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CIVIL JURISDICTION OF THE NEW YORK COURT OF APPEALS AND APPELLATE DIVISIONS*

HAROLD L. KORN**

INTRODUCTION

THE purpose of this article is to outline the jurisdictional framework which governs the civil business of New York's two major levels of appellate courts—the Court of Appeals and the Appellate Division of the Supreme Court. Recent major revisions of both New York's civil practice law and the judiciary article of its constitution left the jurisdiction of both courts for the most part unchanged. This hardiness, however, is probably less a tribute to the clarity or soundness of the present provisions and attendant case law than it is to the legal profession's reluctance to see the old order pass. The body of doctrine governing Court of Appeals jurisdiction—"a subject to which the most subtle minds of our jurisprudence have contributed"¹—is surpassingly intricate, abounding in fine distinctions and technicalities that simply fail to justify their existence as useful indicators of a soundly fashioned program of business for the state's highest court. The heavily overworked Appellate Divisions remain burdened with governing statutes² which not only reject any kind of "final judgment" rule but authorize appeal as of right from non-final orders in the broadest terms.³

Certainly there are questions here that deserve the most serious attention of delegates to the New York State Constitutional Convention. The focus of the present article, however, is on presenting the major outlines of existing doctrine in relatively brief compass. While increased understanding of this doctrine may itself induce change, the primary purpose here is expository; and it is hoped that this summary analysis of the subject will prove useful to the practitioner as well as to the student of appellate court jurisdiction.

The two sections of the article treat separately two aspects of appellate

* The substance of this article will appear as part of the chapter on appeals in a Manual on New York Civil Practice by Weinstein, Korn and Miller, to be published in the Spring of 1967.

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1. Cohen & Karger, Powers of the New York Court of Appeals 4 (rev. ed. 1952).

2. Unlike the detailed provisions of the New York Constitution specifying Court of Appeals jurisdiction (art. 6, § 3), the one relating to Appellate Division jurisdiction (art. 6, § 4(k)) simply states:

The appellate divisions of the supreme court shall have all the jurisdiction possessed by them on the effective date of this article and such additional jurisdiction as may be prescribed by law, provided, however, that the right to appeal to the appellate divisions from a judgment or order which does not finally determine an action or special proceeding may be limited or conditioned by law.

The basic implementing statute is New York Civil Practice Law and Rules § 5701 [hereinafter cited CPLR, without section symbol].

3. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 268 (1957) (dissenting opinion; citing predecessor New York statute as an "extreme example"); *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949).

jurisdiction that are not always carefully distinguished in the cases—*i.e.*, appealability and reviewability. Appealability (section I) deals with the characteristics that the determination of the court below must possess in order that it may properly be brought before the appellate court. The characteristics of some determinations will ground an appeal as of right, others will be appealable only by permission of the appellate court or the lower court or one of the justices, and still others will not be appealable at all.

Reviewability (section II) deals with the questions that the appellate court can consider once the appeal is properly before it. Limitations on reviewability may depend on the nature of the question involved—*e.g.*, whether a question of law, fact or discretion—or on the nature of the determination which raises the question, when it is a determination other than the one on which the appeal is grounded—*e.g.*, a non-final order must “necessarily affect” the final judgment to be reviewable on an appeal from that judgment.

The various ways in which an appellate court can dispose of the appeal after considering the questions properly before it—*e.g.*, whether it can grant final judgment or must remand to a lower court—are intimately connected with the scope of review available to the appellate court, and, for this reason, section II also touches briefly upon the subject of disposition of the appeal.

I. APPEALABILITY

A. Court of Appeals

The jurisdiction of the Court of Appeals is controlled by article 6, the judiciary article, of the constitution. The Court’s jurisdiction, as there set forth, may be neither enlarged nor diminished by the legislature save in one respect: The legislature may abolish appeal as of right based on a dissent, reversal or modification in any class of cases and substitute appeal by permission instead.⁴

Although the constitutional provisions would apparently be self-executing in the absence of implementing legislation,⁵ the CPLR continues the policy of restating them in the general practice statutes. The constitutional provisions are terse and difficult to understand unless reorganized and expounded upon; and the statutes embody decisional and legislative glosses which not only explain but also amplify or qualify aspects of the Court’s jurisdiction in a way that would not be apparent from a bare reading of the constitutional language.

CPLR 5601 and 5602 describe the lower court determinations that are appealable to the Court of Appeals—the former, those appealable as of right, and the latter, those requiring permission. The scope of review available in the Court of Appeals is covered by CPLR 5501(b). Several points are salient. In keeping with the Court’s role as final arbiter of the law in a state with two levels of appellate courts, (1) the appealable determination generally must be

4. N.Y. Const., art. 6, § 3(b)(7); see Cohen & Karger, *op. cit. supra* note 1, at 7-9, 15.

5. Cohen & Karger, *op. cit. supra* note 1, at 11-12.

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a final one, unless the Appellate Division certifies that it involves a question of law which the Court of Appeals ought to review;⁶ (2) the Court will generally hear only matters that have previously been passed upon by the Appellate Division;⁷ and (3) the Court is mostly concerned with review of questions of law. Furthermore, the provisions governing appeal as of right reflect some attempt to identify those cases that are most appropriate for appeal to the high court. However, as earlier indicated, the provisions and the vast body of case law interpreting them are exceedingly complicated, and many of the highly technical distinctions they contain are not justifiable either as providing a rational way of limiting the burden on the Court of Appeals or as winnowing out for review by that Court the most urgent issues of policy.

1. Appeal as of Right

a. *In general.* CPLR 5601⁸ specifies the cases in which an appeal may be taken as of right to the Court of Appeals. They are classified by subdivision into four major headings. All except subdivision (c) require a final determination in the courts below.

Subdivision (a) governs the most common basis for appeal as of right: a dissent, reversal or modification by the Appellate Division. Subdivision (b) provides, in two separate and noncongruent provisions, for appeal as of right

6. *But see* CPLR 5601(c), 5602(a)(2), and pp. 316-18, 321-23 *infra*.

7. *But see* CPLR 5601(b)(2), and pp. 313-16 *infra* (direct appeal from lower court in certain constitutional cases).

8. CPLR 5601. Appeals to the court of appeals as of right:

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent or such order directs reversal of the judgment or order appealed from or directs modification of such judgment or order.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon non-final determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

from either the Appellate Division or the court of original instance based on the presence of a constitutional question. Subdivision (c) covers the only instance of appeal as of right from a non-final determination, authorizing appeal from an Appellate Division order granting or affirming the granting of a new trial upon appellant's stipulation that, if there is an affirmance, judgment absolute shall be entered against him. Finally, subdivision (d) covers the case in which an appeal as of right from a final determination may be founded upon the presence of a dissent, reversal, modification or constitutional question in the Appellate Division on an earlier appeal from a non-final order, if that non-final Appellate Division determination "necessarily affected" the final judgment.

The complexity of these rules, embodied in the constitution and evolved after a century's experimentation in fashioning a proper jurisdiction for the Court of Appeals, prohibits any simpler form of statement. Every attempt at a simpler classification requires exceptions and qualifications. Thus, it may be said that appeal lies as of right only from a final determination, except for appeals from the denial of a new trial (subdivision (c)). The final determination appealed from must be by the Appellate Division, except for direct appeal from the court of original instance when the only question is the constitutionality of a statute (subdivision (b)(2)) or after an intermediate Appellate Division order possessing the proper characteristics (subdivision (d)). And appeal as of right does not lie if the determination has passed through two appellate courts below, except for appeals based on constitutional questions (subdivision (b)).

b. *When two appeals below.* The judiciary article of the constitution, as revised and adopted in 1961, provided in section 3(b)(7) that:

No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding *where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court*, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. (Emphasis added.)

Its evident purpose is to allow appeal only by permission of the Appellate Division from determinations (except those involving a constitutional question) which have been passed upon by two levels of appellate courts below the Court of Appeals. The effect is to require permission of the Appellate Division for an appeal to the Court of Appeals in all cases originating in courts whose appeals pass through a lower appellate court—*e.g.*, an Appellate

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Term or a county court—before reaching the Appellate Division. This includes city courts, district courts, and the New York City Civil Court.⁹

CPLR 5601 and 5602 do not reflect this limitation correctly. They were drafted on the basis of the analogous provision in the former judiciary article, which was identical to the present one except for the italicized phrase; in its stead appeared the phrase “originally commenced in any court other than the supreme court, a county court, a surrogate’s court, or the court of claims.” The former limitation thus applied somewhat arbitrarily to all cases originating in “inferior” courts (those other than the named ones). It operated mainly, just as the new provision, to prevent a third appeal as of right, but was not as effectively geared to this single purpose.

The limitation of subdivisions (a) and (c) of CPLR 5601 to actions “originating in the supreme court, a county court, a surrogate’s court, the court of claims or an administrative agency” is therefore inconsistent with section 3(b)(7) of the present judiciary articles of the constitution.¹⁰ Appeals from the Family Court, for example, go directly to the Appellate Division¹¹ and thus are not subject to the constitutional limitation; but, since the Family Court is not among those named in CPLR 5601 and 5602, appeal as of right would not lie under the CPLR. Since the constitution controls in case of conflict and would be self-implementing even in the absence of statute, the more restrictive formulation in CPLR 5601 and 5602 should not be given effect. The statutes should, in any event, be amended to avoid any misapprehension by the bar as to the scope of the limitation.

The limitation does not apply when the basis for appeal as of right is the presence of a constitutional question pursuant to either paragraph of CPLR 5601(b), or to controversies originating before an administrative agency and reaching the courts by way of a proceeding for judicial review.¹²

c. *Dissent, reversal or modification.* CPLR 5601(a) covers the most common grounds for appeal as of right: a dissent in the Appellate Division, or a reversal or modification by that court of the determination below. If (1) there is such a dissent, reversal or modification; (2) the appeal to the Appellate Division was not from an appellate determination of a lower appellate court; and (3) the Appellate Division determination is a final one, then CPLR 5601(a) allows an appeal as of right.

The theory behind this primary branch of the Court’s mandatory jurisdiction is that the disagreement among the judges below evidenced by a dissent,

9. See 7 Weinstein, Korn & Miller, *New York Civil Practice* [hereinafter cited W-K-M] ¶¶ 5702.05-5702.07, 5703.01-5703.05.

10. As to the same inconsistency in CPLR 5602, see notes 68, 82 *infra*.

11. N.Y. Family Ct. Act § 1011; *cf.* *Goff v. MacMillan*, 12 N.Y.2d 836, 187 N.E.2d 468, 236 N.Y.S.2d 614 (1962) (appeal as of right in case originating in the old Children’s Court).

12. See 7 W-K-M ¶ 5601.03.

reversal or modification indicates questions of a sufficiently debatable nature to warrant review by the Court of Appeals.

The terms "dissent," "reversal" or "modification," as grounds for appeal as of right, have been broadly and somewhat mechanically implemented. It is of no consequence that the dissent, reversal or modification concerns only a question that the Court of Appeals has no power to review.¹³ Nor does it matter, in the case of modifications, how trivial or mechanical the change actually is.¹⁴

The dissent, reversal or modification invests both parties with the right to appeal, even if the modification is actually in the appellant's favor¹⁵ or the dissent is adverse to his position.¹⁶ In multiparty actions, each party may appeal as of right from so much of the order as aggrieves him, even though the dissent, reversal or modification concerns only a different party or claim, so long as there has been "a single determination of the rights of all the parties as a whole."¹⁷ An exception exists, however, in condemnation proceedings because of the numerous parties frequently involved.¹⁸

Such a mechanical reading of the dissent, reversal or modification grounds for appeal as of right may be simple to apply, but it bears no relation to the rationale for this branch of the Court's mandatory jurisdiction—*i.e.*, that the Court should review questions whose debatable nature is objectively demonstrated by disagreement among the judges below. This policy cannot be implemented by review of cases in which the disagreement concerns only matters which the appellant does not or cannot seek to have reviewed or which the Court has no power to review. Though an attempt by the CPLR revisors to

13. *E.g.*, *Ream v. Ream*, 281 N.Y. 673, 22 N.E.2d 869 (1939) (allowance to plaintiff-appellant's attorney); *Myers v. Albany Sav. Bank*, 295 N.Y. 893 67 N.E.2d 524 (1946) (costs).

14. See, *e.g.*, *Taylor v. Board of Educ.*, 295 N.Y. 658, 65 N.E.2d 51 (1945) (deletion of redundant language); *Paul v. Instituto Argentino de Promocion del Intercambio*, 299 N.Y. 598, 86 N.E.2d 113 (1949) (deletion of descriptive language).

15. *E.g.*, *Dudley v. Perkins*, 235 N.Y. 448, 139 N.E. 570 (1923).

16. *E.g.*, *Matter of Wittner*, 289 N.Y. 645, 44 N.E.2d 619 (1942) (order to suspend appellant from law practice for two years; the two dissenters voted to disbar him).

17. *Eisenbach v. Gimbel Bros.*, 281 N.Y. 474, 477, 24 N.E.2d 131, 133 (1939) (dissent concerned third-party defendants; appeal by third-party plaintiff); see *Dignam v. Great A. & P. Tea Co.*, 296 N.Y. 970, 73 N.E.2d 558 (1947) (dissent as to corporate defendant; appeal by individual defendant). See generally *Cohen & Karger, op. cit. supra* note 1, at 209-11 (dissents), 224-28 (reversals and modifications).

The result is different when actions are jointly tried but not consolidated, so that they do not result in a single judgment in the court of original instance. See *id.* at 213, 230; *cf. id.* at 228-29.

18. Absent special circumstances, a condemnation proceeding is considered, for the purpose of appeal to the Court of Appeals, "a separate proceeding as to each parcel, or each group of contiguous parcels, in the same ownership. A reversal, modification or dissent in the Appellate Division as to one parcel does not permit an appeal . . . as of right by the owner of another parcel as to which there has been a unanimous affirmance." *Matter of City of New York (Whitestone Bridge Approach)*, 293 N.Y. 684, 685, 56 N.E.2d 297 (1944); see *Cohen & Karger, op. cit. supra* note 1, at 211, 229-230.

remove such cases from appeal as of right failed of enactment, the present prospects for reform seem much brighter.¹⁹

In the relatively rare cases of a proceeding instituted in the Appellate Division—e.g., disciplinary proceedings against attorneys, or actions on submitted facts under CPLR 3222—it is clear that there cannot be a “reversal” or “modification” by the Appellate Division, and appeal can lie as of right only on the basis of a dissent or a constitutional question.²⁰

The rule is otherwise, however, when a proceeding to review the determination of an administrative agency is commenced in the Appellate Division, pursuant to either CPLR article 78 or a specific statute governing judicial review. Even though the Appellate Division is the first court to hear the case, an annulment or a modification of the agency’s determination is analogized to reversal or modification of a lower court and will support appeal as of right to the Court of Appeals.²¹

d. *Constitutional grounds.* CPLR 5601(b) covers the two types of appeal as of right based on the presence of a constitutional question. Paragraph (1) allows appeal from a final determination of the Appellate Division, “where there is directly involved the construction of the constitution of the state or of the United States.” Paragraph (2) authorizes appeal directly from the final judgment of a court of record of original instance, “where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.” Paragraph (2) thus bears the distinction of being the only provision for Court of Appeals review in civil cases of determinations that have not been passed upon by the Appellate Division.²²

On a direct appeal under paragraph (2), the Court may review only the constitutional question, for the provision does not apply unless this is the “only question” involved on the appeal. When appeal lies from the Appellate Division

19. See 7 W-K-M ¶ 5601.05. In an address before the New York State Bar Association dinner on January 27, 1967, the Hon. Stanley H. Fuld, Chief Judge of the Court of Appeals, lamented these anomalies and suggested that the Constitutional Convention consider the adoption of a scheme, similar to that governing the jurisdiction of the United States Supreme Court, leaving the selection of cases that warrant plenary review mainly to the Court’s discretion. See N.Y. Times, Jan. 28, 1967, p. 13, col. 2.

20. See, e.g., *Matter of Mathot*, 222 N.Y. 8, 117 N.E. 948 (1917) (disbarment); *State Bank v. Oregon-Washington R.R.*, 248 N.Y. 569, 162 N.E. 528 (1928) (submission of controversy).

