to appraise real property in assessing it for taxation or to give expert testimony in an action or proceeding in connection with any such assessment may now be employed by a municipal corporation by local law, ordinance or resolution of the governing legislative body.<sup>206</sup>

Banking organizations may preserve photographic reproductions of records in compliance with Section 128 of the Banking Law.<sup>207</sup>

Disposition of county clerks' records, the records of commissioners of jurors, and similar records, is affected by Chapter 793 of the New York Laws of 1952.

An "evidence" topic of interest is the question of whether a cross-examiner may use a book or opinion in cross-examining an expert witness. A recent commentary in this connection is as follows:

"... the examiner will not be permitted to ask the witness if he agrees with Sir William Osler's famous observation in one of his medical treatises that it was remarkable how soon after a lawsuit patients suffering from injuries caused by shock recovered their health."<sup>208</sup>

But the authorities are in conflict, Wigmore indicating disapproval of the practice of thus using books.<sup>209</sup> In New York, moreover, it has been held that opinions expressed in treatises of recognized authority which are at variance with those given on the stand by an expert may not be received in evidence as "*affirmative proof*."<sup>210</sup> Also, a trial judge's charge was held "too broad" in stating:

"When an expert takes the stand and gives an opinion, he may . . . be shown other books and other opinions and asked whether he agrees with the books or the opinions therein contained."<sup>211</sup>

But this decision is carefully distinguished in *Hastings v. Chrysler Corp. et al.*,<sup>212</sup> which points out that *People v. Riccardi*<sup>213</sup> dealt with a *private written report*, and not with "treatises and literature of recognized authority." The latter may be used to impeach a witness on

205. N. Y. Laws 1952, c. 568, amending N. Y. CITY ADM. CODE § 166-1.0 by adding a new subdivision c.

206. N. Y. Laws 1952, c. 257, amending N. Y. CITY GEN. MUN. LAW § 98.

207. N. Y. Laws 1952, c. 790.

208. Willens, *Cross-examining the Expert Witness With the Aid of Books*, 41 J. CRIM. L. & CRIMINOLOGY 192-8 (1950). See *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 803 (1903).

209. VI WIGMORE, EVIDENCE § 1700 (3d ed. 1940).

210. *McEvoy v. Lommel*, 78 App. Div. 324, 327, 80 N. Y. Supp. 71, 73 (1st Dep't 1903).

211. *People v. Riccardi*, 285 N. Y. 21, 32 N. E. 2d 776 (1941) (*Italics mine*).

212. 273 App. Div. 292, 77 N. Y. S. 2d 524 (1st Dep't 1948).

213. 285 N. Y. 21, 32 N. E. 2d 776 (1941).

the stand with respect to his knowledge of the subject on which he professes to be an expert, although if the expert does not concede the authoritativeness of the literature attempted to be resorted to, it may not be used on cross-examination.<sup>214</sup>

The *Hastings v. Chrysler* distinction of the *Riccardi* case was cited with approval by the Court of Appeals itself in *People v. Feldman*.<sup>215</sup>

New York has not adopted the proposed Model Code of Evidence. Indeed, Professor Morgan has written of it:

"The reception which the Model Code of Evidence of the American Law Institute has met strongly indicates that the bar at any rate is not ready for codification."<sup>216</sup>

#### TRIAL

Many lawyers lose sight of the efficacy of Section 443(3) of the Civil Practice Act, which permits a separate trial of one or more issues. This is hidden away in the statute, but it is worthy of more general use, particularly in cases in which there has been a general release.<sup>217</sup>

For non-jury trials important amendments have been made to Section 549 of the Civil Practice Act. The doctrine of *Corr v. Hoffman*<sup>218</sup> to the effect that a trial court has "no revisory or appellate jurisdiction to correct by amendment error in substance affecting the judgment" has been abolished.<sup>219</sup> The trial court may now correct its errors instead of directing a new trial, and it may "take additional testimony, amend findings of fact and conclusions of law and render a new decision."

