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Gerald Abraham
Harvard Law School

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A UNITARY APPROACH TO SPECIAL PROCEEDINGS: THE NEW YORK PROPOSALS*

BY GERALD ABRAHAM¹

THE revolutionary goal of the code reform in civil procedure was the creation of the completely unitary action: that is, a single form of procedure for all judicial proceedings. To a great extent this goal has been attained. Most of the remedies which are available in the courts of a particular state today may be obtained by following one basic form of procedure.²

In one very important respect, however, the reformers failed. From the very beginning, a considerable number of remedies were left entirely outside the codes. Each of these remedies was permitted to retain its own peculiar procedure, although there often was a good deal of uncertainty as to just what that procedure was. They generally were provided for by separate statutes scattered throughout the substantive laws of the state. The Field Code denominated all of these remedies which did not follow the traditional procedure of an action as "special proceedings,"³ but that was the only generic treatment it gave them.

Why such diversity was allowed to exist in the face of the spirit of uniformity which brought the codes into being is difficult to say. In any event, these exceptions to the one form of action principle remained well established, and through the years the legislatures have created a good many additional ones. The New York legislature probably has created more than any other. Provided for in both the Civil Practice Act and the Consolidated Laws, these special proceedings range from such ancient remedies as habeas corpus and quiet title to such less familiar proceedings as destroying a dangerous dog and compelling a reluctant public officer to turn his books over to a successor.⁴ As these special proceedings have multiplied in number and

* This article is adapted in part from materials prepared by the author as a member of the staff of the New York State Advisory Committee on Practice and Procedure. The views expressed therein are those of the author and do not necessarily reflect the position of the Advisory Committee.

1. Teaching fellow Harvard Law School.

2. See generally, Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1959).

3. N.Y. Code Proc. § 3, N.Y. Laws, 1848, ch. 379.

4. For examples of the wide scope of these statutory special proceedings, see the following New York statutes, which represent but a small portion of the special proceedings now extant in that state: N.Y. Agr. & Mkts. Law § 116 [destruction of dangerous dog—*Matter of Foote*, 129 Misc. 2, 221 N.Y. Supp. 302 (1927)]; N.Y. Civ. Prac. Act §§ 110-a [removal—*Matter of Victor v. Maziroff*, 300 N.Y. 686, 91 N.E.2d 586 (1950)], 211-a [contribution between joint tortfeasors—*West v. City of N.Y.*, 276 N.Y. 524, 12 N.E.2d 458 (1937)], 310-312 (depositions for use without the state), 313-321 [perpetuation of testimony—*Matter of Callahan*, 262 App. Div. 398, 28 N.Y.S.2d 980, reargument denied, 262 App. Div. 978, 30 N.Y.S.2d 695 (3rd Dep't 1941), motion for leave to appeal dismissed, 287 N.Y. 743, 39 N.E.2d 942, appeal and reargument denied, 264 App. Div. 812, 35 N.Y.S.2d 288 (3d Dep't 1942)], 773-811 [proceedings supplementary to judgment—*Reeves v. Crownshield*, 274 N.Y. 74, 8 N.E.2d 283 (1937)], 977-b [liquidation foreign corporation—*Oliner v. American-Oriental Banking Corp.*, 282 N.Y. 588, 27 N.E.2d 443

variety, they have brought with them difficult problems not unlike those which gave rise to the code reforms.

The proposed revision of civil procedure in New York⁵ takes the first

(1940)], 1077-b [compel production records in mortgage foreclosure—Matter of East River Savings Bank, 294 N.Y. 356, 62 N.E.2d 601 (1945), 1283-1306 (proceeding against a body or officer), 1307-1319 (proceeding relating to express trust), 1320-1324 (proceeding for settlement of infant's claim), 1330-1335 (proceeding to value interest in real property), 1340 (proceeding to enforce agreement for valuation or appraisal), 1356-1384 (proceeding for appointment of committee of incompetent), 1384-a-1384-v (proceedings relative to wards of veteran's bureau), 1385-1406 (proceeding for disposition of real property of infant or incompetent), 1409-a-1409-i (proceeding for release of claim of infant or incompetent against state), 1410-1447 (summary proceedings to recover real property), 1448-1469 [arbitration—Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S.2d 709 (3rd Dep't), aff'd, 306 N.Y. 966, 120 N.E.2d 227 (1954)], 1469-a-1469-f (proceeding for discovery of bondholders); N.Y. Civ. Rights Law §§ 60-64 (change of name); N.Y. Condem. Law [condemnation—Swartz, Inc. v. Utica, 223 App. Div. 506, 228 N.Y. Supp. 660 (4th Dep't), aff'd, 254 N.Y. 555, 173 N.E. 864 (1928)]; N.Y. Debt. & Cred. Law §§ 2-24 (general assignment for benefit of creditors—Matter of Lincoln Chair & Novelty Co., 274 N.Y. 353, 9 N.E.2d 7 (1937)], 120-139 (discharge of judgment debtor from imprisonment), 150 [discharge of bankrupt from judgment—Guasti v. Miller, 203 N.Y. 259, 99 N.E. 416 (1911)], 250 [payment of debts of incompetent—Matter of Glover, 274 N.Y. 585, 11 N.E.2d 766 (1937)]; N.Y. Dom. Rel. Law § 70 [habeas corpus—Warren v. Garlipp, 217 App. Div. 55, 216 N.Y. Supp. 466 (4th Dep't 1926)], 109-118-a [adoption—Matter of Law, 281 App. Div. 851, 119 N.Y.S.2d 306 (2d Dep't 1953)]; N.Y. Election Law §§ 330-336 [proceedings to enforce—Matter of Emmet, 150 N.Y. 538, 44 N.E. 1102 (1896)]; N.Y. Gen. Corp. Law §§ 25 [election contest—Matter of Orbach v. Kubeby, 3 A.D.2d 269, 161 N.Y.S.2d 269 (1st Dep't 1957)], 40-42 (change of name), 50-53 (transfer of property), 61-a [assessment of litigation expenses—Matter of Bailey, 291 N.Y. 534, 50 N.E.2d 653 (1943)], 100-119 [voluntary dissolution—Matter of French, 181 App. Div. 719, 168 N.Y. Supp. 988 (1st Dep't 1918)]; N.Y. Gen. Munic. Law §§ 4 [investigation of expenses of towns and villages—Matter of Town of Hempstead, 32 App. Div. 6, 52 N.Y. Supp. 618 (2d Dep't 1898)], 50-e(5) [leave to serve late notice of claim—Matter of Fabricant v. City of N.Y., 298 N.Y. 818, 83 N.E.2d 862 (1949)]; N.Y. Judiciary Law §§ 90 [admission to and removal from bar—Matter of Mathot, 222 N.Y. 8, 117 N.E. 948 (1917)], 475 [attorney lien—Peri v. N.Y. Central & H.R. R.R. Co., 152 N.Y. 521, 46 N.E. 849 (1897)]; N.Y. Lien Law §§ 19-21-a, 31, 59 [discharge and vacating mechanics lien—Lehigh Structural Steel Co., Inc. v. Nyack Kennel Club, 283 N.Y. 617, 28 N.E.2d 29 (1940)]; N.Y. Mental Hygiene Law § 204 (habeas corpus); N.Y. Pub. Officers Law §§ 20-28 [leave to sue on bond—Matter of U.S.A., 282 N.Y. 95, 25 N.E.2d 383 (1940)], 80 (delivery of books to successor); N.Y. Pub. Serv. Law §§ 57, 63-g, 74, 87, 89-m, 103, 169 (summary proceeding to enforce order of Public Service Commission); N.Y. Real Prop. Law §§ 360-366 (quiet title), 370-435 (title registration), 540-563 (foreclosure of mortgage by advertisement), 570-587 (discover death of life tenant), 590-593 (partition of property of infant or incompetent); N.Y. Real Prop. Tax Law §§ 700-760 (judicial review of assessments and equalization determinations), 999 (supplementary proceeding to collect taxes); N.Y. Stock Corp. Law §§ 10 [inspection of books—Matter of Diamond v. 87 Nassau Street Corp., 1 Misc. 2d 802, 147 N.Y.S.2d 660 (Sup. Ct. 1955)], 21 [valuation of stock of dissenting stockholder—Matter of Baker v. Central N.Y. Power Corp., 284 N.Y. 1, 29 N.E.2d 241 (1940)].