The situation is analogous when the Appellate Division dismisses an appeal; the dismissal is neither a reversal nor a modification, and appeal of right can be based only on a dissent or a constitutional question. See Cohen & Karger, *op. cit. supra* note 1, at 232.

21. E.g., *Fineman v. Camp Ga-He-Ga*, 258 N.Y. 423, 180 N.E. 105 (1932) (unanimous reversal of State Industrial Board). See generally Cohen & Karger, *op. cit. supra* note 1, at 232-35.

22. CPLR 5601(d) also authorizes a direct appeal to the Court of Appeals from judgments of a court of original instance, but on such an appeal the court reviews only the prior non-final determination of the Appellate Division. See CPLR 5501(b) and p. 319 *infra*.

under paragraph (1), in contrast, all issues in the case that are otherwise within the Court's jurisdiction to review are before it.²³

Both paragraphs of CPLR 5601(b) are unrestricted by the exclusion—applicable to all other types of appeal as of right—of determinations which have passed through two appellate courts below.²⁴ And both have in common that they require a final determination below, that a constitutional question must have been raised below,²⁵ and that this constitutional question must be a substantial one. The requirement of substantiality, designed to prevent abuse of this method of obtaining appeal as of right, has been engrafted on the statute by the cases, and there are no fixed guidelines as to what the Court will consider substantial.²⁶

A prime source of difficulty in applying the language of CPLR 5601(b)(1) has been in determining whether a constitutional question is "directly" involved. The Court has read the term "directly" to mean that the question must be "necessarily" involved in the Appellate Division's decision.²⁷

The problem is present whenever the Appellate Division's decision could have been reached on some ground, such as statutory construction, that would not require resolution of the constitutional question.²⁸ If resolution of both the constitutional and the nonconstitutional question was essential to the Appellate Division's decision, then the constitutional question was "directly" and "necessarily" involved, and appeal will lie of right even though the record does not disclose the Appellate Division's reasoning.²⁹

When, on the other hand, the decision could rest independently on either ground, the appeal does not lie unless it appears from the record that the Appellate Division rested its decision only on the constitutional ground. If the record is silent,³⁰ or if it discloses that the Appellate Division rested its decision

23. See *Kohnberg v. Murdock*, 5 N.Y.2d 859, 155 N.E.2d 861, 182 N.Y.S.2d 12 (1958); *Bogart v. County of Westchester*, 295 N.Y. 934, 68 N.E.2d 36 (1946).

24. See pp. 310-11 *supra*.

25. When the appeal is from an Appellate Division determination pursuant to paragraph (1), it suffices if the constitutional question was raised for the first time in the Appellate Division. See *Hood & Sons, Inc. v. Du Mond*, 297 N.Y. 209, 213, 78 N.E.2d 476, 477 (1948), *rev'd on the merits*, 336 U.S. 525 (1949); *Jongebloed v. Erie R.R.*, 296 N.Y. 912, 72 N.E.2d 627 (1947).

26. See 7 W-K-M ¶ 5601.08.

27. *Haydorn v. Carroll*, 225 N.Y. 84, 88, 121 N.E. 463, 464 (1918).

28. See the valuable analysis of the problem and discussion of authorities—many of them no-opinion decisions—in *Cohen & Karger, op. cit. supra* note 1, at 257-61 & nn.28-37.

29. *Cohen & Karger, op. cit. supra* note 1, at 258 n.29, explains that "typical examples of such cases are those where the courts below construe a statute in a way which makes inescapable consideration of the substantial question whether as so construed it is constitutional. On appeal by the party challenging such application of the statute, both the construction and the validity of the statute are directly involved, and appeal as of right is authorized."

30. See, e.g., *People ex rel. Ryan v. Lynch*, 262 N.Y. 1, 4, 186 N.E. 28-29 (1933) ("The court might have held merely that the definition of 'resident' was proper on the facts presented. This is a question of interpretation not of constitutionality.").

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on the nonconstitutional ground³¹ or on *both* grounds,³² the appeal will not lie; thus the fact that the burden of establishing appealability is on the appellant³³ becomes crucial in the many cases in which the actual grounds of the decision below are unclear.³⁴

The requirements for direct appeal from the court of original instance under paragraph (2) are more stringent in two respects than those for appeal from the Appellate Division under paragraph (1). First, the constitutional question must be the *only* issue on appeal. This limitation is quite strict.³⁵ Private parties may sometimes escape its rigor by stipulating that the lower court's construction of a statute was correct if this is the only nonconstitutional issue in the case,³⁶ but it seems that this stipulation will not be accepted when a public body or officer is a party and the public has an interest in the question.³⁷

The second additional requirement of paragraph (2) is that the constitutional question involve "the validity of a statutory provision of the state or of the United States."³⁸ This does not exclude the case in which the challenge is only to the constitutionality of a statute as applied.³⁹ But a challenge to governmental action that does not entail an attack upon the validity of a statute will not suffice.⁴⁰ Whether direct appeal is authorized may be a close question when the challenge is to governmental action taken under the authority of a statute,⁴¹ and fine distinctions will sometimes be called for between the "power of the legislature to enact the statute as construed" and the "propriety

31. *E.g.*, *People ex rel. Moss v. Supervisors*, 221 N.Y. 367, 369, 117 N.E. 578, 579 (1917).

32. *E.g.*, *Ballou v. Reti*, 264 N.Y. 67, 190 N.E. 153 (1934).

33. See *Haydorn v. Carroll*, 225 N.Y. 84, 88, 121 N.E. 463, 464 (1918).

34. Another troublesome group of cases are those in which the appellant claims that the Appellate Division's reliance on a non-constitutional ground was erroneous. *Compare, e.g.*, *Valz v. Sheephead Bay Bungalow Corp.*, 249 N.Y. 122, 163 N.E. 124 (1928), *with Matter of Levy*, 255 N.Y. 223, 174 N.E. 461 (1931). See also discussion of these and related decisions in *Cohen & Karger, op. cit. supra* note 1, at 266-74.

35. See, *e.g.*, *Powers v. Porcelain Insulator Corp.*, 285 N.Y. 54, 57, 32 N.E.2d 790, 791 (1941); *Matter of Coates*, 5 N.Y.2d 917, 156 N.E.2d 722, 183 N.Y.S.2d 96 (1959); *Cohen & Karger, op. cit. supra* note 1, at 262, 275, & n.73.

36. See *Powers v. Porcelain Insulator Corp.*, 285 N.Y. 54, 61, 32 N.E.2d 790, 793 (1941); *Doubleday, Doran & Co. v. Macy & Co.*, 269 N.Y. 272, 280-81, 199 N.E. 409, 410 (1936). A formal stipulation is not necessary, so long as it appears that both parties consent to the lower court's construction. See *Buchsbaum, Appeal as of Right to the New York Court of Appeals on Constitutional Questions*, 24 N.Y.U.L.Q. Rev. 158, 163 (1949).

37. See *Matter of Chirillo*, 283 N.Y. 417, 422-24, 28 N.E.2d 895, 896-98 (1940) (concurring opinion); *Cohen & Karger, op. cit. supra* note 1, at 263.

38. The enactments of cities and other political subdivisions of the state are considered statutes for this purpose. See, *e.g.*, *F.T.B. Realty Corp. v. Goodman*, 300 N.Y. 140, 89 N.E.2d 865 (1949) (local law).

39. See, *e.g.*, *O'Kane v. State*, 283 N.Y. 439, 28 N.E.2d 905 (1940).

40. See, *e.g.*, *Lewis v. Board of Educ.*, 276 N.Y. 490, 12 N.E.2d 172 (1937) (suit to enjoin defendant from permitting religious worship in public schools).

41. *Cf. Lapchak v. Baker*, 298 N.Y. 89, 80 N.E.2d 751 (1942) (in suit to challenge constitutionality of statute requiring security in stockholders' actions, Court on direct appeal may consider only whether requiring *any* security is violation of due process and not whether *amount* required by lower court was unreasonable).

of the particular use of the statute or of the manner of applying or administering it."⁴²

As the preceding discussion indicates, whether a party is entitled to appeal under these provisions will often be a close question. In contrast to the ease in applying the grounds of dissent, reversal or modification, the lawyer who seeks to appeal as of right on constitutional grounds may face considerable uncertainty as to whether the Court will agree that such an appeal lies. If he is mistaken, CPLR 5514(a) assures that he will not be barred from seeking permission to appeal, but he may have incurred unnecessarily the expense of preparing the record and briefs for an appeal on the merits.

e. From order granting new trial, by stipulation for judgment absolute. CPLR 5601(c) allows an appeal as of right from an Appellate Division order "granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him." This is the only instance of appeal as of right to the Court of Appeals from a non-final determination. It is an unusual, ill-understood and often hazardous method of appeal.⁴³

It permits the party who has had a verdict or decision in his favor⁴⁴ set aside and a new trial granted—either by the Appellate Division or by the trial court with an Appellate Division affirmance—to obtain immediate Court of Appeals review of this determination⁴⁵ in lieu of proceeding with the expense and uncertainty of a second trial. If he succeeds in obtaining a reversal, his verdict or decision will be reinstated. But, if the Court of Appeals affirms, final judgment will be entered against him; although it is the grant of a new trial that the court is affirming, the appellant has voluntarily relinquished the chance of prevailing at a second trial by stipulating for judgment absolute in the event of affirmance.

Moreover—and this is the extra hazard lurking in appeal under CPLR 5601(c)—the chances of an affirmance are significantly increased by the rules governing review on such appeals. First, since an appeal under this provision is from a non-final determination, the Court of Appeals is powerless to review any question of "fact" or "discretion"⁴⁶—*e.g.*, the ordinary grant of a new trial

42. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282-93 (1921) (dissenting opinion) (applying analogous provision concerning jurisdiction of United States Supreme Court); see Cohen & Karger, *op. cit. supra* note 1, at 264-65.

43. See generally 7 W-K-M ¶¶ 5601.11-5601.20.

44. It has been held that a party is not aggrieved when a verdict or decision *against* him is set aside and a new trial is ordered, although the relief he requested was judgment in his favor rather than a new trial. See *Gibbons v. Schwartz*, 288 N.Y. 612, 42 N.E.2d 611 (1942); 7 W-K-M ¶ 5511.05. As to the special rules governing who is aggrieved when the grant of a new trial is conditioned upon a party's refusal to consent to a reduced or increased verdict, see *id.* ¶ 5501.13.

45. In some cases, this may be the only way of obtaining Court of Appeals review of the order granting the new trial, since there is authority for the proposition that such an order is not reviewable on appeal from the final judgment, pursuant to CPLR 5501(a), as one that "necessarily affects" the final judgment. See *id.* ¶ 5501.08.

46. See pp. 342-43 *infra*.

on the ground that the verdict was against the weight of the evidence or that a new trial would be "in the interests of justice." It follows that, if the Appellate Division's decision was based even in part or alternatively on factual or discretionary grounds, the Court of Appeals cannot reverse because it cannot review those grounds.⁴⁷ In this situation, the rule today is settled that the Court—unless it allows the appellant to withdraw his stipulation—will affirm and direct judgment absolute against him.⁴⁸ The appellant can avoid this result, if the appeal to the Appellate Division presented questions of fact or discretion, only by procuring from that court a statement pursuant to CPLR 5615 that it did not consider these questions or that it did do so but would not grant a new trial because of them. This suffices to remove them from consideration and permit review on the law in the Court of Appeals.⁴⁹

When no questions of fact or discretion are present or when they are removed in this manner, the decision of the Appellate Division is open to full review and will be reversed if the appellant can show that the original verdict or decision in his favor was not infected by any error of law warranting the grant of a new trial. But the appellant faces a special hazard here as well, for, if there was any error of law capable of supporting the grant of a new trial, the Court will affirm even if the Appellate Division rested its decision on a different and improper ground.⁵⁰ The Court may search the record for this error of law, even though the appellant argues only to the point considered and passed upon by the Appellate Division. Thus, the presence of any legal error sufficient to sustain the grant of a new trial—*e.g.*, in the admission or exclusion of evidence⁵¹—becomes, by virtue of the stipulation, cause for a final adjudication on the merits against the appellant.⁵² It is well recognized that this judgment

47. *E.g.*, *Stevens v. Brien*, 283 N.Y. 196, 27 N.E.2d 987 (1940). See generally *Cohen & Karger, op. cit. supra* note 1, at 295-96; 7 N.Y. Jud. Council Rep. [N.Y. Legis. Doc., 1941, No. 23], pp. 529-31 (1941).

48. See note 47 *supra*. See also *Rockowitz C. & B. Corp. v. Madame X Co.*, 248 N.Y. 272, 275, 162 N.E. 76, 77 (1928) (Appeal from Appellate Division's reversal of judgment for plaintiff and grant of new trial; plaintiff-appellant's "burden . . . is to show that there was no question of fact justifying a reversal, and that as matter of law on the evidence the plaintiff was entitled to judgment.").

49. For fuller discussion of the operation of CPLR 5615 and the effect of the Appellate Division's statement upon the Court of Appeals' disposition of the appeal, see 7 W-K-M ¶¶ 5601.18-5601.19, 5615.01.

50. See, *e.g.*, *Young v. Syracuse, B. & N.Y.R.R.*, 166 N.Y. 227, 59 N.E. 828 (1901); *People ex rel. Withubee v. Board of Supervisors*, 70 N.Y. 228 (1877).

51. See *Krekeler v. Thaul*, 73 N.Y. 608 (1878).

52. Thus, in *Mackay v. Lewis*, 73 N.Y. 382, 383 (1878), the Court cautioned that: The appellant takes the risk not only of the questions considered by the court below, and upon which they have made the order, but of every other exception appearing upon the record, and every legal question that can be made by the respondent who may sustain his order upon showing any legal error whether noticed by the court below or not. Not unfrequently have appellants been brought face to face with insuperable objections to the judgment they sought to have restored by a reversal of the order granting a new trial, which they had overlooked, and the court below had not found it necessary to consider, and had final judgment against them, when by submitting to the order and going back to a new trial they might have succeeded. In other words the privilege of an appeal in the case mentioned has proved a trap to the unwary suitor, who for the luxury of an

absolute rests upon a form of consent and may not accord with the merits of the controversy,⁵³ but, like a judgment entered upon actual consent or default, it is given ordinary res judicata effect.⁵⁴

The fact that an appeal under CPLR 5601(c) may result in a judgment contrary to that which would be dictated by the merits of the case has, however, led the Court to reject stipulations on public policy grounds in certain types of cases. Thus, appeal by stipulation for judgment absolute is barred in matrimonial actions,⁵⁵ since to permit it is deemed tantamount to having parties alter their marital status by consent.⁵⁶ And the Court has alleviated somewhat the hazards of the procedure, especially when the appellant was not aware that questions of fact requiring automatic affirmance were present, by a liberal attitude toward withdrawal of these appeals.⁵⁷ Generally, "it warns counsel, upon the argument of the appeal, of the dangers of his course, and it encourages the withdrawal of the appeal where it appears that the stipulation was given ill advisedly."⁵⁸

f. *When non-final Appellate Division determination "necessarily affected" the final judgment.* CPLR 5601(d) is a highly technical provision but can be quite useful in appropriate cases. It comes into play after the Appellate Division has decided an intermediate appeal—that is, one from a non-final order—in the action, and the case has been remanded to the trial court and has proceeded to a final judgment. Absent CPLR 5601(d), the aggrieved party could not then reach the Court of Appeals without first appealing again to the Appellate Division, this time from the final judgment. On this appeal, the Appellate Division would review only the lower court proceedings subsequent to the first appeal.⁵⁹ The case could then reach the Court of Appeals as of right only if this second appeal produced a dissent, reversal or modification (or if a constitutional question were involved); otherwise, permission to appeal would be necessary. Once the case reached the Court of Appeals, CPLR 5501(a) would allow review of the Appellate Division's earlier determination if it "necessarily affected" the final judgment.

appeal, and upon the faith that the court had erred in the precise point passed upon, have [sic] thrown away a good cause of action.