A definition of "interested witnesses" is found in *Noseworthy v. City of New York*.<sup>220</sup>

If a substantial issue is raised as to the making of a contract to arbitrate or a submission, or the failure to comply therewith, a jury trial may now be had, by amendment of Section 1450 of the Civil Practice Act, effective September 1, 1952.<sup>221</sup>

The time limit for a motion for judgment notwithstanding the verdict

214. I am indebted to Mr. Louis A. Tepper of the New York bar for demonstrating the impact of the *Hastings* distinction upon the *Riccardi* principle.

215. 299 N. Y. 153, 168, 85 N. E. 2d 913, 920 (1949).

216. Morgan, 29 TEXAS L. REV. 587-610 (1951).

217. *City of New York v. Interborough Rapid Transit Co.*, 134 Misc. 827, 236 N. Y. Supp. 449 (Sup. Ct. 1929); *Kye v. Stearns*, 130 Misc. 28, 223 N. Y. Supp. 582 (Sup. Ct. 1927).

218. 256 N. Y. 254, 268, 176 N. E. 383, 389 (1931).

219. N. Y. Laws 1951, c. 218. Cf. *Herpe v. Herpe*, 225 N. Y. 323, 327, 122 N. E. 204, 205 (1919). See also amendments of 1951 to N. Y. CIV. PRAC. ACT §§ 550 and 551. Cf. RULES CIV. PRAC. 220, 221 as amended July 28, 1951. See 126 N. Y. L. J. 383, col. 3 (Sept. 6, 1951).

220. 298 N. Y. 76, 80 N. E. 2d 744 (1948).

221. N. Y. Laws 1952, c. 762.

is now governed by the Rules of Civil Practice,<sup>222</sup> the text of which will be found in the New York Law Journal of September 6, 1951. This is accomplished by an amendment of Section 457(a) of the Civil Practice Act.<sup>223</sup> "The same term" is no longer the time limit. The new time limit is fifteen days from the rendition of a verdict or decision, or if no verdict is returned, from the time of the discharge of the jury; and in a non-jury case, fifteen days from the date of rendering the decision.<sup>223a</sup>

Since July 1, 1952, when alternate jurors are used in a criminal case the court may direct that one or more of the alternates be kept in the custody of the sheriff or one or more court officers, separate and apart from the regular jurors until the jury have agreed upon a verdict. Thus, if during deliberations a juror dies or becomes ill, the court may order him to be discharged and utilize the alternate.<sup>224</sup> Perhaps this policy should be carried over to civil cases where alternate jurors are used.

It is elementary that ordinarily jurors will not be allowed to impeach their own verdict.<sup>225</sup> Yet affidavits of jurors may be considered as to statements made outside the jury room<sup>226</sup> or to show that the jury forgot to consider interest<sup>226a</sup> or that the five-sixths rule of Section 463(a) was not complied with.<sup>227</sup>

In non-jury trials the parties frequently waive formal findings of fact and conclusions of law. However, even if there is such a waiver and the case is settled during trial there can be no determination upon the merits of a non-jury case without something in the nature of findings of fact

222. RULES CIV. PRAC. 60 (a).

223. N. Y. Laws 1952, c. 588.

223a. N. Y. CIV. PRAC. ACT § 549. See Seventeenth Report J. C. 72-3, 179-204 (1951). Section 549 provides that the time for making the motion is to be "prescribed by the rules of civil practice." Supplementing this, a new Rule 60(a) fixes the time at fifteen days from the rendition of a verdict or decision, or if no verdict is returned, from the time of discharge of the jury; and in a non-jury case, fifteen days from the date of rendering the decision. Thus "the same term" is no longer the time limit. (See 126 N. Y. L. J. 383, col. 3 (Sept. 6, 1951), for text of new Rule 60(a) ).