5. See N.Y. Sen. Introductory No. 26 (1960) (Civil Practice Law); N.Y. Sen. Introductory No. 27 (1960) (Rules of Civil Procedure); N.Y. Sen. Introductory No. 28 (1960) (amendments to consolidated laws); N.Y. Sen. Introductory No. 29 (1960) (amendments to unconsolidated laws); N.Y. Sen. Introductory No. 30 (1960) (transfer to unconsolidated laws). The proposals have been issued with explanatory notes and studies in a series of four preliminary reports of the Advisory Committee on Practice and Procedure. N.Y. Leg. Doc. 6(b) (1957) (hereinafter cited as First Report); N.Y. Leg. Doc. 13 (1958) (hereinafter cited as Second Report); N.Y. Leg. Doc. 17 (1959) (hereinafter cited as Third Report); N.Y. Leg. Doc. 20 (1960) (hereinafter cited as Fourth Report). The major portion of these reports has been reprinted in McKinney's Session Law News of New York, Pamphlet No. 4, pp. A-335 to A-461 (1957); Pamphlet No. 7, pp. A-177 to A-507 (1958); Pamphlet No. 5, pp. A-171 to A-621 (1959); Pamphlet No. —, pp. A-167-

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steps toward a solution of these problems and toward the creation of a unitary special proceeding: that is, a single form of procedure for all proceedings in which a deviation from the standard is justified.⁶ This proposal represents a basic change in the present approach toward special proceedings and merits closer attention in light of the problems which prompted it. The New York experience is presented as representative of a condition which to a degree exists nationally.⁷

I. HISTORY

In the early stage of development of the common law procedure, each form of action was a separate proceeding with its own rules.⁸ As the system developed, despite the bewildering variety of forms of action, a body of procedure grew up which was applied in common to most of these forms.⁹ The dominant philosophy of this procedure was essentially that the parties, and not the court, had the primary responsibility for carrying the litigation forward and for determining its scope and content. They were required to do this in carefully defined formal steps. The judge, to a great extent, was little more than an umpire whose function it was to see that no misstep was made.¹⁰

Whatever the merits of this procedural philosophy,¹¹ it was hardly

to A-683 (1960). A summary and discussion of the proposals is contained in Weinstein, Proposed Revision of New York Civil Practice, 60 Colum. L. Rev. 50 (1960).

6. The proposals relevant to special proceedings are contained in Third Report 46-48, 154-62, Fourth Report 221, 307-10.

7. See Clark, Code Pleading 87-92 (1928); cf. Fed. R. Civ. Proc. 1, 81.

8. Pollack and Maitland, appropriately enough, use a medieval metaphor to describe the system:

We liken it to an armory. It contains every weapon of medieval warfare from the two-handed sword to the poniard. The man who has a quarrel with his neighbor comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of swordplay; he must not try to use his cross-bow as a mace. To drop the metaphor, our plaintiff is not merely choosing a writ, he is choosing an action, and every action has its own rules.

2 Pollack & Maitland, *The History of English Law* 561-62 (2d ed. 1898).

9. See 2 Pollack & Maitland, *op. cit. supra* note 8, at 562, n.2.

10. This philosophy is described by Millar as embodied in the principles of "party prosecution" and "party presentation." It has been present to a certain extent in every procedural system, but probably more in the common law system than in any other. The tendency of our modern procedure has been toward more judicial participation in the litigation. Millar, *The Formative Principles of Civil Procedure*, 13 Ill. L. Rev. 1 (1923). For an unfavorable comparison with the Roman system, which was characterized by judicial, rather than party, issue formulation, see Kocourek, *The Formula Procedure of Roman Law*, 8 Va. L. Rev. 337, 434 (1922).

11. Much of our modern procedural reform has been concerned with throwing off its restraints. The Italian jurist Chiovendu points out that basic to this modern development has been the concept that

The justice of the cause does not start with the decision . . . there has been slowly forming the conviction that the judge as organ of the state ought not to preside passively over the suit, to pronounce at its end the judgment, as the automatic machine, activated by the weight of the dropping coin, gives forth a sweetmeat or a ticket of admission: he ought instead to participate as a living and active force . . . Most problems of procedural law turn upon a fundamental point—the relation between the initiative of the parties and the initiative of the

conducive either to speed or flexibility of adjudication. As a result, the procedure in certain "extraordinary remedies," which by their nature demanded more summary judicial action, developed independently of this system. The first of these were the great prerogative writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.¹² By giving the court greater control of the litigation at an earlier stage, it was found that applications for such extraordinary relief could be disposed of far more expeditiously.

These extraordinary remedies had certain procedural characteristics in common. But, in greater part, the procedure of each was essentially unique and adapted to the needs for which it was created.¹³ No uniform mode of summary procedure applicable to a broad class of cases and administered by the same courts which applied the traditional procedure developed in Anglo-American law as it did on the continent.¹⁴

The technique of providing summary procedure for particular remedies grew in popularity in our law. As the legislature made more frequent incursions into the judicial field, the number of such remedies rapidly expanded. By the time of the beginning of code reform in 1848, they outnumbered the forms of action.¹⁵

David Dudley Field strongly felt that the greatest evil of the common law procedural system was its diversity. The countless variations in the manner of obtaining judicial relief, he maintained, were completely useless and did much to impede the administration of justice. Uniformity was the single most important procedural need of the time. Consequently, the goal of Field's reform was a "uniform course of proceeding in all cases, legal and equitable."¹⁶

judge. The forms of proceeding can be more or less rigid, more or less multiplied, the proceeding itself can be more or less brief, the guarantees greater or less of a just decision, according as the judge has more or less power.

Chiovenda, *Le Riforme Processuali e le Correnti del Pensiero Moderno* (1907), quoted in Millar, *Notabilia of American Civil Procedure 1887-1937*, 50 *Harv. L. Rev.* 1017, 1068 (1937). But Pollock and Maitland remind us that the common law philosophy of limited judicial participation, along with its emphasis on formalism, "the twin-born sister of liberty," has played a dominant role in the development of "the rule of law" in England. 2 *Pollack & Maitland*, op. cit. supra note 8, at 563-64.

12. Originally administrative orders by the Crown to its officials, they were developed by Kings Bench into judicial writs. Their issuance continued a matter of discretion and did not develop into a matter of course as did the issuance of the original writs initiating the forms of action. See Plucknett, *A Concise History of the Common Law* 56, 165 (4th ed. 1948); Jenks, *The Prerogative Writs in English Law*, 32 *Yale* 523 (1923).

13. See 1 Holdsworth, *History of English Law*, 226-31 (3d ed. 1922). See generally, High, *Extraordinary Legal Remedies* (3d ed. 1896).

14. For examples of such continental procedure see Engelman-Millar, *History of Continental Civil Procedure* 578, 768 (1927); Kaplan, vonMehren, Schaefer, *Phases of German Civil Procedure*, 71 *Harv. L. Rev.* 1193, 1265-68 (1957); McMahon, *Summary Procedure: a Comparative Study*, 31 *Tul. L. Rev.* 573 (1957).

15. See partial listing of only those proceedings referred to in Former Section 390 of the Code. N.Y. Code Proc. § 471, note (Vorhees ed. 1852).

16. Field, *What Shall Be Done with the Practice of the Courts?* 7 (1847), reprinted in 1 *Speeches, Arguments and Miscellaneous Papers of David Dudley Field* 226 (Sprague ed. 1884).