53. See, e.g., *Roberts v. Baumgarten*, 126 N.Y. 336, 340-41, 27 N.E. 470, 471 (1891).

54. See *Canfield v. Harris & Co.*, 252 N.Y. 502, 170 N.E. 121 (1930); cf. *Roberts v. Baumgarten*, *supra* note 53.

55. *Weiman v. Weiman*, 295 N.Y. 150, 65 N.E.2d 754 (1946) (annulment); *Friedman v. Friedman*, 240 N.Y. 608, 148 N.E. 725 (1925) (divorce).

56. See also *People ex rel. Judson v. Thacher*, 55 N.Y. 525, 537 (1874) (quo warranto proceeding to try title to office). But, although similar considerations may sometimes be involved, the Court will usually accept stipulations by municipalities or the state in suits against them for money damages, e.g., *Curcio v. City of New York*, 275 N.Y. 20, 9 N.E.2d 760 (1937), and by public agencies in proceedings to review their licensing or other administrative determinations, e.g., *Epstein v. Board of Regents*, 295 N.Y. 154, 65 N.E.2d 756 (1946) (revocation of license to practice medicine).

57. See *Ratray v. Raynor*, 10 N.Y.2d 494, 500, 180 N.E.2d 429, 432, 225 N.Y.S.2d 39, 44 (1962).

58. 7 N.Y. Jud. Council Rep. [N.Y. Legis. Doc., 1941, No. 23], p. 530 (1941).

59. See CPLR 5501(a)(1).

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Frequently, however, the earlier appeal to the Appellate Division will have involved the only substantial and debatable issues in the case. This will often be true, for example, if it was from a so-called interlocutory determination⁶⁰ or from an order striking a defense or denying summary judgment. In these cases, the second appeal to the Appellate Division would be pointless—because that court could review only the subsequent, noncontroversial proceedings—except to serve as a conduit for a subsequent appeal to the Court of Appeals.⁶¹ Furthermore, if the substantial issues in the case were sufficiently debatable to produce a dissent, reversal or modification, this would have occurred on the earlier appeal to the Appellate Division. Yet, although this cardinal touchstone for cases warranting appeal as of right is thus present, the appellant could not take advantage of it absent CPLR 5601(d). The first Appellate Division determination would have been appealable only by permission of the Appellate Division on certified questions—despite the dissent, reversal or modification—because it was non-final.⁶² And the appealability of the second, the final, Appellate Division determination would depend upon its own characteristics and not upon those of the prior Appellate Division order.

CPLR 5601(d) eliminates these incongruities. Its sole condition is that the intermediate Appellate Division determination be one that “necessarily affected” the final judgment—the same criterion that governs the reviewability of non-final orders on appeal from a final judgment under CPLR 5501(a). If the intermediate Appellate Division determination satisfies the criterion, CPLR 5601(d)

- (1) Grants the appellant the option of bypassing a second appeal to the Appellate Division and allows him instead to appeal directly to the Court of Appeals from the final judgment of the lower court; and
- (2) Preserves to the appellant an appeal as of right if the intermediate appeal to the Appellate Division involved a dissent, reversal, modification or constitutional question, whether he chooses the direct appeal option or proceeds again through the Appellate Division in the ordinary way.

Companion provisions in CPLR 5602 secure the first of these benefits in those cases in which there is no basis for the second—that is, they grant the option of direct appeal to the Court of Appeals from the final judgment of the lower court *by permission*, when an intermediate appeal to the Appellate

60. An interlocutory determination is commonly defined as one that substantially determines the rights of the parties but leaves something to be done; the remaining proceedings usually involve the relief to be granted, as when damages must be ascertained or an accounting had. See 5 W-K-M ¶ 5011.02. See also *Cambridge Valley Nat'l Bank v. Lynch*, 76 N.Y. 514, 516 (1879); *Cohen & Karger, Powers of the New York Court of Appeals* 65-70, 314-20, 329-33 (rev. ed. 1962).

61. See *Gambold v. MacLean*, 254 N.Y. 357, 359, 173 N.E. 220, 222 (1930).

62. See CPLR 5602(b)(1), 5713.

Division necessarily affected the final judgment but did not involve a dissent, reversal, modification or constitutional question.⁶³

On a direct appeal from the lower court's judgment—whether as of right pursuant to CPLR 5601(d) or by permission pursuant to CPLR 5602(a)(1)(ii) or 5602(b)(2)(ii)—the Court of Appeals will review only the non-final Appellate Division order. This restriction on review is covered by CPLR 5501(b).⁶⁴ Waiver of review of the subsequent proceedings below is the price of bypassing the Appellate Division; this accords with the fundamental policy that the Court of Appeals will review only matters that have previously been before the Appellate Division, except in the one situation involving the constitutionality of a statute covered by CPLR 5601(b)(2).

CPLR 5501(b) also limits review to the prior Appellate Division order when appeal is taken as of right pursuant to CPLR 5601(d) from a unanimous Appellate Division affirmance of the final judgment, based on the characteristics of the prior Appellate Division order. Since the prior order is the only one that involved disagreement among the judges below or a constitutional question, it is the only one that warrants Court of Appeals review as of right.⁶⁵

This branch of the jurisdiction of the Court of Appeals is the only one that finds no express authority in the constitution. Nevertheless, that Court has sustained its constitutionality, recognizing that it is entirely consistent with the rationale and policies of the constitutional provisions governing jurisdiction of the Court of Appeals.⁶⁶

2. Appeal by Permission.

a. *In general.* CPLR 5602⁶⁷ outlines the situations in which appeals may be taken to the Court of Appeals only by permission. Subdivision (a) covers

63. See CPLR 5602(a)(1)(ii), 5602(b)(2)(ii).

64. See 7 W-K-M ¶¶ 5501.18, 5601.25.

65. These are the only situations to which the limitation on review of CPLR 5501(b) applies. If the subsequent final Appellate Division order is independently appealable as of right by virtue of a dissent, reversal, modification or constitutional question, or if appeal from it is taken by permission, the appeal would not be "pursuant to" the provisions therein specified and CPLR 5501(b) would have no application.

66. *Buffalo Elec. Co. v. State*, 14 N.Y.2d 453, 201 N.E.2d 869, 253 N.Y.S.2d 537 (1964).

67. CPLR 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

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those in which either the Appellate Division or the Court of Appeals may grant permission, and subdivision (b) those in which only the Appellate Division may grant permission.

The basic doctrines may be simply stated. As a general rule, appeal lies by permission in any case in which it does not lie as of right. When the reason why appeal does not lie as of right is either (1) that the determination is not final or (2) that the appeal to the Appellate Division was from an appellate determination of a lower appellate court,⁶⁸ only the Appellate Division may grant permission. When neither (1) nor (2) is the case, both the Court of Appeals and the Appellate Division may grant permission.

In one special situation, the Court of Appeals alone may grant permission—that is, from an Appellate Division order granting or affirming the grant of a new trial or hearing in a proceeding by or against a public officer, board or agency.⁶⁹ Neither court has power to grant permission in a case which is appealable as of right, and a motion for leave to appeal in such a case will be dismissed or denied.⁷⁰ At one time, there was danger that the time to take an appeal of right would have expired before the motion for leave was dismissed,⁷¹ but the general extension of time provisions in CPLR 5514 will now cover all such cases.

b. *Permission of either court.* Paragraph (1) of CPLR 5602(a) covers the ordinary case in which the Court of Appeals and the Appellate Division have concurrent jurisdiction to grant permission to appeal—*i.e.*, from an order which

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

68. The language of CPLR 5602, like that of CPLR 5601, is misleading as to this limitation. See note 82 *infra*.

69. See CPLR 5602(a)(2); note 73 *infra* and accompanying text.

70. See, *e.g.*, *Unger v. Village of Falconer*, 2 N.Y.2d 731, 138 N.E.2d 733, 157 N.Y.S.2d 371 (1956); *cf.* *Sage v. Broderick*, 249 N.Y. 601, 164 N.E. 600 (1928).

71. See *Sage v. Broderick*, *supra* note 70.

is not appealable as of right because neither a dissent, reversal or modification nor a constitutional question is involved, but which satisfies two conditions: that it embody a final determination and that it not have passed through two appellate courts below.

Generally, the final determination appealed from is the order of the Appellate Division (sub-paragraph (i) of CPLR 5602(a)(1)). Sub-paragraph (ii) covers direct appeal by permission from the final judgment of a court of original instance after an intermediate Appellate Division order that "necessarily affects" the final judgment. It is the analogue of CPLR 5601(d), which covers such direct appeal when the appeal lies as of right.⁷²

Paragraph (2) of CPLR 5602(a) is a special provision reflecting a 1951 constitutional amendment designed to meet a difficult problem previously faced by administrative agencies after the Appellate Division had reversed or annulled an agency determination and remitted for a new hearing or further proceedings.⁷³ Broader in scope than the problem that impelled its adoption, it authorizes both courts to grant permission to appeal from any non-final Appellate Division order on review of proceedings by or against a public officer, board or agency, unless the order is one granting or affirming the grant of a new trial or hearing, in which case only the Court of Appeals may grant permission.

In all cases in which both courts are authorized to grant leave to appeal, the application may initially be made to either the Appellate Division or the Court of Appeals. It may not be made to both simultaneously.⁷⁴ If permission is first sought in the Court of Appeals and denied, the Appellate Division has no authority to grant it after the refusal by the higher court. It should be noted that the Appellate Division rarely grants leave in the cases in which it has concurrent power with the Court of Appeals, presumably because it considers that the higher court can better judge whether the appeal should be allowed. The concurrent power arrangement may therefore involve some wasted effort, but it is provided for in the constitution and cannot be changed without constitutional amendment.

While all the constitutional provisions governing appeal to the Court of Appeals by permission require that a question of law be involved which ought to be reviewed by that Court,⁷⁵ the provision governing the cases in which the Court of Appeals and the Appellate Division have concurrent power to grant

72. See pp. 318-20 *supra*.

73. For further discussion of the nature of the problem and the operation of the remedial provision, see 7 W-K-M ¶ 5602.06; 2 N.Y. Adv. Comm. Rep. [N.Y. Legis. Doc. 1958, No. 13], pp. 110-11; Benjamin, Administrative Adjudication in New York 366-68 (1942); Cohen & Krager, *op. cit. supra* note 60, at 292-94.

74. *Weld v. Bartol*, 5 N.Y.2d 792, 154 N.E.2d 574, 180 N.Y.S.2d 322 (1958) (motion made in Court of Appeals, while motion was pending in Appellate Division, dismissed as premature).

75. N.Y. Const., art. 6, § 3(b)(4)-(7).

leave states, in addition, that "such an appeal shall be allowed when required in the interest of substantial justice."⁷⁶

While the Court of Appeals remains, as it has been in the past,⁷⁷ primarily a court of law concerned with "public interest or the interest of jurisprudence,"⁷⁸ it is now recognized that it has "the duty to see justice done in every case no matter how brought before it."⁷⁹ It is now often sufficient for the applicant to show that there has been probable error below sufficient to justify reversal, regardless of the general interest or importance of the questions involved. At the same time, it remains true that the public interest in, or novelty or difficulty of, the questions may move the Court to grant leave without a showing of probable error.⁸⁰ A combination of reasons for further review of course increases the likelihood of leave being granted.

The Court of Appeals has made it clear that a denial by it of leave to appeal should not be considered a precedent and has little, if any, value as an indication of the Court's view toward the questions involved.⁸¹

c. *Permission of Appellate Division; the certified question.* The two paragraphs of CPLR 5602(b) cover the two situations in which appeal lies by permission of the Appellate Division alone—that is, in general, when (1) the appeal is from a non-final order of the Appellate Division, or (2) the appeal to the Appellate Division was from an appellate determination of a lower appellate court.⁸² While the exceptions and amplifications appearing in CPLR 5602(b) may appear formidable in contrast to the pristine simplicity of the underlying constitutional provisions,⁸³ they are actually essential to a proper understanding of the rules; for the constitutional provisions fail to reflect

76. N.Y. Const., art. 6, § 3(b)(6).

77. See generally Cohen & Karger, *op. cit. supra* note 60, Ch. 2.

78. *Sciolina v. Erie Preserving Co.*, 151 N.Y. 50, 53, 45 N.E. 371, 372 (1896).

79. Cohen & Karger, *op. cit. supra* note 60, at 355.

80. *Id.* at 355-56.

81. The matter was summed up in this way in *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 297-98, 169 N.E. 386, 390-91 (1929):

A denial of a motion for leave to appeal is not equivalent to an affirmance of the order thus withdrawn from review. It does not give to the order the value of a precedent. Not infrequently relief is refused in the exercise of discretion, for the test in many cases is the promotion of substantial justice. . . . The ruling, too, is summary. Motions for leave to appeal have the careful consideration of all the judges of the court, yet they lack the authority that attaches to a decision with all the aid of argument. . . . Appellate Divisions and trial courts are at liberty, if they please, to give to such a refusal some measure of significance, as a token, though indecisive, of the impressions of this court. They are not bound thereby as by an authoritative precedent. This is the rule in the Supreme Court of the United States upon the denial of applications for writs of certiorari. . . . It is the only safe rule if the doctrine of adherence to precedent is to be kept within reasonable limits.

82. As was more fully indicated earlier (see pp. 310-11 *supra*), the provisions regarding determinations passing through two levels of appellate courts below the Court of Appeals, both here and in CPLR 5601, still reflect the formulation of the old judiciary article, which achieved a somewhat similar purpose by enumerating those courts whose determinations were appealable directly to the Appellate Division. For discussion of the operation of CPLR 5602(b)(2), see 7 W-K-M ¶ 5602.16.

83. N.Y. Const., art. 6, § 3(b)(4), (7).

judicial and legislative glosses and qualifications implicit in their combined operation with other provisions governing jurisdiction of the Court of Appeals.⁸⁴

Paragraph (1) of CPLR 5602(b) is the basic provision governing appeal from non-final orders of the Appellate Division. With the exception of the special provision regarding proceedings by or against a public body or officer,⁸⁵ leave of the Appellate Division is the exclusive method of appeal from its own non-final determinations.

When the Appellate Division grants leave to appeal from a *final* determination, it need only certify that, in its opinion, a question of law is involved which ought to be reviewed by the Court of Appeals. But when it grants leave to appeal from a non-final order,⁸⁶ it must state the questions of law which are decisive of the appeal and certify them to the Court of Appeals for answer.⁸⁷ The Court of Appeals, in the latter situation, is limited to consideration of the questions certified and must certify its answers to them.⁸⁸

This requirement of certification of questions on appeals from non-final orders appears to be a vestige of early conceptions of the high court's role as an oracle of the law for the guidance of lower courts.⁸⁹ Nevertheless, the Court from the beginning has refused to treat the certified question device as authorizing it to render advisory opinions⁹⁰ or to answer abstract questions,⁹¹ and it has refused to answer questions that are not decisive of the appeal before it.⁹²

84. Thus, for example, in para. (1) of CPLR 5602(b) alone:

(1) The reference to CPLR 5601(c) codifies case law holding that the provision for appeal as of right by stipulation for judgment absolute, from an order granting or affirming the grant of a new trial or hearing, is the exclusive method of appeal from such an order; the Appellate Division is thus powerless to grant permission in that situation. See 7 W-K-M ¶ 5601.12.

(2) The reference to CPLR 5602(b)(2)(iii) covers orders granting or affirming the grant of a new trial or hearing when the case originated in an inferior court; in this situation, a stipulation for judgment absolute is required in addition to permission of the Appellate Division. See *id.* ¶¶ 5601.14, 5602.16.

(3) The reference to CPLR 5602(a)(2) calls attention to the special provision regarding non-final orders in proceedings by or against a public body or officer. In this case, the Appellate Division's power is not exclusive but concurrent with the Court of Appeals as to non-final orders generally, and the Court of Appeals has exclusive power as to orders granting or affirming the grant of a new trial or hearing. See *id.* ¶ 5602.06.

As to the comparable complexities in CPLR 5602(b)(2), see *id.* ¶ 5602.16.

85. CPLR 5602(a)(2); see *supra* notes 69 and 73.

86. Presumably this would include, in addition to the cases covered by CPLR 5602(b)(1), those proceedings involving public bodies or officers in which the Appellate Division as well as the Court of Appeals may grant leave to appeal from non-final orders pursuant to CPLR 5602(a)(2).