224. N. Y. Laws 1952, c. 670, amending N. Y. CODE CRIM. PROC. § 358(a).

225. McDonald *et al.* v. Pless, 238 U. S. 264 (1915); Payne v. Burke *et al.*, 262 N. Y. 630, 188 N. E. 96 (1933); Miller v. Mattern *et al.*, 149 Misc. 883, 268 N. Y. Supp. 296 (Sup. Ct. 1934), *aff'd*, 241 App. Div. 782, 270 N. Y. Supp. 1002 (3d Dep't 1934); Wirt v. Reed, 138 App. Div. 760, 123 N. Y. Supp. 706 (1st Dep't 1910); Gambon *et al.* v. City of New York *et al.*, 153 Misc. 401, 274 N. Y. Supp. 653 (Sup. Ct. 1934).

226. People v. Durling, 303 N. Y. 382, 103 N. E. 2d 336 (1952); McHugh v. Jones, 283 N. Y. 534, 29 N. E. 2d 76 (1940); People v. Leonti, 262 N. Y. 256, 186 N. E. 693 (1933); Reed v. Cook *et al.*, 103 N. Y. S. 2d 539 (Sup. Ct. 1951); Wilkins v. Abbey, 168 Misc. 416, 5 N. Y. S. 2d 826 (Sup. Ct. 1938).

226a. Mayaguez Drug Co. v. Globe & Rutgers Fire Ins. Co., 260 N. Y. 356, 183 N. E. 523 (1932).

227. See note 226 *supra*.

sufficient to apprise the parties and the appellate courts of what facts were essential to the trial court's determination.<sup>228</sup>

The parties can compel formal findings of fact in a non-jury case if they submit proposed findings with or before the submission of their final briefs after the trial.<sup>229</sup>

## JUDGMENT, TENDER, EXECUTION AND COSTS

### 1. Judgment

My conclusions on the subject "Declaratory Judgments versus Advisory Opinions—Evolution against Revolution" were summarized in the form of so-called "Ten Commandments" governing declaratory judgments which were published on the first page of the New York Law Journal of December 2, 1941.<sup>230</sup>

A resurvey, from the years 1941 through 1949, is found under the heading "Development of Law, Declaratory Judgments" in 62 *Harvard Law Review* 787-885. My 1941 conclusions in the light of that resurvey continue to be my present conclusions.

A declaratory judgment may be in rem or in personam.<sup>231</sup>

Perhaps the best New York declaratory judgment decision is *N. Y. Foreign Trade Zone Operators Inc. v. State Liquor Authority et al.*<sup>232</sup>

A judgment must state the residence address of the person in whose favor the judgment was rendered<sup>233</sup> and the trade and last known address of the judgment debtor.<sup>234</sup>

Affidavits of "no military service" are governed by Military Law Section 303, and "interest" is governed by Civil Practice Act Section 480.

### 2. Tender

Civil Practice Act Section 112(g), relating to restoration of benefits by a party seeking to have a transaction declared void, has been amended

228. *United States v. Crescent Amusement Co. et al.*, 323 U.S. 173, 185 (1944); *American Tobacco Co. et al. v. The Katingo-Hadjapatera et al.*, 194 F.2d 449 (2d Cir. 1951); *United States v. Forness et al.*, 125 F.2d 928, 942, 943 (2d Cir. 1942); *Querze v. Querze*, 290 N.Y. 13, 47 N.E.2d 423 (1943); *Steel Co. v. Associated Metals & Minerals Corp.*, 277 App. Div. 687, 102 N.Y.S.2d 655 (1st Dep't 1951); *Mason v. Lory Dress Co. et al.*, 277 App. Div. 660, 102 N.Y.S.2d 285 (1st Dep't 1951); *Shaffer v. Martin et al.*, 20 App. Div. 304, 46 N.Y. Supp. 992 (4th Dep't 1897).

229. N.Y. CIV. PRAC. ACT §439.

230. They will be found amplified in CARMODY, *MANUAL OF NEW YORK CIVIL PRACTICE* 634-9 (1946), under the heading Principles Regulating One's Right to Resort to an Action for a Declaratory Judgment.

231. *Redfield et al. v. Critchley et al.*, 277 N.Y. 336, 339, 14 N.E.2d 377 (1938). At least, this is what I deduce from the court's reference to an "unwarranted conclusion."