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To a revolutionary degree, Field attained his goal. The forms of action and the distinction between law and equity were abolished. A single body of procedural rules applicable to all civil actions was established. A general term "special proceeding" was given to all judicial remedies employing a summary procedure, or employing any procedure other than the "ordinary" one of an action.¹⁷

But this was as far as the reform went with regard to special proceedings. Even Field's extraordinary determination and energy were not equal to the task of completing the reform and bringing uniformity to this confused area.¹⁸ Thus the 1848 Code did not deal with procedure in special proceedings at all. It expressly provided that it was not applicable to "any special statutory remedy not heretofore obtained by action."¹⁹ Special proceedings were similarly excepted from the operation of the codes adopted in other states.²⁰

Notwithstanding that the ordinary procedure under the code was now a good deal more simple and expeditious, the "special statutory remedies" excepted from its operation rapidly grew in numbers and variety. Moreover, the statutes creating them often contained only sketchy procedural provisions. Consequently, since neither the code nor common law procedure was applicable to these new remedies, an ever-expanding procedural vacuum was coming into being. The Throop Commission,²¹ which undertook in 1870 the first major revision of the code, recognized this problem. They followed "the general plan of converting the most important special proceedings into actions, where that could be conveniently done; and where that course was impracticable, of applying to them as might be necessary, provisions which now embrace action only."²²

The new Code of Civil Procedure, commonly referred to as the Throop Code, was finally enacted in 1880.²³ Provisions governing many special proceedings were transferred into the code. In the process, some were changed

17. N.Y. Code Proc. §§ 1-3, N.Y. Laws, 1848, ch. 379.

18. To Hepburn, it appeared in many instances "as if the reformers had grown weary in well doing, and had left unfinished their task of establishing uniformity in our judicial procedure." Hepburn, *Cases on Code Pleading* 83 (1901).

19. N.Y. Code Proc. § 390, N.Y. Laws 1848, ch. 379. The following year the special proceedings of scire facias, quo warranto and nuisance were converted into actions. N.Y. Code Proc. §§ 428, 453, N.Y. Laws 1849. Even Field's completed "Code of Civil Procedure," of which the 1848 Code was supposed to have been only a part, provided for procedure in only a few special proceedings and as to these retained the old fragmentary approach. It was submitted to the legislature in 1850, but was never adopted. See Hepburn, *The Development of Code Pleading* 125 (1897); 3 N.Y. Jud. Council Rep. 129, 139-140 (1937).

20. But a generic term was not always employed to identify them and the nature of the proceedings which were chosen for special treatment showed considerable variety. See Hepburn, *Cases on Code Pleading* 83 (1901); Clark, *Code Pleading* 87-92 (1928).

21. So called because of the leadership of Montgomery H. Throop. Appointed as "Commissioners to Revise the Statutes." N.Y. Laws 1870, ch. 33. See introduction prepared by the commissioners to N.Y. Code Civ. Prac. (Throop ed. 1880).

22. N.Y. Code Civ. Proc. § 3333, note (Throop ed. 1880).

23. N.Y. Code Civ. Proc., N.Y. Laws 1880, ch. 245. A portion of the code had been enacted earlier. N.Y. Laws 1876, ch. 449.

into actions. The non-applicability section of the Field Code²⁴ was eliminated, and many provisions applicable to actions alone were applied to special proceedings as well. There was no general provision concerning applicability. An attempt was made to indicate on a section-by-section basis which provisions of the code applied to special proceedings and which did not. But for some reason this plan was not consistently carried out, and the applicability of most sections remained ambiguous.

On the whole, Throop did little to solve the problem. He dealt with only a small percentage of the special proceedings then extant. The many outside the code which were left untouched continued to be added to by the legislature. By 1912, Dean Fiero in a two volume treatise described in detail the procedure in over fifty of the "more important" special proceedings and enumerated at least a hundred more.²⁵ Amendments, which brought the Throop Code at its height to over 3,400 sections, often were made in apparent unawareness of the necessity of indicating applicability to special proceedings.

When the next major code revision was attempted by the Board of Statutory Consolidation, under the leadership of Judge Adolph Rodenbeck, the situation was far more complex than ever before. In 1915 the Board brought forth a short civil practice act and a simple set of modern rules of court.²⁶

Like Field, Rodenbeck was firmly convinced of the importance of uniformity as a leading principle of modern procedure.²⁷ To accomplish it, he made a proposal with respect to special proceedings which was as radical as Field's had been with respect to the forms of action: abolish all special proceedings.²⁸

"It is as confusing," the Board found, "to have several kinds of proceedings each adapted to a particular form of relief as it was under the common law practice to have so many forms of action from which the practitioner was bound at his peril to make a selection for his particular case."²⁹ From this Rodenbeck concluded, "There should be but one form of action and no

24. N.Y. Code Proc. § 390, N.Y. Laws, 1848, ch. 379.

25. 1 Fiero, *Special Proceedings* (3d ed. 1912).

26. See 1 Report of the Board of Statutory Consolidation (1915). A revised version is reported in 5 *id.* (1919).

27. See Rodenbeck, *Principles of a Modern Procedure*, 4 Va. L. Reg. (n.s.) 821 (1919); Rodenbeck, *The New Practice in New York*, 1 Cornell L.Q. 63 (1916); Rodenbeck, *The Reform of the Procedure on the Courts of the State of New York*, 34 N.Y.B.A. Rep. 354, 411-14 (1911).

28. See Rodenbeck, *Principles of a Modern Procedure*, *supra* note 27, at 824. He spared only those proceedings, such as habeas corpus, which were required by the constitution. The civil practice act and rules actually proposed, however, were less daring. Undoubtedly because of the enormous task which a revision of the consolidated laws entailed, only the special proceedings contained in the code were abolished. Section 4 of the proposed civil practice act excepted from the "one form of action" requirement "proceedings otherwise specially regulated by other statutes which shall be called 'special proceedings.'" 1 Report of the Board of Statutory Consolidation 17 (1915); see *id.* at 7, 17, 168.

29. *Id.* at 168.

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special proceedings except where the constitution requires it. Substantive statutes should not be cluttered up with special remedial provisions. There should be but one form of procedure for the enforcement of all substantive rights, with such modifications to meet idiosyncracies of special cases as may be found necessary."³⁰

Although striving for uniformity, Rodenbeck recognized the need for a summary form of procedure in certain cases. This need was met within the framework of the action. A summons, similar to a notice of motion returnable on a date certain, was provided for, to be used where specifically authorized.³¹

The Rodenbeck proposals were more advanced than any which had been made up to that time. Had they been adopted, New York again would have regained its position of leadership in procedural reform which Field had won nearly seventy years before. The proposals went in to a joint legislative committee, however, and never came out. The Committee brought forth its own bill in 1919 which was enacted in the following year as the present Civil Practice Act.³² It retained the approach of the Throop Code toward special proceedings. A few were transferred to the consolidated laws,³³ and the applicability of some of the practice provisions was clarified.

Basically, however, the problems of a highly diversified procedure in special proceedings were left unsolved. In 1937 the Judicial Council recognized this need³⁴ and recommended a major change of approach in the very significant area occupied by the prerogative writs.³⁵ As the need for administrative review grew, these writs were rapidly increasing in importance. As a result, the legislature added Article 78 to the Civil Practice Act.³⁶ That statute abolished the writs of certiorari, mandamus and prohibition and substituted a uniform procedure, having characteristics of both a motion and an action, to be employed in all proceedings against a body or officer.

30. Rodenbeck, *Principles of a Modern Procedure*, supra note 27, at 824.

31. See 1 Report of the Board of Statutory Consolidation 60-61, 271-72 (1915); Gross, *New York's Proposed Simplified Practice Act*, 25 *Yale* 24 (1916).

32. N.Y. Civ. Prac. Act, N.Y. Laws 1920, ch. 925. See generally Report of the Joint Legislative Committee on the Simplification of Civil Practice, N.Y. Leg. Doc. 111 (1919).

33. *Id.* at 27, 31, 34-35.

34. The Council found that "In the field of special proceedings, as distinguished from actions, undue emphasis is still placed upon the form of the remedy. A great variety of special proceedings exists, each being regarded as distinct and separate from the others, and having its own pleading and practice provisions, although some of the provisions are the same in all the proceedings. The litigant is, as a result, compelled to select the particular proceeding which is regarded by the courts as adapted to the relief which he seeks. He cannot merely state in his pleadings the material facts on which he relies and demand the relief to which he deems himself entitled as he could do in an action. He must put the proper label on his papers and must adhere to the forms with which that label is associated. Similarly the courts themselves have often been slaves to the theories which have developed about the nature of the various proceedings." 3 N.Y. Jud. Council Rep. 133 (1937).

35. See 3 N.Y. Jud. Council Rep. 129-198 (1937).

36. N.Y. Civ. Prac. Act §§ 1283-1306. See proposed revision of Article 78 in Second Report 394-405; Fourth Report 354-356.