87. See CPLR 5713.

88. CPLR 5614. See also CPLR 5612(b).

89. See 7 N.Y. Jud. Council Rep. [N.Y. Legis. Doc., 1941, No. 23], pp. 506-07.

90. *Matter of Robinson*, 160 N.Y. 448, 55 N.E. 4 (1899); *Cohen & Karger, op. cit. supra* note 60, at 362.

91. *E.g., Schenck v. Barnes*, 156 N.Y. 316, 322-23, 50 N.E. 967, 969 (1898); *Granman v. Westchester Racing Ass'n*, 153 N.Y. 449, 458, 47 N.E. 896, 899 (1897).

92. *E.g., McClellan v. City of Buffalo*, 309 N.Y. 690, 128 N.E.2d 327 (1955); *Chancer v. Chancer*, 307 N.Y. 667, 120 N.E.2d 845 (1954); see *Cohen & Karger, op. cit. supra* note 60, at 364.

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There is a substantial body of case law relating to the formal requirements for the certified question, although these requirements are sometimes relaxed or ignored and their rigor is sometimes softened by lenient "interpretation" of the certified question.⁹³ Questions may be held improper and the appeal dismissed when they are stated too narrowly⁹⁴ or more broadly than is necessary⁹⁵ to be decisive of the appeal. And some cases indicate that the question should be categorical in form and susceptible of a "yes" or "no" answer.⁹⁶ Yet the Court has often considered questions stated in a manner which avoids entirely the need to comply with formal requirements—*e.g.*, "is the defense sufficient?" or "did the Special Term err in granting the motion?"⁹⁷

The certified question must, of course, be a question of law, since the Court of Appeals lacks power to review questions of fact (or the kind of "discretion" that is treated as "fact") on an appeal from a non-final determination.⁹⁸ Further, it must appear that the Appellate Division's decision rests solely on this question of law and not additionally or alternatively on factual or discretionary grounds. Otherwise, the certified question of law would not be "decisive of the correctness of" the Appellate Division's determination pursuant to CPLR 5713; and, even if the Court of Appeals disagreed with the Appellate Division on the certified question, the Appellate Division's decision would still rest on a basis beyond challenge in the Court of Appeals.⁹⁹

To aid the Court of Appeals in its review and disposition of appeals on certified questions, other provisions of the CPLR provide for recitals by the Appellate Division concerning its disposition of questions of fact or discretion and authorize certain presumptions by the Court of Appeals in the absence of recitals.¹⁰⁰

3. Finality.

As is apparent from the preceding discussion, much of the doctrine governing jurisdiction of the Court of Appeals turns upon whether the determination

93. *Bata v. Bata*, 304 N.Y. 51, 105 N.E.2d 623 (1952). See generally 7 N.Y. Jud. Council Rep. [N.Y. Legis. Doc., 1941, No. 23], p. 507 (1941); Cohen & Karger, *op. cit. supra* note 60, at 363-75.

94. *E.g.*, *Gary v. H. H. Vaught & Co.*, 243 N.Y. 585, 154 N.E. 615 (1926). *But cf. Akely v. Kinnicut*, 238 N.Y. 466, 471-72, 144 N.E. 682 (1924) ("inasmuch as the parties have argued" the issues at length, "we shall interpret the questions which have been certified to us liberally and regard them as impliedly involving all of the questions necessary").

95. *Cf. North Hempstead v. Public School Corp.*, 231 N.Y. 447, 132 N.E. 144 (1921) (first question too broad; second question proper).

96. *E.g.*, *Devlin v. Hinman*, 161 N.Y. 115, 55 N.E. 386 (1899); *Metropolitan Trust Co. v. Bishop*, 237 N.Y. 607, 143 N.E. 762 (1924).

97. See Cohen & Karger, *op. cit. supra* note 60, at 369-70, and authorities there cited.

98. *E.g.*, *Matter of Westerfield*, 163 N.Y. 209, 57 N.E. 403 (1900); *Rosenstiel v. Rosenstiel*, 15 A.D.2d 904, 225 N.Y.S.2d 915 (1st Dep't 1962). See pp. 342-43 *infra*.

99. See authorities in 7 W-K-M ¶ 5602.12, at Nos. 38 and 39. Review may nevertheless be available if the case and certified question pose the issue of law whether there was an abuse of discretion or a lack of any evidence to support a factual determination. See Cohen & Karger, *op. cit. supra* note 60, at 377 nn.87 & 88.

100. See CPLR 5612(b), 5614, 5713; 7 W-K-M ¶¶ 5602.14, 5612.02, 5612.07, 5614.01, 5713.03.

from which appeal is sought "finally determines" the action. A large body of case law has developed as to the meaning of finality for this purpose,¹⁰¹ most of it designed to ease the rigor of the requirement when strong practical or policy reasons warrant immediate Court of Appeals review even though the determination disposes of less than the entire action—*e.g.*, when the determination is final as to a severable claim or party,¹⁰² or when an interlocutory judgment causes immediate irreparable injury.¹⁰³

The CPLR itself deals with only two specific facets of the finality problem. First, CPLR 5611 and 5701(a)(1), taken together, provide that an Appellate Division order which "disposes of all the issues" in the action is "final" for the purpose of appeal to the Court of Appeals, and that no appeal lies to the Appellate Division from a subsequent final or interlocutory judgment entered in the court below pursuant to such an Appellate Division order.¹⁰⁴

The clearest example of an order disposing of all the issues is one granting summary judgment for the defendant and dismissing the complaint, or one granting summary judgment for the plaintiff as to both liability and the amount of damages. A motion for a new trial, too, will often raise all the issues in the case, and, if the motion is denied, nothing remains to be done but to enter the judgment.¹⁰⁵ When the Appellate Division grants or affirms the grant of summary judgment, or denies or affirms the denial of a new trial in such cases, another appeal to the Appellate Division would be pointless since there would be nothing for it to review.¹⁰⁶

The second difficult facet of the finality problem dealt with by CPLR 5611 concerns a determination which would clearly be final but for the fact that it may be avoided by some future contingency.¹⁰⁷ Typical is the granting of a motion to dismiss or for summary judgment with leave to serve an amended pleading. CPLR 5611 provides that the granting of "leave to replead or to

101. See Cohen & Karger, *op. cit. supra* note 60, at 35-93, 126-206, 358-59.

102. See generally *id.* at 81-93, 181-206. See also *Matter of Republique Francaise (Cellosilk Mfg. Co.)*, 309 N.Y. 269, 128 N.E.2d 750 (1955) (foreign corporation, over which court acquired no in personam jurisdiction, regarded as third party; denial of its motion to vacate judgment therefore final).

103. See generally Cohen & Karger, *op. cit. supra* note 60, at 65-81.

104. See 7 W-K-M §§ 5611.01-5611.04. See also *id.* § 5601.27. The problem here dealt with should be distinguished from that which existed under the former practice as to the proper *paper* from which the appeal was to be taken. The latter has been remedied by CPLR 5512(a). At present the appealable paper under CPLR 5512(a), in both actions and special proceedings, is the Appellate Division order. Cases under the prior practice, dismissing an appeal from an Appellate Division order in an action on the sole ground that the appeal should have been taken from a judgment entered in the court below upon the Appellate Division order, should be distinguished from those dismissing because the determination was non-final. CPLR 5611 and 5701(a)(1) are concerned only with the latter; the former are, of course, overruled by CPLR 5512(a).

105. Closer questions that often arise in deciding whether "all the issues" have been disposed of remain a matter of case law. See 7 W-K-M § 5611.01.

106. CPLR 5501(a)(1) authorizes review of a non-final judgment or order that "necessarily affects" the final judgment, on an appeal from the final judgment, "provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken." See p. 338 *infra*.

107. See generally Cohen & Karger, *op. cit. supra* note 60, at 60-65.

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perform some other act"¹⁰⁸ does not defeat the finality of the Appellate Division's order; it will still be final if the act is not performed within the time limited therefor, but it "takes effect" as a final order only when the specified time expires. If the act is performed, the order is, of course, non-final.¹⁰⁹ CPLR 5611 is apparently inapplicable if no time limit is fixed for the aggrieved party to perform the act; such cases will be governed by the prior case law.¹¹⁰ Orders made "without prejudice" to an application to vacate or modify the determination or to seek the same relief in a different proceeding are generally held to be final immediately.¹¹¹

B. Appellate Division

The Appellate Division of the Supreme Court is the state's intermediate appellate court. It actually comprises four courts, sitting separately in each of the four judicial departments into which the state is divided. Its major business is to hear appeals from the Supreme Court—the statewide trial court of general jurisdiction—and the county courts. Appeals from the statewide Supreme Court are taken to the Appellate Division for the department embracing the county in which the determination appealed from was entered,¹¹² so that each Appellate Division supervises the decisions of the lower courts within its own territorial portion of the state.¹¹³

CPLR 5701, the basic provision governing appealability to the Appellate Division, applies only to appeals from the Supreme Court and the county courts. The Appellate Division hears appeals from a number of other courts as well, including courts of original instance¹¹⁴ and appellate courts below the level of the Appellate Division.¹¹⁵ The former include the Court of Claims,¹¹⁶

108. See note 110 *infra*.

109. See, e.g., *Department of Health v. Natural Plating Corp.*, 11 N.Y.2d 674, 180 N.E.2d 906, 225 N.Y.S.2d 751 (1962).

110. Compare *People ex rel. Hart v. York*, 169 N.Y. 452, 62 N.E. 562 (1902) (order reinstating appellant to police force upon his stipulating not to claim back salary held non-final until stipulation given), with *Zirn v. Bradley*, 284 N.Y. 321, 31 N.E.2d 42 (1940) (plaintiff held in contempt and complaint dismissed, but could purge contempt and have complaint reinstated by producing documents; determination held final).

111. E.g., *Malkenson v. Journal News Corp.*, 296 N.Y. 10, 68 N.E.2d 853 (1946); *Paradis v. Doyle*, 291 N.Y. 503, 50 N.E.2d 645 (1943); see *Cohen & Karger, op. cit. supra* note 60, at 60-61.

112. CPLR 5711. As to the application of this rule when there has been a motion for change of venue, see CPLR 511(d); 2 W-K-M ¶ 511.10; 7 *id.* ¶ 5711.02.

113. An appeal mistakenly brought in the wrong department will not be entertained there, but the mistake can be corrected and the notice of appeal amended upon application to the proper department. See *Richelson v. Fox*, 6 A.D.2d 802, 175 N.Y.S.2d 575 (2d Dep't 1958); *People v. Schoff*, 266 App. Div. 158, 159, 42 N.Y.S.2d 216, 217 (4th Dep't 1943). CPLR 5711 also provides for the transfer of appeals from the proper department to another one "in furtherance of justice." See 7 W-K-M ¶ 5711.03.

114. See CPLR 5702.

115. See CPLR 5703.

116. N.Y. Ct. Cl. Act § 24. The appeal must be taken to the Appellate Division in the Third Department, except that, if the claim arose in the Fourth Department, the appeal is to be taken in that department. The provisions of the CPLR "relating to appeals in the Supreme Court apply, so far as practicable," except as modified in article 3 of the Court of Claims Act. *Ibid.*

the Surrogate's Court¹¹⁷ and the Family Court.¹¹⁸ The latter include the Appellate Terms of the Supreme Court, which have been established only in the First and Second Departments, and appellate determinations of a county court or of a Special Term of the Supreme Court.¹¹⁹ As to the practice governing appeal from and to these other courts, it is necessary to refer to the particular court acts governing them and to local court rules, although in many respects the practice conforms—especially in the newer court acts prepared since adoption of the CPLR—to that provided in the CPLR for appeals from the Supreme Court and county courts.¹²⁰

Apart from its appellate jurisdiction, it is well recognized that the Appellate Division, as successor to the powers of the old General Term, has the power to exercise all the original jurisdiction of the Supreme Court.¹²¹ It

is not a separate court but a branch of the Supreme Court; . . . it possesses all of the original jurisdiction of the Supreme Court [and] while as a matter of administrative convenience it will ordinarily decline to take original jurisdiction, it has full power to do so and may do so whenever it sees fit.¹²²

117. Section 288 of the Surrogate's Court Act provides that appeals may be taken to the Appellate Division from "a decree of a surrogate's court, or from an order affecting a substantial right." Sections 288-310 cover many of the details of appeals practice.

118. N.Y. Family Ct. Act §§ 1011-18. Section 1011 provides that appeals are to be taken to the Appellate Division of the department in which the Family Court whose order is being appealed from is located. The appeal lies "as of right from any order of disposition and, in the discretion of the appropriate Appellate Division, from any other order under this act." *Id.* § 1012. The provisions of the CPLR apply "where appropriate," *Id.* § 1018. The New York City Civil Court Act also provides for appeal to the Appellate Division of the department in which the action or proceeding is pending, "unless an Appellate Term has been established by said Appellate Division and it has directed that such appeals be taken to such term." N.Y.C. Civ. Ct. Act § 1701. Both the First and Second Departments have established Appellate Terms and provided that all appeals from the New York City Civil Court are to be taken to them. See Rule 1, App. Term Rules for First Judicial Dep't; Preamble, App. Term Rules for Second Judicial Dep't.

119. CPLR 5703; see 7 W-K-M ¶¶ 5703.01-5703.06. The Appellate Terms hear appeals from the New York City Civil Court and from other specified city, district and county courts. *Id.* ¶ 5703.01. County courts hear appeals from many city, village, police and justice's courts. *Id.* ¶ 5703.06. Both Uniform City Court Act § 1701 and Uniform District Court Act § 1701 provide for appeal to the county court except when an Appellate Term has been established to hear such appeals. But the only district courts presently in existence are in Nassau and Suffolk Counties, in the Second Department, and that department has provided that all appeals from those courts are to be taken to the Appellate Term for the department. See Preamble, App. Term Rules for Second Judicial Dep't.

120. See 1 W-K-M ¶¶ 101.10-101.13; 7 *id.* ¶¶ 5702.05-5702.06. Typically, the acts governing particular courts state that the CPLR appeals provisions shall apply when not inconsistent with the act and to the extent practicable. Absent such a statement, the CPLR is, in any event, applicable by virtue of the general applicability provision of the particular act or of CPLR 101; in either event, applicability of the CPLR depends less on this general statement than on the amount of detail in the other act and whether it covers the particular practice point in a manner deemed exclusive of or inconsistent with the CPLR provisions. *Cf.* 1 *id.* ¶¶ 101.05, 101.07-101.09, 101.14.

121. N.Y. Const. art. 6, § 4(k); see *Morris v. Morris*, 18 A.D.2d 1007, 238 N.Y.S.2d 568 (2d Dep't 1963); *Matter of Ass'n of Bar of City of New York*, 222 App. Div. 580, 227 N.Y. Supp. 1 (1st Dep't 1928).

122. *Id.* at 585, 227 N.Y. Supp. at 6.

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This includes the power to hear and determine in the first instance any motion, contested or ex parte, that a Special Term may determine.¹²³

Provisions in CPLR 5704(a) authorizing the Appellate Division or a justice thereof to overturn ex parte orders in pending Supreme Court proceedings therefore seem superfluous insofar as they apply to the Appellate Division en banc; and, insofar as they purport to grant this authority to a single justice of the court, they may raise a question of conflict with the constitutional provision that

No justice of the appellate division shall, within the department to which he may be designated . . . exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division. . . .¹²⁴

The Appellate Division is, of course, not required to exercise the original jurisdiction of the Supreme Court and, as a matter of sound judicial administration, will not do so unless "unusual," "unique" or "peculiar" circumstances are involved;¹²⁵ the predecessors of CPLR 5704(a) were invoked most typically to vacate stays,¹²⁶ restraining orders¹²⁷ and temporary injunctions¹²⁸—cases in which there is a danger of irreparable injury and a need for prompt action. Sound judicial administration calls for particular restraint by the Appellate Division in the situations covered by CPLR 5704(a); for they involve what is, in effect, a direct appeal from an ex parte determination of the Special Term, contrary to traditional procedure for an ex parte determination requiring application to the same court or judge to vacate or set aside the order and, if that be denied, appeal from the order of denial.¹²⁹

1. *Appealable Judgments and Orders—Summary Outline*

CPLR 5701 is the basic provision governing appeal from the determinations of Supreme and County Courts to the Appellate Division. All judgments, whether interlocutory or final, are appealable as of right, subject only to an

123. See *Mitchel v. Cropsey*, 177 App. Div. 663, 164 N.Y. Supp. 336 (2d Dep't 1917); *Matter of Barkley*, 42 App. Div. 597, 59 N.Y. Supp. 742 (4th Dep't 1899), *appeal dismissed*, 161 N.Y. 647, 57 N.E. 1103 (1900).