232. 285 N.Y. 272, 34 N.E.2d 316 (1941).

233. N.Y. CIV. PRAC. ACT. § 501(2).

234. N.Y. CIV. PRAC. ACT. § 501(1).



to make it clearly applicable to transactions found by courts to be "void" from the time of their execution as well as to those found to be "voidable" and declared void at the request of the party entitled to rescission.<sup>235</sup>

### 3. Execution

Direct levy of execution against a money debt or contract obligation is now permitted by a new Section 687(a) of the Civil Practice Act. This harmonizes with the law which permits the levy of execution against a debt which has been attached. Since September 1, 1952, the levy of execution is permitted whether or not an attachment has been levied.<sup>236</sup>

### 4. Costs

Compulsive deterrents to suing in a higher court when one should sue in a lower court are found in amendments to Civil Practice Act Section 1474, subdivisions 1 and 2, which provide that a plaintiff may recover no costs or disbursements if he sued in the Supreme Court and recovered under \$4000 when he could have sued in the City Court. Similarly, if he sued in the City Court and recovered under \$1500 when he could have sued in the Municipal Court.<sup>237</sup> A new and simple bill of costs (aggregating \$150) is provided for Supreme Court cases within New York City.<sup>238</sup> Thirteen items have become three, based upon average amounts derived from a county clerks' survey. In the City Court, costs are increased to Supreme Court amounts<sup>239</sup> and maximum costs in the Municipal Court are increased from \$75 to \$150.<sup>240</sup>

The \$50 costs item heretofore in Civil Practice Act Section 1472 has been increased to \$100.<sup>241</sup>

## MISCELLANEOUS

Effective September 1, 1952, no waiver of the right to be represented by an attorney in any arbitration proceeding shall be effective unless the waiver is evidenced by a writing expressly so providing, signed by the party requesting such representation, or unless the party fails to assert such right at the beginning of the hearing.<sup>242</sup>

235. N. Y. Laws 1952, c. 487. See LEG. DOC. NO. 65 K (1952).

236. N. Y. Laws 1952, c. 835.

237. N. Y. Laws 1952, c. 430. See Eighteenth Report J. C. 55 (1952).

238. N. Y. CIV. PRAC. ACT § 1504(a), added by N. Y. Laws 1951, c. 502.

239. N. Y. Laws 1951, c. 502.

240. N. Y. Laws 1951, c. 503, amending N. Y. CITY MUN. CT. CODE § 164 (14).

241. N. Y. Laws 1951, c. 160.

242. N. Y. Laws 1952, c. 547. See Eighteenth Report J. C. 57 (1952). Space does not permit review of about twenty miscellaneous practice statutes analyzed in 24 N. Y. Sr. BAR BULL. 144-5 (1952). See also *id.* at 139-44 with respect to 1952 increases in judicial salaries and related matters.

## APPEALS

Upon a reversal or modification, an appellate court must now state the grounds of its decision.<sup>243</sup>

A new Civil Practice Act Section 592 (a) prevents dismissal of an appeal from an order even though a subsequent order, unappealed from, granted reargument and adhered, or granted resettlement, or denied leave to renew.<sup>244</sup> The appellate court, in its discretion, may review the subsequent order.<sup>245</sup>

The deadly appellate trap of *People ex rel. Manhattan Storage & Warehouse Co. v. Lilly*<sup>246</sup> continues to exist, causing time to appeal to run from the date of entry, as against a litigant who submitted a proposed order or judgment for signature. He is deemed to have entered it himself, although he is utterly ignorant of the fact of entry. This rule is nothing short of professional murder, particularly since no court possesses the power to extend the time in which to take an appeal.<sup>247</sup>

Time to appeal is extended so as to give a party upon whom a notice of appeal is served "ten days to appeal in every case, except where he would have a longer period" otherwise provided by law. This eliminates the "forced" initiation of appellate review where a litigant does not want to appeal unless his adversary does, hopes that this adversary will not, yet fears that he may at the last moment, just before the normally unextendable time to appeal runs out.<sup>248</sup>