Important as this step toward a unitary special proceeding has been, it represents only a beginning. The problems with respect to special proceedings which troubled Field, Throop, Rodenbeck and the Judicial Council are the same ones which we face today, except that they have been intensified by the continued proliferation of special proceedings.

II. DEFINITION

One of the most perplexing problems in connection with special proceedings has been the threshold one of definition. This includes both the task of retrospectively identifying an application for relief as an action, a special proceeding or a motion, and the task of prospectively determining which of these modes of procedure may be employed. The problem is not merely an academic one. Important consequences may hinge on what label is attached to the proceeding. But the surprisingly large number of cases which have been concerned with this problem have resulted in little clarification of general principles.

The Field Code attempted a basic statutory definition.³⁷ Throop, although conceding that "This definition has often been severely criticized, and in truth leaves the distinction between an action and a special proceeding very shadowy,"³⁸ decided to retain it practically intact.³⁹ The draftsmen of the Civil Practice Act followed suit, and consequently we have the same statutory definition today.⁴⁰

Both the Civil Practice Act and the General Construction Law define an action as "an *ordinary* prosecution in a court of justice by a party against another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense."⁴¹ A special proceeding is defined by the Civil Practice Act as "every other prosecution by a party for either of the purposes specified" with respect to an action;⁴² while the General Construction Law provides "Every prosecution by a party against another in a court of justice which is not an action is a special proceeding."⁴³

The sole basis of distinction between an action and a special proceeding, therefore, is found in the single word "ordinary" used in defining an action. Actions are ordinary prosecutions; special proceedings are not. Soon after

37. N.Y. Code Proc. §§ 1-3, N.Y. Laws 1848, ch. 379.

38. N.Y. Code Civ. Proc. § 3333, note (Throop ed. 1880).

39. See N.Y. Code Civ. Proc. §§ 3333, 3334 (Throop ed. 1880). Field was rather piqued at the minor changes, e.g., "proceeding" to "prosecution," which Throop did make in the definition. See Field, *The Latest Edition of the New York Code 16-17 (1878)* (letter to Brainerd and others generally denouncing Throop's work).

40. See N.Y. Civ. Prac. Act §§ 4,5; see also N.Y. General Construction Law §§ 11-a, 46-a.

41. N.Y. Civ. Prac. Act § 4; N.Y. General Construction Law 11-a. (Italics supplied.)

42. N.Y. Civ. Prac. Act § 5.

43. N.Y. General Construction Law § 46-a.

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the Field Code was enacted, the courts completed the circle of this definition by making it clear that "ordinary" prosecutions are those which employ the traditional procedure of an action.⁴⁴ That is to say, a proceeding which is commenced by service of a summons, which progresses by the pleadings of the parties, and which terminates in a judgment is an action; one which is commenced, progresses or terminates in some other manner is a special proceeding.⁴⁵

Under this test, it usually is not too difficult a task for the practitioner to look back and determine whether the procedure which he has been using in a case is that of an action or a special proceeding. Such retrospective identification can be important. An appeal to the court of appeals from the appellate division, for example, must be taken directly from the order of the appellate division in a special proceeding; but in an action it is first necessary to enter a judgment in the trial court on the order of the appellate division.⁴⁶

Even in looking backward, however, the practitioner must be wary of pitfalls. Thus, there are independent judicial proceedings which fit into the definitions of neither actions nor special proceedings and consequently fall into a procedural no man's land where there is no Civil Practice Act and no right of appeal.⁴⁷ Typical of such proceedings are those which are not prose-

44. See *Belknap v. Waters*, 11 N.Y. 477 (1854); *Hyatt v. Seely*, 11 N.Y. 52 (1854); *People ex rel. Bendon v. The County Judge of Rensselaer*, 13 How. Pr. 398 (N.Y. Sup. Ct. 1852).

45. See *Matter of Klein*, 309 N.Y. 474, 481, 131 N.E.2d 888, 891 (1956); *Roe v. Boyle*, 81 N.Y. 305 (1880); *Matter of Burge*, 203 Misc. 677, 118 N.Y.S.2d 23 (Sup. Ct. 1952), rev'd on other grounds, 282 App. Div. 219, 122 N.Y.S.2d 232 (1st Dep't 1953), aff'd, 306 N.Y. 811, 118 N.E.2d 822 (1954); 3 *Fiero*, Particular Actions and Proceedings 3095-96 (4th ed. 1922); cf. *Matter of Jetter*, 78 N.Y. 601 (1879); *Marvin v. Marvin*, 78 N.Y. 541 (1879); *Matter of Callahan*, 262 App. Div. 398, 28 N.Y.S.2d 980, reargument denied, 262 App. Div. 978, 30 N.Y.S.2d 695 (3d Dep't 1941), motion for leave to appeal dismissed, 287 N.Y. 743, 39 N.E.2d 942, appeal and reargument denied, 264 App. Div. 812, 35 N.Y.S.2d 288 (3d Dep't 1942); *McLean v. Jephson*, 26 Abb. N. Cas. 40, 13 N.Y. Supp. 834 (Sup. Ct. 1890).

46. N.Y. Civ. Prac. Act § 591; see generally *Cohen and Karger, The Powers of the New York Court of Appeals 94-124* (1952); cf. N.Y. Civ. Prac. Act § 621.

47. See, e.g., *Matter of Klein*, 309 N.Y. 474, 131 N.E.2d 888 (1956) (out-of-state proceeding for the investigation of a municipality); *Matter of Hirsch*, 287 N.Y. 785, 40 N.E.2d 649 (1942) (ex parte motion by incompetent's committee for appointment of special guardian to bring action); *Matter of Droegge*, 197 N.Y. 44, 90 N.E. 342 (1909) (proceeding by bar association for removal of city magistrate); *Matter of Jones*, 181 N.Y. 389, 74 N.E. 226 (1905) (motion by county board to set aside presentment of grand jury against it); *Matter of Sauberman*, 267 App. Div. 192, 45 N.Y.S.2d 359 (1st Dep't 1943) (motion to discharge record of conditional sales contract); *Matter of Murtagh*, 117 App. Div. 302, 102 N.Y. Supp. 176 (3d Dep't 1907) (motion for commitment of insane person); *Grimmer v. Warren, Moore & Co.*, 123 Misc. 737, 206 N.Y. Supp. 63 (Sup. Ct. 1924) (motion for extension of lien). Non-judicial proceedings, of course, are in this category. See *Matter of Luoma*, 282 App. Div. 612, 126 N.Y.S.2d 543 (3d Dep't 1953) (workmen's compensation proceeding); *People ex rel. Watt v. Zucca*, 160 App. Div. 578, 145 N.Y. Supp. 754 (1st Dep't 1914) (proceeding before board of assessors). But a motion to a court for the enforcement of a subpoena issued in connection with a nonjudicial proceeding commences a special proceeding. See *Matter of Manufacturers Trust Co. v. Brown*, 296 N.Y. 549, 68 N.E.2d 861 (1946).

cuted either "by a party"⁴⁸ or "against another party"⁴⁹ as required by the definition. Another trap for the unwary is that a special proceeding may at a certain stage take on the character of an action, or an action may suddenly change into a special proceeding.⁵⁰

What causes the greatest difficulty of all in these cases of retrospective identification, however, is that an application for relief, which apparently is a motion within an action, may quite unexpectedly turn out to have been a separate special proceeding. This confusion is possible because the procedure employed in a special proceeding and a motion often is indistinguishable. Both are applications to a court for relief. A special proceeding may be commenced by a notice, a hearing had and relief granted by an order of the court in exactly the same manner as on a motion. Frequently, the only distinction is a theoretical one. That is, a motion supposedly is made "in" an action or special proceeding,⁵¹ while a special proceeding is "independent" thereof.⁵² The rationale which the courts use in making the distinction often is difficult to perceive.

48. See, e.g., *Matter of Droeg*, supra note 47, where the Court of Appeals expressly dismissed an appeal in a proceeding by the bar association for removal of a city magistrate on the ground that it was not prosecuted by a party. But cf. *Matter of Mathot*, 222 N.Y. 8, 117 N.E. 948 (1917) (disbarment proceeding, also by the bar association).