124. N.Y. Const., art. 6, § 4(j); see 7 W-K-M ¶¶ 5704.01-5704.03, 5704.05. A parallel provision in CPLR 5704(b) purports to grant similar authority to an Appellate Term or a justice thereof vis-à-vis ex parte orders in actions pending in those courts from which appeal lies to the Appellate Term. See *id.* ¶ 5704.06. The treatment in the CPLR of former distinctions between action by a "court" and by a "judge" out of court (see generally 2 *id.* ¶¶ 2212.06-2212.20) leaves some uncertainty as to the present content of the constitutional provision; see *id.* ¶ 2212.21.

125. *E.g.*, *Matter of Willmark Serv. Sys. Inc.*, 21 A.D.2d 478, 251 N.Y.S.2d 267 (1st Dep't 1964); *First Nat'l Bank v. Reoux*, 11 A.D.2d 876, 203 N.Y.S.2d 25 (3d Dep't 1960).

126. *Axinn & Sons Millwork & Supply Corp. v. Sandwich Constr. Co.*, 15 A.D.2d 662 (2d Dep't 1962) (stay of execution); *National Equip. Rental Ltd. v. George*, 16 A.D.2d 787 (2d Dep't 1962) (stay in order to show cause why venue should not be changed).

127. *Myers v. Jacobson*, 231 App. Div. 784, 245 N.Y. Supp. 861 (3d Dep't 1930).

128. *Dexter Sulphite Pulp & Paper Co. v. Randolph*, 205 App. Div. 863, 197 N.Y. Supp. 904 (4th Dep't 1923).

129. See p. 331 *infra*.

exception designed to prevent appeal as of right when all the issues in the case have already been decided by the Appellate Division on an earlier appeal.¹³⁰

Most non-final orders are also appealable as of right. Paragraph (2) of CPLR 5701(a) is the basic provision governing these so-called intermediate appeals; it authorizes appeal as of right from seven enumerated classes of orders, including among them the broad catchall provisions for any order that "involves some part of the merits" or "affects a substantial right."

It is generally recognized that this broad authority for appeal as of right from almost every kind of intermediate determination is a prime source of delay and expense in litigation and imposes an undue burden on the Appellate Divisions. Nevertheless, the proposal of the CPLR revisers to eliminate the broad catchall language met with substantial opposition from some segments of the bar. The result was a compromise limited only to orders on motions to require a more definite statement or to strike scandalous or prejudicial matter in a pleading; as to these, CPLR 5701(b) now requires permission to appeal.¹³¹

CPLR 5701(c) specifies the procedure for seeking leave to appeal in the limited instances when it is required.¹³² The party aggrieved by the order may seek leave to appeal first from the judge who made the order and then, upon refusal, from a justice of the Appellate Division, or from a justice of the Appellate Division directly;¹³³ if he applies to the Appellate Division justice first and leave is denied, he cannot thereafter apply to the judge who made the order.¹³⁴

An appeal to the Appellate Division from the Supreme Court or a county court may be taken only from a judgment—either final or interlocutory—or an order. That is, the determination of the lower court which serves as the basis for the appeal, and which measures the time to appeal (CPLR 5513) and is to be specified in the notice of appeal (CPLR 5515), must be embodied in a formal judgment or order. Many wasteful dismissals have resulted from attempts

130. CPLR 5701(a)(1); see p. 326 *supra*. The term "judgment" includes, of course, the determinations in special proceedings that were denominated final and interlocutory orders under pre-CPLR practice. See 1 W-K-M ¶¶ 101.05, 101.07, 401.04.

131. CPLR 5701(b) also provides that non-final orders in Article 78 proceedings are appealable only by permission. This is a continuation of the former practice, except insofar as Civil Practice Act § 1304 required, in effect, permission of the lower court for such an appeal. Since, under CPLR 5701(c), either the lower court or a justice of the Appellate Division may grant permission, the possibility of intermediate appeal in Article 78 proceedings has been broadened somewhat.

132. See also CPLR 5516.

133. *A. Fleisig Sons Folding & Set Up Paper Box Corp. v. Kossoff*, 21 A.D.2d 682, 252 N.Y.S.2d 28 (2d Dep't 1964) (leave to appeal under CPLR 5701(c) may be granted at Appellate Division level only by individual justice and not by court).

134. It should be noted that CPLR 5701(c) was designed to require permission for orders formerly appealable as of right, and not to allow appeal by permission from orders that were not previously appealable at all. *Lee v. Chemway Corp.*, 20 A.D.2d 266, 247 N.Y.S.2d 287 (1st Dep't 1964).

to take an appeal from a decision¹³⁵ or from findings of fact or conclusions of law¹³⁶ or from rulings made during the course of the trial.¹³⁷ While all of these matters may be reviewed in a proper case, pursuant to CPLR 5501, on an appeal from a final judgment, they will not serve as an independent foundation for an appeal. Indeed, in the case of trial rulings, even entry of a formal order embodying the court's determination will generally not serve to found a direct appeal.¹³⁸

Paragraph (2) of CPLR 5701(a) embodies the long-settled rule that only orders determining a motion made on notice are appealable. The proper procedure for obtaining appellate review of an *ex parte* order—now codified in paragraph (3) of CPLR 5701(a)—is first to move to vacate or set aside the order and, if this motion is denied, to appeal from the order denying the motion to vacate.¹³⁹ This gives the lower court an opportunity to reconsider its order in the light of the arguments of both sides; in some cases the time and expense of an appeal may be saved. The notice limitation is not imposed on permissive appeals pursuant to CPLR 5701(b) and 5701(c), since both parties will have an opportunity to present their contentions on the motion for leave to appeal.

Orders and judgments entered upon a default¹⁴⁰ are generally not appealable.¹⁴¹ The proper procedure, as in the case of *ex parte* orders, is to move to open the default and, if that motion is denied, to appeal from the order of denial.¹⁴² The order denying a motion to open or vacate a default is of course appealable.¹⁴³

2. Intermediate Orders—in General

The wide range of non-final orders appealable as involving “some part of the merits” or affecting “a substantial right” was noted earlier.

Although the two standards are often used without distinguishing between them, the one referring to “some part of the merits” is probably the narrower. In the early case of *St. John v. West*,¹⁴⁴ the “merits” were referred to as

135. *E.g.*, *Sostre v. Mailler*, 9 A.D.2d 828, 192 N.Y.S.2d 777 (3d Dep't 1959); *Edwards v. Hunting*, 11 A.D.2d 768, 205 N.Y.S.2d 234 (2d Dep't 1960).

136. *E.g.*, *Fleetash Realty Co. v. Severio Constr. Co.*, 11 A.D.2d 769, 205 N.Y.S.2d 212 (2d Dep't 1960); *Benedetto v. O'Grady*, 10 A.D.2d 628, 196 N.Y.S.2d 319 (2d Dep't 1960).

137. *E.g.*, *Schlansky v. Augustus V. Riegel, Inc.*, 11 A.D.2d 787, 205 N.Y.S.2d 154 (2d Dep't 1960); *Anchor Motor Freight v. Local Union No. 445*, 11 A.D.2d 766, 204 N.Y.S.2d 891 (2d Dep't 1960).

138. See 7 W-K-M ¶ 5701.18 nn.64 & 65. *But see id.* ¶ 5701.12 n.33.

139. *E.g.*, *Vallen v. Fifth Ave. Coach Corp.*, 5 A.D.2d 769, 169 N.Y.S.2d 996 (1st Dep't 1958); *City of New York v. Every*, 231 App. Div. 576, 248 N.Y. Supp. 92 (3d Dep't 1931).

140. See CPLR 2216, 3215.

141. CPLR 5511; see 7 W-K-M ¶¶ 5511.10-5511.11.

142. *E.g.*, *Dejmek v. Lite-Vent, Inc.*, 11 A.D.2d 764, 204 N.Y.S.2d 939 (2d Dep't 1960); *Consumers Indus., Inc. v. ABC Insulation Co.*, 285 App. Div. 1176, 141 N.Y.S.2d 923 (2d Dep't 1955). See also 5 W-K-M ¶ 5015.04 nn.9 & 10.

143. See 7 *id.* ¶ 5701.07.

144. 4 How. Pr. 329, 332 (1850).

"the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the *discretion* or *favor* of the court."

Today, however, it is well known that there is hardly a question of practice that cannot be appealed; and, if a matter is said to be addressed to the court's discretion or favor, this may mean a more limited scope of review but will rarely affect appealability. Appeals on practice matters are legion, ranging far and wide over questions of venue, parties, consolidation and joint trial, pleading and pre-trial disclosure. The only meaningful method of inquiry as to the content of the present standards is to examine the types of orders that have been held *not* to involve some part of the merits or affect a substantial right.

The kinds of orders most commonly so treated are those which may be regarded as only preliminary to a disposition of the motion on the merits. These would include, for example, an order in a grade-crossing elimination proceeding reserving for future determination *de novo* the amount which the railroad would have to contribute for the cost of improvements,¹⁴⁵ or an order merely validating service of a notice of motion to determine the amount of a deficiency judgment in a foreclosure action.¹⁴⁶ The nonappealability of orders referring issues to a referee to hear and report has also been put upon this ground,¹⁴⁷ as well as upon the ground that the order is "merely discretionary."¹⁴⁸

In the area of pre-trial disclosure, although orders granting or denying discovery and inspection or pre-trial examination are generally appealable,¹⁴⁹ orders directing a party to answer a particular question propounded on an examination have sometimes been held unappealable on the ground that questions of competency and materiality should be reserved for determination at the trial.¹⁵⁰ The Third Department has applied this rule even when a question

145. *Matter of Grade Crossings*, 297 N.Y. 246, 78 N.E.2d 596 (1948). *But cf.* *Gilbert v. Case*, 3 A.D.2d 930, 163 N.Y.S.2d 179 (2d Dep't 1957).

146. *Williams Lumber Inc. v. Sigloch*, 277 App. Div. 1043, 100 N.Y.S.2d 409 (2d Dep't 1950) ("The motion will not be finally disposed of until there shall have been a determination whether there is a deficiency. No substantial right of the appellant has as yet been affected.").

147. See, e.g., *Manufacturer's Trust Co. v. Madgo Realty Corp.*, 256 App. Div. 954, 10 N.Y.S.2d 22 (2d Dep't 1939) (relied upon by court in *Williams Lumber Inc. v. Sigloch*, *supra* note 146); *Matter of Silaski*, 175 App. Div. 199, 161 N.Y. Supp. 513 (2d Dep't 1916).

148. *Stock v. Mann*, 233 App. Div. 18, 251 N.Y. Supp. 465 (3d Dep't 1931); *cf.* 7 W-K-M ¶ 5701.14. An order referring issues to a referee to hear and determine is appealable. See *Davidson v. Sterngrass*, 279 App. Div. 875, 110 N.Y.S.2d 346 (2d Dep't 1952), overruling earlier cases to the contrary.

Seemingly grounded on similar considerations are a line of Second Department decisions holding nonappealable (although not consistently) orders which deny relief without prejudice to renewal of the motion. See 7 W-K-M ¶ 5701.16.

149. See, e.g., *Kaplan v. Kaplan*, 13 A.D.2d 995, 216 N.Y.S.2d 502 (2d Dep't 1961) (granting discovery and inspection of books); *Weinrib v. American Binder Co.*, 270 App. Div. 914, 61 N.Y.S.2d 699 (2d Dep't 1946) (order granting examination before trial modified). See generally *Annot.*, 37 A.L.R.2d 586 (1954).

150. See, e.g., *Kogel v. Trump*, 271 App. Div. 890, 66 N.Y.S.2d 899 (2d Dep't 1946). The Third Department has heard such appeals. See *Pistana v. Pangburn*, 2 A.D.2d 643,

of privilege is involved,¹⁵¹ a strong dissent pointing out its inappropriateness in that situation.

3. Orders Granting or Denying a New Trial

In addition to the catchall provisions just discussed, the several sub-paragraphs of CPLR 5701(a)(2) expressly authorize appeal as of right from various specific kinds of orders. Perhaps the most important of these is sub-paragraph (iii), providing for appeal as of right from an order granting or refusing a new trial except after an advisory jury verdict.¹⁵²

Although this provision regarding the appealability of new trial orders is unchanged from the former practice, the lawyer must be alert to the impact of a substantial revision of the practice governing trial and post-trial motions, including motions for a new trial. These motions are covered in CPLR article 44.

Of the four types of motions specified in article 44, those under CPLR 4402, 4403 and 4404 may involve a request for a new trial.¹⁵³ It is important to distinguish among these different types of new trial motions, for, despite the seemingly all-inclusive language of CPLR 5701(a)(2)(iii), different appeal consequences attach to each of them.

a. *Motion under CPLR 4402.* The so-called motion for a mistrial or for withdrawal of a juror, formerly a matter of case law, is now covered by CPLR 4402 as a motion for a continuance or a new trial.¹⁵⁴ The approach of the courts to appeals from such orders has not been completely consistent. Certainly the trial judge's discretion is very great and the scope of appellate review commensurately limited, particularly in the case of a grant of the motion.¹⁵⁵ Despite occasional intimations that the discretion is so broad as to be non-

151 N.Y.S.2d 742 (3d Dep't 1956). The First Department also seems to have heard such appeals (see *Southbridge Finishing Co. v. Golding*, 2 A.D.2d 882, 157 N.Y.S.2d 898 (1st Dep't 1956)) although it states as a general rule that "rulings made during an examination before trial are not appealable"; see *Wall St. Traders, Inc. v. Wang*, 12 A.D.2d 757, 215 N.Y.S.2d 457 (1st Dep't 1961). Some courts are now refusing to give informal rulings on issues arising during the course of an examination before trial. Requiring formal motions is objectionable not only because it delays the examination and adds to cost, but also because entry of a formal order encourages appeals.

151. *Brown v. Golden*, 6 A.D.2d 766, 174 N.Y.S.2d 75 (4th Dep't 1958), reaffirmed in *Kruglikov v. Kruglikov*, 16 A.D.2d 735, 226 N.Y.S.2d 931 (4th Dep't 1962). Cf. *Triangle Publications, Inc. v. Ferrare*, 4 A.D.2d 591, 168 N.Y.S.2d 128 (3d Dep't 1957).

152. This provision concerns only the right to appeal from orders granting or denying a new trial made at the trial court level. It should be distinguished from the right to *review* of an order denying a new trial on appeal from the final judgment; see CPLR 5501(a)(2), and also from the various provisions regarding new trials ordered by an appellate court when reversing a lower court judgment on appeal. See generally 7 W-K-M ¶¶ 5522.03-5522.05, 5613.04.

153. The motion authorized by CPLR 4401 is one made during trial for judgment as a matter of law. Its grant will ordinarily result in an appealable judgment and its denial in a "trial ruling" which can be reviewed only on an appeal from the final judgment. See *id.* ¶ 5701.18.

154. See 4 W-K-M ¶ 4402.01. As to the grounds for such a motion, see *id.* ¶ 4402.02.

155. See *id.* ¶ 4402.03.

reviewable,¹⁵⁶ appeals have sometimes been heard on the merits, although with recognition of the broad discretion vested in the trial judge.¹⁵⁷

In a First Department case, an appeal from the grant of a mistrial was dismissed for the eminently practical reason that it would accomplish nothing, since "trial of the action is of necessity postponed until it can be moved again for trial, and a reversal of the order would not reinstate it in the place it then held upon that calendar."¹⁵⁸ The Fourth Department decisions are especially difficult to reconcile.¹⁵⁹

The most that can be said, in the light of this kind of case law, is that the order granting or denying a new trial under CPLR 4402 is probably appealable, but that in some situations the appeal will be subject to dismissal as raising a moot question and that in all cases review will be circumscribed by great deference to the trial court's discretion.

b. *Motion under CPLR 4403.* Motions for a new trial after the verdict of an advisory jury or the report of a referee to report in an action triable by the court are now governed, together with motions to confirm or reject such a verdict or report, by CPLR 4403.