Appeals in Civil Service disciplinary matters are affected by amendment of Section 22(3), of the Civil Service Law.<sup>249</sup>

There can be no stipulation for judgment absolute in divorce cases.<sup>250</sup>

Records on appeal have been somewhat shortened.<sup>251</sup>

For those in the higher reaches of appellate practice, two interesting decisions with respect to the jurisdiction of the Court of Appeals are *Scarnato v. State of New York*,<sup>252</sup> (indicating an enlargement of the Court's jurisdiction to review questions of fact), and *Gambold v. MacLean et al.*<sup>253</sup>

243. N. Y. Laws 1951, c. 595, amending N. Y. CIV. PRAC. ACT § 584(1).

244. N. Y. Laws 1951, c. 258.

245. Seventeenth Report J. C. 205-11 (1951).

246. 299 N. Y. 281, 86 N. E. 2d 747 (1949).

247. *Terwilliger v. Browning, King & Co.*, 207 N. Y. 479, 101 N. E. 463 (1913).

248. N. Y. Laws 1952, c. 291. See Eighteenth Report J. C. and supporting study D (1952).

249. N. Y. Laws 1952, c. 398.

250. *Weiman v. Weiman*, 295 N. Y. 150, 65 N. E. 2d 754 (1946); RULES CIV. PRAC. 283.

251. RULES CIV. PRAC. 232, 234, as amended July 2, 1951.

252. 298 N. Y. 376, 83 N. E. 2d 841 (1949).

253. 254 N. Y. 357, 173 N. E. 220 (1930), presenting a case of an appeal directly to the Court of Appeals from a judgment of the Supreme Court without going through the

At the 1951 election the people approved a new subdivision 5 for New York Constitution Article VI, Section 7. This permits an appeal to the Court of Appeals on a question of law from a non-final order in a proceeding by or against a public officer, tribunal or court. Thus an administrative tribunal need no longer stipulate for judgment absolute if the Appellate Division refuses to grant leave to appeal on a certified question.<sup>254</sup>

I have stipulated for judgment absolute only once in my career, specifically relying upon and endeavoring to emulate Mr. Frederick Bryan's great victory in *Curcio v. City of New York*,<sup>255</sup> but, alas, one should never be in a hurry about dying, getting married, resting a plaintiff's case or stipulating for judgment absolute. In the manner of Judge James Garrett Wallace's song, I was affirmed without opinion with appropriate overtones from Chopin.

And thus I become philosophical, endeavoring to evaluate the panorama all at once, and finding solace in the last paragraph of Glenn's work on *Liquidation*:

"If some of our late reforms have missed the true mark, still we have the rest of the structure; and better still, our history justifies the confidence that while the bad cannot last, the good will remain."<sup>256</sup>

Indeed, my optimism in the progress of things procedural is such that I fly with enthusiasm to paraphrase a great question posed about thirty years ago by Sir John Salmond, profound author of *Salmond on Jurisprudence*:

"Through centuries of slow development we have gathered together the materials for the greatest system of law that the world has ever known. Is it too much to hope that we are now approaching the end of that long era, and that, procedurally speaking, at least, we are ready to build up these materials into a stately monument of perfect form which will endure forever as one of the great contributions of this century to the cause of Truth, Justice and Civilization?"<sup>257</sup>

Appellate Division, yet reviewing a determination of the Appellate Division affirming an interlocutory judgment. See N. Y. CONST. Art. VI, § 7.

254. See *Matter of Rochester Gas & Elec. Corp. v. Maltbie*, 298 N. Y. 680, 82 N. E. 2d 582 (1948); *Matter of Epstein v. Board of Regents*, 295 N. Y. 154, 157, 65 N. E. 2d 756, 757 (1946); BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN NEW YORK*, 366-8 (1942).

255. 275 N. Y. 20, 9 N. E. 2d 760 (1937).

256. GLENN, *LIQUIDATION* 379 (1st ed. 1935).

257. See 22 COL. L. REV. 197, 203 (1922).