49. The requirement is not expressly stated in Section 5 of the Civil Practice Act, but is included in Section 46-a of the General Construction Laws which was enacted at the same time. This indicates the intent of the legislature, although the General Construction Law does not purport to effect the Civil Practice Act. See General Construction Law § 101. Despite some talk to the effect that all legal proceedings are either actions or special proceedings (cf. *Keeffe v. Third National Bank of Syracuse*, 177 N.Y. 305, 69 N.E. 593 (1904)), the courts have generally held that ex parte proceedings are neither actions nor special proceedings. See, e.g., *Matter of Hirsch*, 287 N.Y. 785, 40 N.E. 649 (1942) (dismissing an appeal from an ex parte order because it "does not finally determine a special proceeding within the meaning of the Constitution"); cf. *Matter of Klein*, 309 N.Y. 474, 131 N.E.2d 888 (1956); *Cohen and Karger*, op. cit. supra note 46, at 147; but cf. *Matter of Cooper*, 22 N.Y. 67, 86 (1860) (application for admission to the bar); *Cohen and Karger*, op. cit. supra note 46, at 103.

50. The danger is described by Abbott in his note to *McLean v. Jephson*:

The ordinary proceedings in an action sometimes branch out into a special proceeding, and in pursuing that branch the practitioner must not forget that he has crossed the line of demarcation. On the other hand there are a number of special proceedings which at one stage or another are, so to speak, transmuted into actions, or subjected to the regulations applicable to actions, by reason of special provisions of statutes which, with the innocent intention of simplifying the practice, declare, sometimes in one form and sometimes in another, that a special proceeding shall be from such a point, or in such a respect subject to the provisions regulating actions.

26 Abb. N. Cas. 40, 44, 13 N.Y. Supp. 834 (Sup. Ct. 1890).

51. The Civil Practice Act defines an "order" as a "direction of a court or judge, made in an action or special proceeding" (Section 127), and a "motion" as an "application for an order" (Section 113).

52. See *Matter of Callahan*, 262 App. Div. 398, 28 N.Y.S.2d 980, reargument denied, 262 App. Div. 978, 30 N.Y.S.2d 695 (3d Dep't 1941), motion for leave to appeal dismissed, 287 N.Y. 743, 39 N.E.2d 942, appeal and reargument denied, 264 App. Div. 812, 35 N.Y.S.2d 288 (3d Dep't 1942); *Matter of Burge*, 203 Misc. 677, 118 N.Y.S.2d 23 (Sup. Ct. 1952), rev'd on other grounds, 282 App. Div. 219, 122 N.Y.S.2d 232 (1st Dep't 1953), aff'd 306 N.Y. 811, 118 N.E.2d 822 (1954); *Matter of Lima and Honeoye Falls Railway Co.*, 68 Hun 252, 22 N.Y. Supp. 967 (Sup. Ct. 1893); 3 *Fiero*, op. cit. supra note 45, at 3096.

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Particularly troublesome problems and a great deal of litigation have arisen in connection with appeals. An order is appealable as of right to the Court of Appeals only if it "finally determines" a special proceeding.⁵³ The right of appeal thus may turn on whether a particular application for relief is denominated a motion, which results in an "intermediate" order, or a separate special proceeding, which results in a "final" order.⁵⁴ Concerned primarily with policy considerations relevant to appealability, the Court of Appeals has made decisions as to what constitutes a special proceeding which are not readily reconciled with standards applied elsewhere.

Thus, under the third party finality principle, a motion which substantially affects the rights of a non-party is held to institute a separate special proceeding, although the identical motion as to a party would be considered merely another motion "in" the action.⁵⁵ A similar principle has been applied to designate as special proceedings motions affecting parties in capacities different from those in which they had thus far conducted the litigation.⁵⁶ On the other hand, applications for provisional remedies are held to be motions in an action, although the action has not yet begun and although they involve non-parties.⁵⁷

A problem entirely different from retrospectively determining what

53. N.Y. Const. art. 6, § 7; see N.Y. Civ. Prac. Act § 588; see generally Cohen and Karger, *op. cit. supra* note 46, at 35-124.

54. See generally Cohen and Karger, *op. cit. supra* note 46, at 125-206.

55. See, e.g., *Geary v. Geary*, 272 N.Y. 390, 6 N.E.2d 67 (1936) (motion by receiver in separation action for an order directing defendant's employer, not a party, to pay defendant's pension to receiver); *Geller v. Flamont Realty Corp.*, 260 N.Y. 346, 183 N.E. 520 (1932) (motion to hold non-parties in contempt for violation of order that they turn money over to receiver); *Peri v. N.Y. Central and Hudson River Railroad Co.*, 152 N.Y. 521, 46 N.E. 849 (1897) (motion by attorney of plaintiff to vacate satisfaction of judgment for plaintiff to the extent of attorney's lien); *Belknap v. Waters*, 11 N.Y. 477 (1854) (motion by non-party creditor to set aside judgment by confession); see generally Cohen and Karger, *op. cit. supra* note 46, at 181-206.

56. See, e.g., *Matter of Bailey*, 291 N.Y. 534, 50 N.E.2d 653 (1943) (motion by directors of corporation to assess against corporation expenses of a successful defense of a stockholder's action); *Neenan v. Woodside Astoria Transportation Co.*, 261 N.Y. 159, 184 N.E. 744 (1933) (motion by one defendant in a negligence action against another defendant for contribution as a joint tort-feasor); *Moore v. Vulcanite Portland Cement Co.*, 220 N.Y. 320, 115 N.E. 719 (1917) (motion by one defendant to charge another defendant with costs because in interest with plaintiff); see Cohen and Karger, *op. cit. supra* note 46, at 140-41.

57. See *Oestreicher v. Oestreicher*, 289 N.Y. 759, 46 N.E.2d 360 (1942) (arrest); *Matter of Burge*, 203 Misc. 677, 118 N.Y.S.2d 23 (Sup. Ct. 1952), *rev'd on other grounds*, 282 App. Div. 219, 122 N.Y.S.2d 232 (1st Dep't 1953), *aff'd* 306 N.Y. 811, 118 N.E.2d 822 (1954) (receiver); *Morris Plain Industrial Bank v. Gunning*, 295 N.Y. 640, 64 N.E.2d 710 (1945) (attachment, motion by non-party); Cohen and Karger, *op. cit. supra* note 46, at 155-57, 204. For status of a motion to take testimony before an action has begun compare *Matter of Attorney General*, 155 N.Y. 441, 50 N.E. 57 (1898) (motion to vacate subpoena issued by attorney general in aid of anticipated action held motion in action), with *Matter of Callahan*, 262 App. Div. 398, 28 N.Y.S.2d 980, reargument denied, 262 App. Div. 978, 30 N.Y.S.2d 695 (3d Dep't 1941), motion for leave to appeal dismissed, 287 N.Y. 743, 39 N.E.2d 942, appeal and reargument denied, 264 App. Div. 812, 35 N.Y.S.2d 288 (3d Dep't 1942) (motion before action to perpetuate testimony under N.Y. Civ. Prac. Act. §§ 313-321 held special proceeding); cf. *Mapley v. Board of Education*, 13 Misc. 2d 88, 175 N.Y.S.2d 358 (Sup. Ct. 1958) (application before action to amend notice of claim is motion in action).

procedure has been followed is presented to the practitioner who must decide prospectively what procedure he will be permitted to employ. The problem is an important one for the practitioner chooses the form of proceeding at his peril. Like the common law litigant, if he chooses wrong his proceeding will be dismissed.⁵⁸ In this situation the statutory definition is of little use. The problem is one of finding authorization for a special proceeding. Without such authorization a departure from the ordinary mode of obtaining relief will not be permitted; and if authorization exists, departure generally will be required.⁵⁹ As a rule, the authority is provided by a statute.⁶⁰

A few special proceedings are provided for in the Civil Practice Act. But the great bulk are authorized in otherwise substantive statutes scattered throughout the Consolidated Laws.⁶¹ They are not indexed as special proceedings and no enumeration is in existence. It is thus a formidable task in itself for the practitioner to become aware that there is a special statute pertaining to the particular relief which he seeks. Moreover, once the statute is found, it will rarely specify in so many words that the relief may be obtained by special proceeding. Procedure may be spelled out which differs enough from that of an action to justify the conclusion that a special proceeding has been created. But, like as not, the statute simply will authorize an application to a court for relief. Nothing further about procedure is said, doubtless because the drafters of the legislation did not have the question of the form of the proceeding which they were creating in mind at all.