CPLR 5701(a)(2)(iii) specifically excepts advisory jury verdicts from its provision for direct appeal from an order granting or denying a new trial. The reason for the exception lies in the purely advisory nature of the jury trial: since there is no right to trial by jury, "the court is at liberty to reject the findings of the jury or to accept them and to disregard the errors committed on the trial if they do not affect the substantial justice of the case."¹⁶⁰ The same principles apply to the grant or denial of a new reference after the report of a referee.¹⁶¹

c. *Motion under CPLR 4404.* CPLR 4404 is the basic provision authorizing a post-trial motion for a new trial on a wide variety of grounds.¹⁶² It replaces the several separate Civil Practice Act provisions covering such motions and also integrates with them the motion for judgment notwithstanding the verdict. Apart from motions made orally at the close of trial or after decision,¹⁶³ only one such post-trial motion is permitted; the moving party

156. *Cf. Landberg v. Fowler*, 278 App. Div. 661, 102 N.Y.S.2d 548 (2d Dep't 1951).

157. *E.g., Murphy v. City of New York*, 273 App. Div. 492, 78 N.Y.S.2d 191 (1st Dep't 1948) (denial of mistrial, after refusing reasonable request for adjournment, reversed); *Schultze v. Huttlinger*, 150 App. Div. 489, 135 N.Y. Supp. 70 (1st Dep't 1912) (grant of motion to withdraw a juror affirmed). See also 4 W-K-M ¶ 4402.03, and cases there cited.

158. *Abraham v. American Exch. Nat'l Bank*, 174 App. Div. 854, 159 N.Y. Supp. 396 (1st Dep't 1918).

159. See 7 W-K-M ¶ 5701.13.

160. *Anderson v. Carter*, 24 App. Div. 462, 465, 49 N.Y. Supp. 255, 257 (4th Dep't 1897), *aff'd*, 165 N.Y. 624, 59 N.E. 1118 (1900). See also *Lansing v. Russell*, 2 N.Y. 563 (1850); *Consolidated Laundries Corp. v. Roth*, 241 App. Div. 48, 270 N.Y. Supp. 881 (1st Dep't 1934).

161. See 4 W-K-M ¶ 4403.08.

162. As to the broad range of questions that may be raised by such a motion, see *id.* ¶¶ 4404.08-4404.33.

163. See *id.* ¶ 4405.03.

and his opponent (by cross-motion) are required to raise all grounds for relief then available to them.¹⁶⁴

A motion for a new trial is usually made shortly before or after entry of a judgment. If a new trial is granted, the right to appeal directly from the order is a valuable one, since a reversal may avoid the necessity for a second trial. If, on the other hand, a new trial is denied, the order is reviewable on appeal from the final judgment pursuant to CPLR 5501, and the common practice of appealing from both the order and the judgment seems a useless formality. The right to appeal from an order denying a new trial can become important, however, in a case in which there is no judgment to appeal from,¹⁶⁵ or in which the time to appeal from the judgment has expired but the time to appeal from the order has not.¹⁶⁶

Sub-paragraph (iii) of CPLR 5701(a)(2) permits immediate and direct appeal from an order granting or denying a new trial upon a post-trial motion made under CPLR 4404. The motion contemplated by that rule is made in writing and culminates in a formal order which, if properly entered, may be appealed from—whether or not judgment has been entered and, if judgment has been entered, whether or not an appeal has been taken from the judgment.¹⁶⁷

Decisions under the former practice frequently held the predecessors of CPLR 5701(a)(2)(iii) inapplicable to orders determining oral motions for a new trial made during or at the close of the trial and entered only in the minutes; these orders were deemed "trial rulings," reviewable only on appeal from the final judgment.¹⁶⁸ Most of the dismissals on this ground were purely academic, for they involved denials of a new trial which could be reviewed on contemporaneous appeals from the final judgment. When there was no such alternative way of securing review, the courts apparently regarded the "trial ruling" impediment to appealability as less formidable.¹⁶⁹ Nevertheless,

164. CPLR 4406.

165. See, e.g., *Acosta v. Miller Transp. Co.*, 276 App. Div. 1005, 95 N.Y.S.2d 851 (1st Dep't 1950). See also *Goldstein v. Goldstein*, 212 App. Div. 470, 471, 208 N.Y. Supp. 810, 811 (2d Dep't 1925) (denial of new trial of adultery issue in divorce action; doubt whether defendant could appeal from subsequent judgment entered upon her default).

166. See *Voisin v. Commercial Mut. Ins. Co.*, 123 N.Y. 120, 25 N.E. 325 (1890). The order might not be entered and served, for example, until after entry and service of the judgment.

167. *Voisin v. Commercial Mut. Ins. Co.*, *supra* note 166; *Gelder v. International Ore Treating Co.*, 148 App. Div. 637, 638, 133 N.Y. Supp. 214, 215 (1st Dep't 1912). A new trial ordered by the court on its own motion would also be directly appealable. See *McGlyn v. Johnson*, 15 Misc. 2d 1028, 1029, 184 N.Y.S.2d 209, 210 (Sup. Ct. 1959).

168. See, e.g., *Kinner v. Kuroczha*, 12 A.D.2d 383, 386, 212 N.Y.S.2d 389, 391 (3d Dep't 1961); *Waters v. Collins*, 5 A.D.2d 358, 362, 171 N.Y.S.2d 1020 (3d Dep't 1958).

169. See, e.g., *Acosta v. Miller Transp. Co.*, 276 App. Div. 1005, 95 N.Y.S.2d 851 (1st Dep't 1950) (order denying reargument of previously denied oral motion for a new trial "deemed" a formal order denying the original oral motion, since it was the first formal written order denying the relief and such an order was necessary to lay the basis for appeal); *cf. Le Glaire v. New York Life Ins. Co.*, 5 A.D.2d 171, 172, 170 N.Y.S.2d 763, 765 (1st Dep't 1958) (motion for directed verdict after jury disagreed:

the mere oral statements denying the appellant's applications at the trial without any showing that they were reduced to writing, signed by the Judge and entered are insufficient to constitute an appealable "order." The necessity

similar results may be expected as to such oral motions under the new practice, and prudence dictates that questions so raised be preserved for direct appeal by renewing them in a formal written motion under CPLR 4404.¹⁷⁰

4. Other Intermediate Orders.

The remaining sub-paragraphs of CPLR 5701(a)(2) expressly provide for appeal as of right from an order granting, refusing, continuing or modifying a provisional remedy,¹⁷¹ an order relating to settlement of a transcript or statement on appeal,¹⁷² and an order which "in effect determines the action and prevents a judgment from which an appeal might be taken" or "determines a statutory provision of the state to be unconstitutional."¹⁷³ Special rules govern the appealability of orders relating to the reargument or renewal of motions and to the resettlement of orders.¹⁷⁴

Finally, it should be noted that, despite the absence of express provisions in the CPLR, post-judgment orders such as the denial of a motion to open a default, or the grant or denial of a motion for relief from a judgment on the ground of fraud or newly discovered evidence, remain appealable as of right under CPLR 5701(a)(2)(v). Such orders are not left to permissive appeal, since they may be made too late to be raised on the appeal from the final judgment pursuant to CPLR 5501(a)(1), even though they necessarily affect the outcome of the litigation.¹⁷⁵

II. REVIEWABILITY

Even though a determination is appealable and is properly brought before the appellate court, limitations may still remain as to the questions which that court is empowered to consider. These limitations are covered mainly by CPLR 5501 and the pertinent case law. CPLR 5501(a), applicable to all appellate courts, specifies the types of non-final orders, rulings and other events during the course of the lawsuit which may be reviewed on appeal from the final judgment. CPLR 5501(b) and 5501(c), applicable, respectively, to

for such an order does not impose any unreasonable burden; nor will it present any difficulty, since the trial judge will sign one as a matter of course if timely submitted.)

170. If for any reason there is no subsequent opportunity to renew questions determined by an order which would be appealable but for the fact that it was made during or at the close of trial, *cf.* 4 W-K-M ¶¶ 4403.11, 4406.01, and there is no judgment to appeal from, it would seem permissible, as under the former practice, to prepare a formal order and have it entered as the foundation for an appeal. See *supra* note 169.

171. CPLR 5701(a)(2)(i).

172. CPLR 5701(a)(2)(ii). The Appellate Division will not itself settle or resettle a transcript on original application; application must first be made to the trial court, and then appeal lies of right pursuant to CPLR 5701(a)(2)(ii). See, *e.g.*, *Ross v. Ingersoll*, 35 App. Div. 379, 59 N.Y. Supp. 827 (1st Dep't 1898); *cf.* *Matter of Ellis*, 14 A.D.2d 511, 217 N.Y.S.2d 650 (4th Dep't 1961) (motion in Appellate Division to dispense with printing of part of minutes denied).

173. CPLR 5701(a)(2)(vi), (vii). These two provisions are largely obsolete today. See 7 W-K-M ¶¶ 5701.20-5701.21.

174. See *id.* ¶¶ 5701.23-5701.25. See also CPLR 5517.

175. See *id.* ¶ 5701.22 (Omission of Civ. Prac. Act § 609 did not change practice.).

the Court of Appeals and to the Appellate Division, deal with the effect on the scope of review of whether a question is characterized as one of "law," "fact" or "discretion."¹⁷⁶

CPLR 5522 specifies the different ways in which the court can dispose of the appeal after considering the matters reviewable by it. It provides that the appellate court may reverse, affirm or modify the judgment or order before it, in whole or in part and as to any party, and shall either itself render a final determination or, "where necessary or proper," remit to another court for further proceedings.¹⁷⁷ Though the provision applies in terms to all appellate courts, the possible dispositions available to the Court of Appeals when it reverses or modifies are considerably more restricted than those available to the Appellate Division, because of both the higher court's limited power to review facts and the special limitations on review imposed as conditions of appealability in certain instances.¹⁷⁸ The dispositions that are permissible depend also upon whether or not the case was tried by a jury as of right.

A. Proceedings Brought Up by Appeal From the Final Judgment

1. Non-Final Judgments or Orders

Paragraph (1) of CPLR 5501(a) provides that an appeal from a final judgment¹⁷⁹ brings up for review any non-final judgment or order which "necessarily affects" the final judgment and has not previously been reviewed by the appellate court.

Of course, most types of non-final orders, other than those made during the course of trial, are directly and immediately appealable as "affecting a

176. The term "discretion" does not appear in the statute. It reflects, however, longstanding doctrines concerning appellate review, developed mainly by case-law analogy to the treatment of questions of fact. See pp. 344-45 *infra*. CPLR 5501(d) applies only to the Appellate Term, providing that it "shall review questions of law and questions of fact." See 7 W-K-M ¶ 5501.23.

177. See also N.Y. Const. art. 6, § 5(a). Dismissal is not mentioned in CPLR 5522. Although it is a method of disposing of an appeal, dismissal is not made on the merits, *i.e.*, after the determination appealed from has been reviewed.

The appellate court may also order restitution of property or rights lost by virtue of the judgment or order of the lower court. CPLR 5523; see 7 W-K-M ¶¶ 5523.01-5523.05. As to entry of the appellate court's order and the remittitur to the court below, see CPLR 5524; 7 W-K-M ¶¶ 5524.01-5524.03.

178. As to appeal on certified questions, see CPLR 5614, 5713; 7 W-K-M ¶¶ 5614.01, 5713.01-5713.03. As to appeal by stipulation for judgment absolute, see CPLR 5615; 7 W-K-M ¶ 5615.01. Apart from these special types of appeal, disposition by the Court of Appeals whenever it reverses or modifies the determination appealed from, if questions of fact are present, is governed by CPLR 5613 and attendant case law. See *id.* ¶¶ 5613.01-5613.05.

179. This, of course, includes what was formerly denominated the "final order" in a special proceeding. See CPLR 105(b); 5011. Although an appeal from the Appellate Division to the Court of Appeals is technically taken from the Appellate Division order determining the appeal (CPLR 5512) and CPLR 5501 refers to review on appeal from a final "judgment," it is clear that there was no intent to curtail the power of review formerly vested by Civil Practice Act § 580; if the Appellate Division order satisfies the requirements of finality, it is the equivalent of a "final judgment" within the meaning of CPLR 5501. See DeLong Corp. v. Morrison-Knudsen Co., 14 N.Y.2d 346, 347 n.1, 200 N.E.2d 557, 558n.1, 251 N.Y.S.2d 657, 659n.1 (1964).

substantial right." But, if not appealed from separately, a non-final order can be reviewed only on an appeal from the final judgment pursuant to CPLR 5501(a)(1). It cannot be reviewed on appeal from a subsequent non-final order in the same action.¹⁸⁰ Since the test for reviewability under CPLR 5501(a)(1)—*i.e.*, whether the determination "necessarily affects" the final judgment—is more restrictive than the one that governs whether an order is directly appealable—*i.e.*, whether it "affects a substantial right"—some orders cannot be reviewed at all unless appealed from directly.

If an order is reviewable under CPLR 5501(a)(1), it is of no consequence that the time to take a direct appeal from it has expired, so long as the appeal from the final judgment is timely taken.

a. *Changes from former practice.* CPLR 5501(a)(1) has broadened the coverage of its former counterpart, section 580 of the Civil Practice Act, in three respects. First, the term "intermediate order" in the former provision had been interpreted literally to include only orders made after commencement of the action and before its final determination, so that orders rendered on motions made after the entry of final judgment, for example, could not be brought up for review together with the final judgment but had to be appealed from separately.¹⁸¹ Two separate appeals were thus required, though all the issues could easily have been raised on a single appeal. The new language, "any non-final judgment or order," is meant to embrace all determinations in an action or special proceeding other than the final judgment itself.¹⁸²

Second, the notice of appeal need no longer specify the non-final orders which are to be reviewed together with the final judgment. Under the former section, a non-final determination not specified in the notice of appeal could not be reviewed together with the final judgment, although fully briefed and argued in the appellate court.¹⁸³ The requirement sometimes worked hardship, while the notice was of little aid to the respondent at the time it was given. Under the new practice, the questions that each party intends to raise on the appeal are to be specified in his brief.¹⁸⁴

Third, a new provision in CPLR 5501(a)(1) expressly includes a non-final determination "which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal." The purpose of this addition is to cover the situation in which the respondent on the appeal objected to a non-

180. *Jones v. 30 Sutton Place Corp.*, 12 A.D.2d 455, 207 N.Y.S.2d 103 (1st Dep't 1960), *aff'd mem.*, 10 N.Y.2d 777, 219 N.Y.S.2d 615 (1961); *Coleman v. Steinbacher*, 254 App. Div. 752, 4 N.Y.S.2d 248 (2d Dep't 1938).

181. See *Fox v. Matthiessen*, 155 N.Y. 177, 49 N.E. 673 (1898), construing *Selden v. D. & H. Canal Co.*, 29 N.Y. 634 (1864); *Cohen & Karger, Powers of the New York Court of Appeals* 337-39 (rev. ed. 1962).

182. See 2 N.Y. Adv. Comm. Rep. [N.Y. Legis. Doc., 1958, No. 13], p. 125.

183. *E.g.*, *O'Connor Long Island Props. Corp. v. Bruckman*, 288 N.Y. 23, 41 N.E.2d 441 (1942) (intermediate order in special proceeding); *Bramley v. Miller*, 243 App. Div. 220, 276 N.Y. Supp. 812 (3d Dep't 1935) (alternative holding).