One court remarked, shortly after the enactment of the Field Code, that the statutory definition of a special proceeding was "not remarkable for . . . perspicuity or distinction."⁶² After more than a century of judicial attempts to sharpen it, the perspicuity and distinction of the definition are, if anything, even less remarkable. It is only fair to ask, however, to what extent the indistinctness of definition is inherent in the nature of the concept being defined. After all, under the present practice in New York and most

58. See, e.g., *Matter of Syracuse Trust Co.*, 158 Misc. 713, 286 N.Y. Supp. 950 (Sup. Ct. 1935), *aff'd*, 247 App. Div. 857, 286 N.Y. Supp. 953 (4th Dep't 1936) (motion by trustee for settlement of account should be action); *Matter of Bruns*, 156 Misc. 873, 282 N.Y. Supp. 617 (Sup. Ct. 1935) (petition to compel trustee to invade principal should be action); *Matter of Federman*, 149 Misc. 4, 267 N.Y. Supp. 126 (Sup. Ct. 1933) (affidavit to reform trust deed should be action); *Matter of Empire Trust Co.*, 123 Misc. 673, 206 N.Y. Supp. 136 (Sup. Ct. 1924) (motion by trustee for settlement of account should be by action); 3 N.Y. Jud. Council Rep. 129, 133, 144-60 (1937). The problem in trust cases was alleviated in 1943 by the creation of a new special proceeding. N.Y. Civ. Prac. Act §§ 1307-1319. See 9 N.Y. Jud. Council Rep. 305-314 (1943); 14 N.Y. Jud. Council Rep. 55-56 (1948); Fourth Report 357-359.

59. See cases cited in note 58 *supra*; cf. *People v. American Loan and Trust Co.*, 150 N.Y. 117, 44 N.E. 949 (1896); *Matter of Loss*, 144 App. Div. 832, 129 N.Y. Supp. 425 (3d Dep't 1911).

60. See *Matter of Coss*, *supra* note 52; *Matter of Federman*, 149 Misc. 4, 267 N.Y. Supp. 126 (Sup. Ct. 1933); but cf. *Matter of Hardy*, 216 N.Y. 132, 110 N.E. 257 (1915). Of course the third party finality cases are an exception to this rule. See notes 55, 56, *supra*.

61. For examples, see note 4 *supra*.

62. *People ex rel. Bendon v. The County Judge of Rensselaer*, 13 How. Pr. 398, 400 (N.Y. Sup. Ct. 1854).

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other states, there is no one type of proceeding which may be defined as a special proceeding. The difficulty in definition lies not so much in the wording of such statutes as Sections 4 and 5 of the Civil Practice Act, as in the fragmentary approach which legislatures historically have taken toward special proceedings.

III. PROCEDURE IN A SPECIAL PROCEEDING

Once the practitioner has decided that the proper mode of applying to a court for relief is by special proceeding, he is faced with the problem of determining what procedure he may use. As in the problems surrounding definition, his major difficulty lies in the fact that the term "special proceeding" does not identify a single type of procedure. In this sense, the special proceeding is about at the stage of development of the action in the middle ages, when "one could say next to nothing about actions in general, while one could discourse at great length about the mode in which an action of this or that sort was to be pursued and defended."⁶³

From the statutory definition of a special proceeding, we know only that its procedure is not "ordinary." In just what respects it is extraordinary must be determined independently with regard to each special proceeding. The basic source of information is the statute authorizing the special proceeding. Then, the Civil Practice Act must be examined in order to determine which of its provisions apply. Finally, when both these sources fail, the practitioner is relegated to such rules as may have developed by decision or by local practice.

A. *Special Statutes*

Statutes authorizing special proceedings generally contain some provision for procedure. A few set out a detailed procedural scheme, as for example do the sections of the Civil Practice Act governing proceedings against a body or officer⁶⁴ and summary proceedings to recover real property.⁶⁵ But the great bulk of such statutes contain very little procedural detail. Moreover, the actual content of such procedure as is provided for may vary considerably from statute to statute. Some of this variation is required by differences in the remedies to which the procedure is adapted. Basically, however, the lack of conformity appears to result from the failure of the legislature to treat the problem as a generic one. Procedure for a new special proceeding often seems to be drafted in complete isolation from all that has gone before.

Despite the absence of uniformity, however, it is possible to make a few generalizations as to some of the common characteristics of the procedure contained in these special statutes. At the outset it may be observed that much of the procedure closely resembles that on a motion.⁶⁶ Thus, the pro-

63. Pollack & Maitland, *op. cit.* note 8 *supra*, at 562.

64. N.Y. Civ. Prac. Act §§ 1283-1306.

65. N.Y. Civ. Prac. Act §§ 1410-1447.

66. Some statutes expressly provide that procedure "shall be the same as upon a

ceeding is frequently commenced by service of notice,⁶⁷ similar to a notice of motion, which informs the adversary that certain relief will be applied for at a certain time and place. The notice requires an actual appearance on the return date, not merely a responsive pleading. A short notice time, such as eight days, is generally provided for.

The relief requested and the facts upon which the relief is based are set forth in what is often termed a petition.⁶⁸ Ordinarily served with the notice, the petition usually is related more closely to an affidavit used in support of a motion than it is to a complaint.⁶⁹ Its function is most often more of an evidentiary than an issue-framing one.⁷⁰ Aside from references to the final order in which the court grants or denies relief, most statutes contain very little post-petition procedure. In respect to such matters as enforcement and appeal, the function and effect of an order terminating a special proceeding is more analogous to the judgment in an action than it is to an order on a motion.⁷¹

B. *Applicability of the Civil Practice Act*

Even the most detailed of the statutes leave huge gaps in the procedure of the special proceeding for which they provide. May the practitioner turn to the general practice provisions to fill in these gaps? Under the Field Code he could not. Under the Civil Practice Act it is possible that he may, but this depends upon which practice provisions he is attempting to apply. Applicability of the Civil Practice Act must be determined on a section by section basis.⁷²

Whether a particular section of the Civil Practice Act applies to special proceedings sometimes may be determined by its wording.⁷³ An express reference to special proceedings, for example, would indicate applicability.⁷⁴ In other instances, although the section itself is silent or refers only to an

motion in an action." See, e.g., N.Y. Civ. Prac. Act § 1469e (proceeding for discovery of names of bondholders).

67. Service is in the same manner as a summons. N.Y.R. Civ. Prac. 21. Unless the court authorizes another manner in an order to show cause. See, e.g., N.Y. Civ. Prac. Act § 1289.

68. See *Shaft v. Phoenix Mutual Life Ins. Co.* 67 N.Y. 544 (1876).

69. See N.Y. Civ. Prac. Act §§ 7(3), 119 (providing that a petition and affidavit may be used interchangeably); *Gould v. Gould*, 108 Misc. 42, 178 N.Y. Supp. 37 (Sup. Ct. 1919), *aff'd*, 203 App. Div. 807, 197 N.Y. Supp. 515 (1st Dep't 1922); but see *Matter of Levine v. Lending*, 176 Misc. 462, 26 N.Y.S.2d 775 (Sup. Ct. 1941).

70. But cf. *Meyer v. New York Hospital*, 7 A.D.2d 60, 180 N.Y.S.2d 918 (1st Dep't 1958), appeal dismissed, 5 N.Y.2d 1021, 185 N.Y.S.2d 547 (holding the petition and answer in a special proceeding to strict pleading standards).

71. See *Matter of Eiss v. Summers*, 205 App. Div. 691, 199 N.Y. Supp. 544 (4th Dep't), appeal dismissed, 236 N.Y. 638, 142 N.E. 316 (1923).

72. For a detailed analysis of applicability of the Civil Practice Act to special proceedings, see Third Report 659-68.

73. A table has been prepared classifying each section of the Civil Practice Act according to whether it expressly refers only to actions, only to special proceedings, to both actions and special proceedings or to neither. It also notes other references, such as to a judgment or summons, which might aid in the determination of applicability, and all provisions expressly dealing with applicability. See Third Report 673-95.

74. See, e.g., N.Y. Civ. Prac. Act § 82 (reference to special proceeding added by amendment).

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action, there may be a provision elsewhere in the act expressly applying it to special proceedings. Section 308, for example, provides that depositions may be taken in a special proceeding "as though the proceeding were an action."⁷⁵ But even such apparently unambiguous language is not free from doubt. Some lower courts, for instance, have refused to allow depositions to be taken in certain "summary special proceedings" such as habeas corpus and summary proceedings to recover real property.⁷⁶

Despite talk in some cases to the contrary,⁷⁷ the failure of a section to contain such specific wording is not a definite indication of non-applicability. Most sections are silent in this respect. Yet many of them have been applied to special proceedings. Apparently much depends upon the subject matter of the particular section and its relation to other provisions of the act.

Thus provisions such as those governing the jurisdiction and powers of courts and judges,⁷⁸ appear to be of such a general nature as to be applicable to all judicial proceedings. On the other hand, the provisions setting forth the rules of pleading,⁷⁹ the avoidance of which is a chief *raison d'être* of the special proceeding, are applicable only to actions.⁸⁰ It may be significant that

75. See also N.Y. Civ. Prac. Act § 10 which applies the statute of limitations to both actions and special proceedings, providing that the "word 'action' contained in this article is to be construed, when it is necessary to do so as including a special proceeding . . ." This provision removed the doubt which existed under the Field Code as to whether there was a statute of limitations for special proceedings at all. See *People ex rel. Olmstead v. The Board of Supervisors of the County of Westchester*, 12 Barb. 446 (N.Y. Sup. Ct. 1852). But with respect to certain portions of the statute of limitations, this provision apparently is not clear enough. Thus in a 4 to 3 decision the Court of Appeals held that Section 44 (twenty year presumption of satisfaction of a "judgment") was not applicable to a final order in a special proceeding, because "judgment" is a word of art applying only to an action. *Hornblower v. Weeks & Sherwood*, 307 N.Y. 204, 120 N.E.2d 790 (1954).

76. Compare *Dubowsky v. Goldsmith*, 202 App. Div. 818, 195 N.Y. Supp. 67 (2d Dep't 1922), *Wiener v. Regent Brand Clothes, Inc.*, 204 Misc. 231, 122 N.Y.S.2d 231 (Sup. Ct. App. T. 1953), and *Application of Heller*, 183 Misc. 630, 52 N.Y.S.2d 460 (Sup. Ct.), *aff'd*, 268 App. Div. 976, 52 N.Y.S.2d 579 (1st Dep't 1944), with 42 West 15th Street v. *Friedman*, 208 Misc. 123, 143 N.Y.S.2d 159 (Sup. Ct. App. T. 1955), and *People ex rel. Glasier v. Glasier*, 1 Misc.2d 650, 148 N.Y.S.2d 242 (Sup. Ct.), modified, 2 A.D.2d 289, 153 N.Y.S.2d 788 (3d Dep't 1956); see *Weinstein and Bergerman, New York Procedures to Obtain Information on Civil Litigation*, 32 N.Y.U.L. Rev. 1066, 1084-85 (1957).

77. "Wherever the Legislature intended provisions of the Civil Practice Act to be applicable to special proceedings as well as to actions it made express provisions to that effect." *Matter of Field's Trust*, 193 Misc. 781, 782, 84 N.Y.S.2d 656, 657 (Sup. Ct. 1948), modified, 276 App. Div. 835, 93 N.Y.S.2d 267 (1st Dep't 1949), modified, 302 N.Y. 262, 97 N.E.2d 896 (1951).

78. N.Y. Civ. Prac. Act §§ 62-81.

79. N.Y. Civ. Prac. Act §§ 241-283.

80. See *Matter of Vanderbilt's Trust*, 279 App. Div. 587, 107 N.Y.S.2d 39 (2d Dep't 1951), motion for leave to appeal denied, 279 App. Div. 666, 108 N.Y.2d 981, motion for leave to appeal denied, 303 N.Y. 1016 (1952) (no cross claim permitted in special proceeding); *Matter of Field's Trust*, 193 Misc. 781, 782, 84 N.Y.S.2d 656, 657 (Sup. Ct. 1948), modified, 276 App. Div. 835, 93 N.Y.S.2d 267 (1st Dep't 1949), modified, 302 N.Y. 262, 97 N.E.2d 896 (1951) (same); *Metropolitan Life Insurance Co. v. Shapiro*, 163 Misc. 76, 296 N.Y. Supp. 1004 (1st Dep't 1937) (no counterclaim permitted in a special proceeding); but cf. *Clark v. Newton*, 140 Misc. 570, 250 N.Y. Supp. 745 (Sup. Ct. App. T. 1931) (summary proceeding to recover real property is an "action" within the meaning of the provision for bills of particulars). Pleading provisions have been applied by analogy in those special proceedings most closely resembling an action. See *People ex rel. Buffalo Burial Park Ass'n v. Stilwell*, 190 N.Y. 284, 290, 83 N.E. 56, 58 (1907); *Matter of Levine v.*

a section, which is itself silent, is closely related to another section which expressly applies to special proceedings.⁸¹

As a rule, sections which refer only to actions, in absence of some other related provision, have been restricted in their applicability accordingly.⁸² But even such sections have been applied to special proceedings where the nature of their subject matter warranted it.⁸³

The only general conclusion that can be made with respect to applicability of the Civil Practice Act to special proceedings is that neither the legislature nor the courts have followed a consistent policy. It is true that in many instances the legislature has taken pains to spell out applicability, sometimes even enacting amendments for that very purpose. But it is safe to say that those who drafted the greater number of sections did not consider the problem of applicability at all.

IV. PROPOSED CHANGES

The proposed changes in the present approach of the Civil Practice Act toward special proceedings⁸⁴ were designed as an immediate response to the problems outlined above. But they are also intended to serve as a foundation upon which the special proceeding may be built into a uniform broadly available procedural device. The ultimate goal is a unitary special proceeding to exist side-by-side with today's unitary action.

To accomplish this, it is proposed that the definition and the applicability of the Civil Practice Act be changed and that a uniform mode of summary procedure be established for all special proceedings insofar as they are not otherwise provided for. Also proposed is a complete survey of the Consolidated Laws with the object of compiling an enumeration of special proceedings, of reducing to a minimum the deviation of their procedure from that of an action, and where deviation is necessary, of conforming it to the new uniform procedure for special proceedings.⁸⁵

Lending, 176 Misc. 462, 26 N.Y.S.2d 775 (Sup. St. 1941). Sometimes special statutes prescribe the use of pleadings "as in an action." See, e.g., N.Y. Civ. Prac. Act §§ 1291, 1292, 1425.

81. See, e.g., N.Y. Civ. Prac. Act § 99 which refers only to an action, but is a general limitation on the power of the court, granted in section 98, to extend time in "an action or special proceeding." Cf. *Grand Central Theatre, Inc. v. Motion Picture Machine Operators Union*, 69 N.Y.S.2d 115 (Sup. Ct. 1941), *aff'd*, 263 App. Div. 989, 34 N.Y.S.2d 400 (1st Dep't 1942).

82. See, e.g., *Granville v. Giatzer*, 281 App. Div. 514, 120 N.Y.S.2d 797 (1st Dep't 1953) (body execution); *Matter of Holle*, 160 App. Div. 369, 145 N.Y. Supp. 388 (3d Dep't 1914) (injunction); *Edaviel Corp. v. Boykin*, 205 Misc. 622, 129 N.Y.S.2d 149 (Sup. Ct. App. T. 1954) (third party practice); *Matter of Reese v. Chappelle*, 206 Misc. 887, 135 N.Y.S.2d 200 (Sup. Ct. 1954) (request to admit); cases cited in note 73 *supra*; cf. *Queens County Water Co. v. O'Brien*, 131 App. Div. 91, 115 N.Y. Supp. 495 (2d Dep't 1909).

83. See, e.g., *Matter of Petroleum Research Fund*, 3 A.D.2d 1, 157 N.Y.S.2d 693 (1st Dep't 1956) (intervention); *Catrakis v. Jaris*, 280 App. Div. 414, 114 N.Y.S.2d 225 (1st Dep't 1952) (real party in interest); *Stephen Estate Inc. v. Kaplan*, 198 Misc. 948, 100 N.Y.S.2d 455 (N.Y.C. Munic. Cy. 1950) (joinder).