184. CPLR 5528.

final ruling below but won on the final judgment. The respondent, not being aggrieved by the judgment, presumably could not cross-appeal and specify the non-final order in his notice of cross-appeal,¹⁸⁵ and the appellant could not and would not do so. While the cases are subject to conflicting interpretations, it appears that the former law may have prevented the respondent from attacking the non-final determination, so that he might suffer a reversal even though consideration of the non-final determination would have entitled him to prevail in whole or in part on the appeal from the final judgment.¹⁸⁶ The new clause makes it clear that the respondent may raise such a non-final determination on the appeal from the final judgment.

b. *Requirement that determination "necessarily affect" the final judgment.* The requirement that the non-final determination be one that "necessarily affects" the final judgment is designed to focus appellate review upon only those questions which may have seriously affected the outcome.¹⁸⁷

In applying the restriction, the generally stated test is that only a non-final determination which, if reversed, would necessarily require a reversal or modification of the final judgment is one that necessarily affects the final judgment. A further limitation sometimes imposed is that there shall have been no further opportunity during the litigation to raise the issues decided by the non-final determination.

The first test poses little difficulty in application. An interlocutory judgment, for example, determining that the plaintiff is entitled to recover and leaving only the amount of damages to be decided, is clearly a determination that necessarily affects the final judgment.¹⁸⁸ Indeed, the interlocutory judgment in such a case will typically involve all the substantial issues in the case; if it were not reviewable on an appeal from the final judgment, the only issue raised by such an appeal would be the amount of the damages.¹⁸⁹ An order denying a motion for a new trial is also plainly one that necessarily affects the final judgment, for, if the motion had been granted, the final judgment would not have been entered.¹⁹⁰ An order striking a defense necessarily affects a final judgment in favor of the plaintiff and is brought up for review by an appeal from

185. See 7 W-K-M ¶ 5511.05.

186. Cf. *Matter of Zaiac*, 279 N.Y. 545, 18 N.E.2d 848 (1939); *Kelsey v. Western*, 2 N.Y. 500 (1849); *Zeldman v. Mutual Life Ins. Co.*, 269 App. Div. 53, 53 N.Y.S.2d 792 (1st Dep't 1945); *General Fireproofing Co. v. Keepsdry Constr. Co.*, 173 App. Div. 528, 160 N.Y. Supp. 179 (3d Dep't 1916), *aff'd*, 225 N.Y. 180, 121 N.E. 768 (1919).

187. See 2 N.Y. Adv. Comm. Rep. [N.Y. Legis. Doc., 1958, No. 13], p. 125 (1958).

188. See, e.g., *Daus v. Gunderman & Sons*, 283 N.Y. 459, 28 N.E.2d 914 (1940) (Appellate Division reversal of denial of application under Workmen's Compensation Law and remission "for an award in favor of the claimant").

189. Cf. *Whitmore v. Village of Tarrytown*, 137 N.Y. 409, 416-17, 33 N.E. 489, 491 (1893).

190. *Fox v. Matthiessen*, 155 N.Y. 177, 49 N.E. 673 (1898). CPLR 5501(a)(2), expressly providing that such orders are reviewable on appeal from a final judgment, is thus superfluous to this extent. See 7 W-K-M ¶ 5501.09.

that judgment.¹⁹¹ Similarly, on an appeal from an accelerated judgment, an order denying the adverse party's motion for summary judgment¹⁹² or motion to dismiss the complaint¹⁹³ necessarily affects the final judgment.

Conversely, when the final judgment can stand even if the non-final determination was incorrect, the non-final determination does not necessarily affect the final judgment. Upon this reasoning, the courts have refused to review, on appeal from a final judgment, orders granting or denying a motion for a bill of particulars,¹⁹⁴ denying a motion for an injunction pendente lite,¹⁹⁵ denying a motion for a change of venue,¹⁹⁶ denying a stay of trial of an action,¹⁹⁷ or directing a reference.¹⁹⁸

It is the second element sometimes entering into the "necessarily affect" test—*i.e.*, whether the same questions can be raised again at a later stage in the litigation—that mars its logical consistency. Nothing in logic compels the conclusion, for example, that an order reversing or setting aside a judgment and granting a new trial does not necessarily affect the final judgment rendered after the second trial. On the contrary, unless the second trial results in a judgment identical to the first, logic would seem to dictate the opposite conclusion. Similarly, pretrial orders denying a motion to dismiss a claim or defense will often necessarily affect the final judgment, in the very real sense that reversal of the order would compel a contrary judgment. Yet both types of orders have often been held nonreviewable on appeal from the final judgment rendered after a trial or, in the case of orders granting a new trial, after the second trial.¹⁹⁹ Application of this element of the "necessarily affect" test has not been uniform, however, and the uncertainty has been compounded by the occasional introduction of "waiver" and "law of the case" reasoning.²⁰⁰

2. Trial Rulings and Remarks

Paragraph 3 of CPLR 5501(a) deals with the review of rulings made during the course of a trial—*e.g.*, on motions to dismiss or for a directed verdict, or on the admission or exclusion of evidence—and errors in instructing the jury or in failing or refusing to charge as requested. Ordinarily, no direct

191. *Rapalee v. Stewart*, 27 N.Y. 310 (1863); *Osteheld v. Star Co.*, 146 App. Div. 388, 131 N.Y. Supp. 247 (2d Dep't 1911).

192. See *Hirschberg v. City of New York*, 294 N.Y. 55, 60 N.E.2d 539 (1945).

193. See *Pederson v. J. F. Fitzgerald Constr. Co.*, 292 N.Y. 587, 55 N.E.2d 50 (1944). For other examples, see 7 W-K-M ¶ 5501.05, at 55-11.

194. *Raff v. Koster, Bial & Co.*, 38 App. Div. 336, 56 N.Y. Supp. 997 (1st Dep't 1899) (granting); *Collins v. McWilliams*, 185 App. Div. 712, 173 N.Y. Supp. 850 (1st Dep't 1919) (denying).

195. *Bramley v. Miller*, 243 App. Div. 220, 276 N.Y. Supp. 812 (3d Dep't 1935) (alternative holding).

196. *Seltzer v. Wendell*, 11 A.D.2d 805, 205 N.Y.S.2d 218 (2d Dep't 1960).

197. *James v. Chalmers*, 6 N.Y. 209 (1852).

198. *Bolles v. Scheer*, 225 N.Y. 118, 121 N.E. 771 (1919). For additional examples, see 7 W-K-M ¶ 5501.05 nn.25-34.

199. See *id.* ¶¶ 5501.06-5501.08.

200. *Ibid.*

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appeal lies from such rulings,²⁰¹ and they may be reviewed only on an appeal from the final judgment.

CPLR 5501(a)(3) should be read in conjunction with CPLR 2002, which embodies the so-called harmless error rule: "An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced." The consequence of the harmless error rule is that the appellate court may affirm despite an erroneous ruling properly preserved for review pursuant to CPLR 5501(a)(3), if the error is deemed nonprejudicial.²⁰²

CPLR 5501(a)(3) should also be read in conjunction with CPLR 4017, which deals with the necessity of objection in order to preserve the point for appeal.²⁰³ The usual consequence of failure to object is forfeiture of the right to urge the point on appeal.²⁰⁴ Nevertheless, an error may at times be considered on appeal even though a proper objection has not been made, for it is well established that the Appellate Division may reverse a judgment and grant a new trial in such cases "in the interests of justice" if the error is deemed "fundamental."²⁰⁵ Since the proper exercise of this power turns upon whether, in view of all the facts and circumstances, substantial justice has been done,²⁰⁶ it is treated as raising a question of discretion, with the consequence that the Court of Appeals cannot reverse "in the interests of justice" when errors have not been properly preserved, and it cannot review the Appellate Division's exercise of such discretion.²⁰⁷

Improper remarks of the trial judge are also reviewable, on appeal from the final judgment, under paragraph (4) of CPLR 5501(a), and may be the basis for reversal if prejudicial.²⁰⁸ As in the case of trial rulings, the statute requires that the point be preserved by proper objection, but this requirement may be less stringently applied here²⁰⁹ because the reason for it is often absent.

201. See *supra* note 137.

202. See 2 W-K-M ¶¶ 2002.01-2002.03. See also 4 *id.* ¶ 4016.13 (harmless error as to order of opening and closing statements).

203. CPLR 4017 governs when and how objections should be made, see *id.* ¶¶ 4017.03-4017.04, 4017.07-4017.08; eliminates the former need for formal exceptions to the charge to the jury, see *id.* ¶¶ 4017.02, 4017.06; alters prior practice by requiring that exception to the charge be made before the jury retires, rather than before verdict, see *id.* ¶ 4017.07; and states that failure to make proper objections "may restrict review upon appeal in accordance with paragraphs three and four" of CPLR 5501(a), see *id.* ¶¶ 4017.05, 4017.09.

204. *E.g.*, *Mravlja v. Hoke*, 22 A.D.2d 848, 254 N.Y.S.2d 162 (3d Dep't 1964) (omission to read definition of standing under Vehicle and Traffic Law); *Ranftle v. City Athletic Club*, 20 A.D.2d 716, 247 N.Y.S.2d 355 (2d Dep't 1964) (in absence of exception or request, failure to make charge more explicit not reversible error).

205. *Werner v. Hertz Corp.*, 18 A.D.2d 888, 237 N.Y.S.2d 629 (1st Dep't 1963); *Niagara Mohawk Power Corp. v. Aetna Ins. Co.*, 15 A.D.2d 390, 224 N.Y.S.2d 536 (4th Dep't 1962). The trial court possesses a similar power in passing upon a motion for a new trial. See 4 W-K-M ¶ 4404.11. Some seemingly unwarranted uncertainty about the power has been injected by recent Court of Appeals decisions, reasoning in terms of "law of the case." See 7 *id.* ¶ 5501.11.

206. See 4 *id.* ¶ 4404.11. See also *id.* ¶¶ 4017.05, 4017.09.

207. See, *e.g.*, *Standard Oil Co. v. Amazon Ins. Co.*, 79 N.Y. 506, 510 (1880); *Cohen & Karger, op. cit. supra* note 181, at 600.

208. See CPLR 2002; see 4 W-K-M ¶¶ 4404.11-4404.12, 4404.15.

209. See, *e.g.*, *Bolte v. Third Ave. R.R.*, 38 App. Div. 234, 56 N.Y. Supp. 1038 (1st Dep't 1899).

An erroneous instruction can be withdrawn if the error is pointed out, but prejudicial remarks or a prejudicial course of behavior may abort the entire trial process and cannot as easily be cured.²¹⁰

3. *Excessive or Insufficient Verdict.*

If, after a jury trial as of right, the verdict was reduced or increased pursuant to respondent's stipulation on a motion to set it aside as excessive or inadequate, the appellate court may review the final amount and increase the judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.²¹¹ The statute formerly applied only when a judgment had been entered for less than the verdict, pursuant to plaintiff's stipulation, and defendant subsequently appealed.²¹² It has been broadened in the CPLR to apply to the situation in which the judgment has been increased pursuant to defendant's stipulation and plaintiff subsequently appeals. The party who has stipulated to a change in the amount of the verdict cannot appeal because he is not a "party aggrieved."²¹³ The party who appeals after his adversary stipulates takes the risk that the appellate court will reinstate the original verdict pursuant to this provision.

B. *Review of Fact and Discretion*

1. *Court of Appeals*

a. *Fact—in general.* Significant constitutional restrictions on the power of the Court of Appeals to review questions of fact reflect the prevailing conception of that Court as primarily one of law.²¹⁴ In civil cases,²¹⁵ the Court is empowered to review the facts only when (1) the Appellate Division has reversed or modified (2) a final or interlocutory determination and (3) made new findings of fact, and (4) a final determination "pursuant thereto" has been entered.²¹⁶ Thus, there is no power to review the facts when the appeal is from

210. See, e.g., *Buckley v. 2570 Broadway Corp.*, 12 A.D.2d 473, 207 N.Y.S.2d 484, 485 (1st Dep't 1960) ("during the progress of the trial there were interruptions and unnecessary criticisms of plaintiff's counsel to such an extent that in our opinion the calm, dispassionate and deliberate consideration of the facts by the jury was unduly impeded. . . . The development of the facts in the presence of a jury so far as is humanly possible should be uncomplicated by personalities and acrimony"); cf. *Durham v. Melly*, 14 A.D.2d 389, 221 N.Y.S.2d 366 (2d Dep't 1961).

211. CPLR 5501(a)(5). For discussion of the trial court's power to correct an excessive or insufficient verdict, see 4 W-K-M ¶ 4404.10.

212. Civ. Prac. Act § 584-a; see, e.g., *Jenks v. Veeder Contracting Co.*, 264 App. Div. 979, 37 N.Y.S.2d 230 (3d Dep't 1942), *aff'd mem.*, 290 N.Y. 810, 50 N.E.2d 231 (1943).

213. *Borgia v. City of New York*, 12 N.Y.2d 151, 157, 187 N.E.2d 777, 779, 237 N.Y.S.2d 319, 322 (1962); *Enslin v. Hudson & M.R.R.*, 5 N.Y.2d 778, 180 N.E.2d 299, 180 N.Y.S.2d 299 (1958).

214. N.Y. Const. art. 6 § 3(a). The constitutional restrictions are restated in CPLR 5501(b).

215. The court may also review the facts in capital punishment cases. N.Y. Const. art. 6, § 3(a).

216. For an exhaustive and definitive treatment of the intricacies of these requirements, see Cohen & Karger, *op. cit. supra* note 181, Ch. 13.

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a non-final determination or when the Appellate Division affirms the determination below (even if it has reversed the lower court's findings and made new ones).²¹⁷

Self-imposed limitations further restrict review of facts in the Court of Appeals. For example, although the constitutional provision seemingly contemplates that, in a case in which the Court of Appeals may review the facts, it may review *all* the facts, the Court has taken the position that it will review only those facts which the Appellate Division specifically reversed and replaced with new findings. The doctrine, as commonly stated, is that unreversed findings, if supported by "substantial evidence," are "conclusive" in the Court of Appeals.²¹⁸

Moreover, in reviewing those findings of the lower court which the Appellate Division did specifically reverse and replace with new findings, the Court of Appeals has also chosen to exercise less than its full potential power.²¹⁹ In theory, at least, the Court could view the facts in such cases as if it were itself the original trier, not confining itself to a choice between the differing findings of the lower courts, and making its own new findings when warranted. Retreating, however, from earlier decisions taking a broader view of its role,²²⁰ the Court of Appeals more recently seems to have excluded entirely the alternative of making its own findings and confined itself to a choice between the findings of the trial court and those of the Appellate Division.²²¹ One consequence of the Court's refusal to make new findings is to restrict its ability to make final disposition of the case.²²²

In choosing between the findings of the two lower courts, the approach of the Court of Appeals seems to be generally to give preference to those of the Appellate Division, and to adopt them if they are "not against the weight of the evidence."²²³ Expressions of preference for the findings of the trial court appear mainly in cases involving issues of witness credibility and emphasize the peculiar advantages of the original trier in such cases.²²⁴

217. *Id.* at 468.

218. *E.g.*, *Leroux v. State*, 307 N.Y. 397, 405, 121 N.E.2d 386, 391 (1954); see *Cohen & Karger, op. cit. supra* note 181, at 473-80. In a case in which, for example, the Appellate Division modified a condemnation decree by reducing the amount of the awards, the facts were open to review in the Court of Appeals; but the Court held that it could not review the amount of the awards with a view to further reduction because, "beyond the extent of" the reduction made by the Appellate Division, that court "affirmed the finding of value made by Special Term, and that finding is immune from further review if supported by substantial evidence." *Matter of City of New York (Sound View Houses-A.F. & G. Realty Corp.)*, 307 N.Y. 687, 688, 120 N.E.2d 858, 859 (1954).

219. *Cohen & Karger, op. cit. supra* note 181, at 485-89.

220. *E.g.*, *Matter of Flagler*, 248 N.Y. 415, 162 N.E. 471 (1928).

221. See *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 61, 50 N.E.2d 542, 544 (1943); *Harrington v. Harrington*, 290 N.Y. 126, 48 N.E.2d 290 (1943); *Cohen & Karger, op. cit. supra* note 181, at 487-88.

222. *Ibid.*

223. *Id.* at 485; see *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 63, 50 N.E.2d 542, 545 (1943).

224. *E.g.*, *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930); *Amend v. Hurley*, 293 N.Y. 587, 594, 59 N.E.2d 416, 418-19 (1944).

Whenever questions of fact are present, disposition of the appeal in the Court of Appeals will depend upon the posture of those issues when the case reaches the Court. To ease the high court's task in ascertaining this posture, the CPLR provides an elaborate set of requirements for specification by the Appellate Division of its treatment of the factual questions, and presumptions to be applied by the Court of Appeals in the absence of such specifications.²²⁵

b. *Issues involving "discretion."* A large complex of restrictions on review in the Court of Appeals is subsumed in the statement that the Court will not review an exercise of discretion. The term "discretion" is used with varying meanings, and the Court itself has been far from consistent in distinguishing among them or in its treatment of such issues.²²⁶

As a general rule, matters which the Appellate Division considers discretionary and—contrary to what the Court of Appeals says it should do—reviews only with an eye to "abuse"²²⁷ are also considered discretionary by the Court of Appeals, with considerably more serious restrictions on reviewability. Some such matters—*e.g.*, dismissal for want of prosecution, or motions for a new trial on the ground of newly discovered evidence—are not reviewable at all in the Court of Appeals unless the courts below have failed to exercise their discretion.²²⁸ Applications for provisional remedies or for examinations before trial are generally not reviewable in the high court unless there is a question as to the power of the courts below to grant relief, as when this depends on an interpretation of practice statutes and rules and attendant case law.²²⁹

The most common kinds of discretionary matters, however, are those typified by the motion for a new trial "in the interests of justice"—*e.g.*, because of misconduct of counsel or the court, or error in the charge not properly objected to.²³⁰ Here, "discretion" means "the absence of rules of law: it raises such a complexity of fact or circumstance, with the slightest variation giving reason for a change in result, that the effort to formulate legal doctrines to govern it is hopeless, and decision must be relegated to the 'discretion' of the courts below, which have power to decide the facts."²³¹ Such an exercise of discretion is reviewable only when the Court of Appeals is willing to term it an "abuse" of discretion; then the issue raised is considered one of law:

This discretion, vested in the lower courts, may, however, become a question of law reviewable by this court, when its exercise is so arbitrary as to deprive litigants of a reasonable opportunity to be heard,

225. CPLR 5712(b)-(c); 5612; see 7 W-K-M ¶¶ 5712.02-5712.05, 5612.01-5612.07.

226. See generally the valuable and comprehensive analysis in Cohen & Karger, *op. cit. supra* note 181, at 582-623.

227. See p. 348 *infra*.

228. Cohen & Karger, *op. cit. supra* note 181, at 586-87.

229. *Id.* at 609-14.

230. See *Gutin v. Mascali & Sons*, 11 N.Y.2d 97, 181 N.E.2d 449, 226 N.Y.S.2d 434 (1962). See also 4 W-K-M ¶¶ 4404.11, 5501.11.

231. Cohen & Karger, *op. cit. supra* note 181, at 615.

or, in other words, comes within that class of rulings which for better terminology, we call "an abuse of discretion." This is not a very polite nor exact description; the term perhaps is unfortunate; it simply means that the court has gone too far and beyond the bounds and limitations set by previous example.²³²

2. Appellate Division

a. *Fact—in general.* CPLR 5501(c) makes no change in the long-settled law that the Appellate Division may review all questions of both law and fact on appeals before it.²³³ The impact of the right to jury trial, however, produces a somewhat different scope of review of questions of fact in jury and non-jury cases.

(i) *jury cases.* In a case tried by a jury as of right, the Appellate Division may reverse on the facts only when the finding of the jury "could not have been reached upon any fair interpretation of the evidence."²³⁴ The test is the same as that applied by the trial court on a motion to set aside the verdict.²³⁵

A helpful discussion of the delicate task to be performed by the Appellate Division in a jury case is contained in *Rapant v. Ogsbury*.²³⁶

The power to review a jury's verdict concedes, in the first place, the premise that a "question of fact is for the jury" and, of course, this is required for most cases by the Constitution. This concession carries with it the established rule that the "weight of evidence" is the jury's own province and that a court will not interfere unless it can see that no reasonable man would solve the litigation in the way the jury has chosen to do.

It merely begs the question, therefore, to say that "only issues of fact" underlie a verdict, because if the power and the necessity for judicial supervision over verdicts is once admitted, there is a point where the power begins to be exercised.

It is easy to describe the point that has been acted upon in actual cases, but not to state it definitively so that it can serve as a guide to be followed with certainty in the next case. The point of interference is where the judge thinks the jury has gone much too far afiel from the course the judge regards as proper, in the sense of his professional way of looking at facts.

232. *Jensen v. Union Ry.*, 260 N.Y. 1, 13, 182 N.E. 226, 230 (1932) (Crane, J., dissenting). See also *Park & Sons v. Hubbard*, 198 N.Y. 136, 139, 91 N.E. 261, 262 (1910) (whether to permit a supplemental pleading); *Winans v. Winans*, 124 N.Y. 140, 143, 26 N.E. 293, 294 (1891) (leave to discontinue).

233. As to the special treatment of questions of fact in reviewing determinations of administrative agencies, see *Cohen & Karger, op. cit. supra* note 181, at 460; Benjamin, *Administrative Adjudication in New York* 328-46 (1942).

234. *Olson v. Chase Manhattan Bank*, 10 A.D.2d 539, 544, 205 N.Y.S.2d 60, 65 (2d Dep't 1960), *aff'd mem.*, 9 N.Y.2d 829, 175 N.E.2d 550, 215 N.Y.S.2d 773 (1961). *But see Palisade Curtain Co. v. Korn*, 197 App. Div. 88, 90, 188 N.Y. Supp. 497, 498 (1st Dep't 1921) ("there should be no hesitancy in setting aside a verdict, where the undisputed evidence and the probabilities clearly indicate that it was contrary to the weight of the evidence") (Emphasis added.).

235. See 4 W-K-M ¶ 4404.09.

236. 279 App. Div. 298, 299, 109 N.Y.S.2d 737, 739 (3d Dep't 1952).

All this is the description of a process and not the definition of a rule. It does not state just where a verdict will be regarded as against the weight of the evidence and just where it will not be so regarded, because either that cannot be stated definitively or at least there has been no notable success achieved in the formulation of a statement.

If the Appellate Division does reverse on the facts in a jury case, it must grant a new trial or hearing.²³⁷ To proceed otherwise would be to disregard the jury's findings in an area constitutionally marked out as the province of the jury.

The Appellate Division may, however, make a final determination if it concludes that there is no evidence at all to sustain the verdict below and plaintiff has failed to make out even a prima facie case.²³⁸ In this situation, the rationale is that the appellate court is not resolving a question of fact as to the weight of the evidence but is deciding, as a matter of law, whether there was an error below in finding facts without any evidence to support them.²³⁹ Under former practice, an appellate court could make a final determination in such a case only if the respondent had moved for a directed verdict below at the close of all the evidence;²⁴⁰ otherwise, it was deemed admitted that there was a question of fact for the jury.²⁴¹ Under the CPLR, the appellate court can make a final determination in such a case regardless of whether a motion for a directed verdict was made below.²⁴²

Since a verdict is against the weight of the evidence when it is excessive or insufficient in amount, the Appellate Division cannot enter a final judgment changing the amount unless it gives the affected party the option of a new trial.²⁴³ So long as the party adversely affected agrees to stipulate to the changed amount, however, the Appellate Division can increase or decrease the amount of the verdict.²⁴⁴ As was indicated earlier, the Appellate Division can also make a final determination, on an appeal from a judgment entered

237. See, e.g., *Caldwell v. Nicolson*, 235 N.Y. 209, 212, 139 N.E. 243, 244 (1923); *Imbrey v. Prudential Ins. Co.*, 286 N.Y. 434, 36 N.E.2d 651 (1941); *York Mortgage Corp. v. Clotar Constr. Corp.*, 254 N.Y. 128, 134, 172 N.E. 265, 267 (1930) ("the power of the Appellate Division to make new findings of fact and a final adjudication thereon is, of course, limited to cases triable by the court and does not extend to cases triable as of right by a jury"). As to the difficult problems arising when a case in which the verdict has been set aside as against the weight of the evidence returns to the appellate court in a similar posture after the second trial, see *W-K-M* ¶ 5522.06.

238. E.g., *Stein v. Palisi*, 308 N.Y. 293, 125 N.E.2d 575 (1955). See also *Strasbourg v. Leerburger*, 233 N.Y. 55, 134 N.E. 834 (1922).

239. *Cohen & Karger*, *supra* note 181, at 452 ("One canon is clear: if the issue is as to the weight of the evidence, the issue is one of fact; the question posed must be whether there is any evidence for a finding, before the issue can approach the realm of law rather than of fact.").

240. *People v. Davis*, 231 N.Y. 60, 131 N.E. 569 (1921).

241. See *Gelardin v. Flomarcy Co.*, 293 N.Y. 217, 56 N.E.2d 558 (1944), discussed in 4 *W-K-M* ¶ 4401.10.

242. See *id.* ¶¶ 4404.05-4404.06.

243. See, e.g., *Afonis v. States Marine Corp.*, 16 A.D.2d 920, 229 N.Y.S.2d 490, *mod.*, 17 A.D.2d 615, 229 N.Y.S.2d 490 (1st Dep't 1962). *But see* *O'Connor v. Papertsian*, 309 N.Y. 465, 473, 131 N.E.2d 883, 887 (1956) (*dictum*).

244. See, e.g., *O'Connor v. Papertsian*, *supra* note 243; *Afonis v. States Marine Corp.*, *supra* note 243.

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pursuant to such a stipulation made in the trial court, by increasing the judgment to an amount not greater or by decreasing it to an amount not less than the amount of the verdict.²⁴⁵

(ii) *non-jury cases*. In a court-tried case, the Appellate Division may reverse whenever it finds that "men may reasonably differ."²⁴⁶ Of course, the Appellate Division, recognizing that it is not always in as good a position as the trial judge to evaluate the evidence, attaches great importance to the views of the trial court. The latter can pass with greater safety upon "the memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses."²⁴⁷

But the final review of the facts is always for the Appellate Division, and, in a proper case, it has not only the power but also the duty to disagree with the trial court.²⁴⁸ It must, like the trial court, "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony."²⁴⁹ And even when issues of credibility are involved, the Appellate Division will often reverse on the basis of its disagreement with the weight given testimony below.²⁵⁰

In non-jury cases, the Appellate Division has unlimited power to make a final determination upon reversing or modifying a judgment of the lower court.²⁵¹ The Appellate Division may make findings of fact in substitution for contrary findings of a court below,²⁵² or it may make original findings.²⁵³ If the judgment is excessive or insufficient, the Appellate Division can increase or decrease it unconditionally;²⁵⁴ there is no need, as there is in a jury case, for a stipulation by the party adversely affected. The Appellate Division is not, however, required to make a final disposition in all non-jury cases; in an appropriate case, it has discretion instead to grant a new trial or to remit for further findings.²⁵⁵

245. CPLR 5501(a)(5); see p. 342 *supra*.

246. *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 62, 50 N.E.2d 542, 544 (1943). As an example of occasional confusion with the standard for jury verdicts, see *Tyrell v. State*, 6 A.D.2d 958, 959, 176 N.Y.S.2d 530, 532 (3d Dep't 1958), a non-jury case in which the court said it could not set aside findings "as against the weight of the evidence unless it can plainly be seen that the preponderance in favor of the plaintiff is so great that the trier of facts could not have reached the conclusion upon any fair interpretation of the evidence."

247. *Barnet v. Cannizzaro*, 3 A.D.2d 745, 747, 160 N.Y.S.2d 329, 333 (2d Dep't 1957).

248. See *Pordy v. Scott Serv. Co.*, 15 A.D.2d 911, 225 N.Y.S.2d 953, 954 (1st Dep't 1962).

249. *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 62, 50 N.E.2d 542, 544 (1943).

250. See, e.g., *Reich v. City of New York*, 6 A.D.2d 556, 559, 179 N.Y.S.2d 630, 632 (1st Dep't 1958) (trial judge rejected as incredible uncontradicted testimony of witness that plaintiff had fallen over a railing, as well as the same witness's identification of plaintiff). See also *Verlaque v. Weldon*, 5 A.D.2d 809, 810, 170 N.Y.S.2d 126, 127 (1st Dep't), *aff'd mem.*, 5 N.Y.2d 816, 155 N.E.2d 121, 181 N.Y.S.2d 211 (1958) (Appellate Division gave special weight to testimony of disinterested witnesses).

251. See *Leonard v. Frantz Co.*, 268 App. Div. 144, 148, 49 N.Y.S.2d 329, 333 (1st Dep't 1944).

252. E.g., *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945).

253. E.g., *Victor Catering Co. v. Nasca*, 8 A.D.2d 5, 185 N.Y.S.2d 466 (4th Dep't 1959).

254. E.g., *Duffy v. City of New York*, 7 A.D.2d 988, 183 N.Y.S.2d 863 (1st Dep't 1959).

255. The criteria for this exercise of discretion are discussed in 7 W-K-M ¶ 5522.05.

b. *Issues involving discretion.* Theoretically, there is no limitation on the Appellate Division's power—in contrast to that of the Court of Appeals—to review an exercise of discretion by the court below in granting or denying the relief sought. The Court of Appeals has said that the Appellate Division “is vested with the same power and discretion as the court at Special Term possesses, and it is not necessary, in order to justify the reversal, to demonstrate that Special Term abused its discretion.”²⁵⁶

Despite this plenary power to reverse if it simply disagrees with the lower court's exercise of discretion, the Appellate Division frequently states that it will not reverse “in the absence of clear abuse” or unless “exceptional” or “unusual” circumstances are present.²⁵⁷ It is questionable, however, whether these statements are very meaningful in the abstract. As to some matters, such as motions for a mistrial or a continuance, they may mean that the lower court's action is virtually non-reviewable. But as to others, such as motions for change of venue, the Appellate Division itself often weighs all the factors that ought properly to guide the discretion of the lower court even while it states that it reviews only for abuse of discretion, and reversals are more common than the “abuse” test would lead one to expect.²⁵⁸

Occasionally, the Appellate Division will lay down detailed guidelines for exercise of the lower court's discretion in a particular area, such as dismissal for want of prosecution.²⁵⁹ Sometimes the CPLR itself affects review by directing and limiting the lower court's discretion, as in CPLR 1001(b), which specifies five criteria for the court to consider in exercising its discretion to determine when necessary parties may be excused.²⁶⁰

CONCLUSION

While some of the complexity of the body of doctrine surveyed in this article is inherent in the nature of appellate review, much of it is needless and avoidable. In addition, significant portions of this doctrine serve poorly the purpose of focusing the attention of appellate courts upon those matters most deserving of review. To the extent that constitutional and statutory reform can substitute simpler standards more effectively geared to a sound program of business for New York's appellate courts, the interests of litigants and those of judicial administration would both be well served.

256. *Phoenix Mut. Life Ins. Co. v. Conway*, 11 N.Y.2d 367, 370, 183 N.E.2d 754, 755-56, 229 N.Y.S.2d 740, 742 (1962). See also *O'Connor v. Papertian*, 309 N.Y. 465, 471-72, 131 N.E.2d 883, 886, (1956) (“Matters of discretion are reviewable by the Appellate Division. Since that court is a branch of the Supreme Court, whenever discretion is vested in ‘the supreme court’ it may be exercised by the Appellate Division by way of a review of the action of trial or Special Term even though there has been no abuse of discretion by the lower branch of the court.”).

257. See, e.g., *Siegler v. Massachusetts Acc. Co.*, 255 App. Div. 1031, 8 N.Y.S.2d 751 (4th Dep't 1938); *Jacob v. Milazzo*, 9 A.D.2d 950, 195 N.Y.S.2d 679 (2d Dep't 1959).

258. See 2 *W-K-M* ¶ 510.11 (venue); 7 *id.* ¶ 5701.13 (mistrial and continuance).

259. See *Sortino v. Fisher*, 20 A.D.2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963), enumerating the various factors that should be considered, and the relevance and weight of each. See 4 *W-K-M* ¶¶ 3216.04-3216.14.

260. See 2 *W-K-M* ¶ 1001.08.