84. See generally Third Report, 46-48, 154-62; Fourth Report 221, 307-10.

85. The Advisory Committee on Practice and Procedure has been unable to accomplish a complete survey. But some changes in the Consolidated Laws along these lines

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A. Definition

As has been pointed out, the basic difficulties of definition, whether they are connected with retrospective or with prospective identification of procedure, really cannot be solved by a single provision of statute. These difficulties must be met by more far-reaching changes for which a statutory definition can only serve as a starting point.

The proposed Civil Practice Law defines as "civil judicial proceedings" all prosecutions of an "independent application to the court for relief."⁸⁶ This would include both actions and special proceedings, as well as those non-man's-land proceedings which now are classified as neither. All such civil judicial proceedings would be required to be "prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized."⁸⁷ But applications for relief brought in the wrong form would no longer be dismissed; instead, the court would "make whatever order is required for its proper prosecution."⁸⁸ It is hoped that eventually an enumeration of all the various statutory authorizations for special proceedings will be added to this definition.⁸⁹

B. Applicability of the General Practice Provisions

The proposed Civil Practice Law provides that "[e]xcept where otherwise required by statute or rule, procedure in special proceedings shall be the same as in actions"⁹⁰ and that wherever the word "action" is used in the proposed practice it shall include a special proceeding.⁹¹ This represents a basic change in approach.

The proposal substantially would eliminate the often difficult problem

are included in the proposals. See generally, N.Y. Sen. Introductory No. 28 (1960); summarized in Fourth Report 631-683. In addition, the committee proposes that most special proceedings now provided for in the Civil Practice Act be transferred to appropriate Consolidated Laws. See generally, N.Y. Sen. Introductory No. 28 (1960); summarized in Fourth Report 427-630. For example, Civil Practice Act provisions governing the following special proceedings are recommended to be transferred: valuing interest in real property (1330-1335, to Real Property Law); appointment of committee of incompetent (1356-1384, to Mental Hygiene Law); relative to wards of veterans bureau (1384-a-1384-v, to Military Law); disposition of real property of infant or incompetent (1385-1406, to Real Property Law); release of condemnation claim of infant or incompetent (1409-a-1409-i, to Condemnation Law); summary proceeding to recover real property (1410-1447, to Real Property Law); discovery of bondholders (1469-a-1469-f, to Personal Property Law). Although in several instances revision seems indicated, transfer is recommended without major change. But in most instances transferred provisions have been conformed to the proposed practice.

86. Section 1.4(b) Fourth Report 221.

87. Section 1.2(b) Third Report 46.

88. Section 1.2(c) Third Report 47.

89. Several states and the federal system have attempted partial enumerations. See, e.g., Fed. R. Civ. Prac. 81; 13 Del. Code Ann., Super. Ct. (CN.) R. 81; Ill. Ann. Stat., C. 110 § 1 (Smith-Hurd 1956). A similar proposal has been made in Virginia. See Denman, Analysis of Summary Proceedings Under Special Statutes in Virginia, 1 Wm. & Mary L. Rev. 58 (1957).

90. Section 1.2(b) Third Report 46.

91. Section 1.4(j) Fourth Report 221.

under the present act of determining which general practice provisions apply to special proceedings and which do not. It also serves to insure against the procedural vacuum that so often arises under the Civil Practice Act when it is determined that its provisions do not apply to special proceedings. Unless some statute or rule can be found which specifically restricts applicability or provides for a different procedure, all of the proposed practice provisions would be applicable to special proceedings as well as to actions.⁹²

The change of approach is part of a general attempt throughout the proposed law and rules to achieve uniformity of procedure as far as possible. The need for a more summary remedy in certain cases has not been ignored. But unnecessary differences in procedure between actions and special proceedings, where the difference originates in the Civil Practice Act, have been eliminated. Thus procedure of special proceedings in such matters as appeals, costs and enforcement of orders, which in the past has given rise to so much needless litigation, has been conformed to that of an action.⁹³

Underlying the proposals is the assumption that procedure should not vary from the norm unless a conscious policy decision has been made that the advantages of such a variance outweigh the disadvantages of the resulting loss of simplicity and uniformity. Such a decision for a variance should be expressed by a statute or rule in a form which is easily accessible to the practitioner. The proposed changes in themselves cannot accomplish this ideal. What is most sorely needed to bring it about is a complete overhauling of all the separate statutes now governing special proceedings. Unnecessary procedural variations should be excised and those special proceedings which do not deserve to be kept should be eliminated altogether.⁹⁴

C. *A Uniform Procedure for Special Proceedings*

While much of the deviation of the procedure in special proceedings from that of an action is unnecessary and should be eliminated, some of it serves a very useful function. It meets needs with respect to certain remedies which cannot be met with the traditional procedure of the action. In broad terms, the need is for a more expeditious disposition of the application for relief and for greater control by the court of such disposition. The basic technique employed by almost all special proceedings is to place the case in the hands of the court at an early stage in the litigation, by what is essentially motion practice, and then to permit the court more or less summarily to dispose of it.

92. A number of states have made similar provisions. See, e.g., Cal. Code Civ. Proc. § 1109; Idaho Code Ann. § 7-402 (1947); Ill. Ann. Stat., c. 110 § 1 (Smith-Hurd 1956); N.M. Stat. Ann. § 21-1-1(1) (1953); N.D. Rev. Code § 32-3205 (1943). See also Fed. R. Civ. Prac. 1, 81.

93. See Second Report 114-19, 317, 322; Third Report 162, 223-26, 717-25; Fourth Report 396-401.

94. In 1935 Illinois enacted more than ninety separate statutes in order to accomplish such conformity. See Ill. Ann. Stat., c. 110 § 1 (Smith-Hurd 1956), and note thereto; Gottlieb, Proposed Revision of Special Acts to Conform with Civil Practice Act, 23 Ill. Bar J. 147 (1935).

A UNITARY APPROACH TO SPECIAL PROCEEDINGS

In view of the basic objectives and techniques which even the diverse special proceedings of the present practice have in common, a major change in approach toward the special proceeding is proposed. For the present fragmentary treatment, the proposed practice would substitute a unitary view of the special proceeding as a single form of proceeding with a single mode of procedure. The change would be made effective by the establishment of a body of rules setting forth the manner in which the procedure of all special proceedings could deviate from that of the action,⁹⁵ subject to whatever provisions are contained in statutes governing particular proceedings.⁹⁶

The new uniform procedure is contained in Title 27 of the proposed Rules of Civil Procedure.⁹⁷ It is really new only in the unitary approach which it takes. The procedure itself is familiar. In its essentials, it corresponds to that now used in most special proceedings. In its details, it represents an effort to meet the needs both of those special proceedings which require a full-scale trial and those in which relief is granted or denied almost immediately upon application. It also has been necessary to make the procedure adaptable to the peculiarities of the many diverse remedies which may be obtained by special proceeding.

Since every deviation from the procedure of an action results not only in interference with overall procedural uniformity, but also in a sacrifice of the benefits of the particular rule departed from, the procedural detail provided for by Title 27 has been kept to a minimum. Only eleven rules are proposed. The object has been to conform the procedure of a special proceeding to that of an action as much as is consistent with the requirements of speed and flexibility. In many instances, the choice of whether to provide for deviation has been a difficult one and may admit of some disagreement.

Perhaps the major difference provided for is that a special proceeding is commenced by service of a notice of petition rather than a summons.⁹⁸ The notice fixes a date for hearing,⁹⁹ not less than eight days after service,¹⁰⁰ at which respondent must appear. It is not, as is the summons, merely a notice to plead. Because of the necessity of obtaining original jurisdiction, the notice is served in the same manner as a summons.¹⁰¹ As is proposed with respect to the complaint in an action,¹⁰² the petition must be served with the notice.¹⁰³

95. See Third Report 154-62; Fourth Report 307-10.

96. Rule 1.1 of the Proposed Rules of Civil Procedure provides that they shall not be applicable "where the procedure is regulated by inconsistent statute." Third Report 153.

97. Third Report 154-62; Fourth Report 307-10. Hereafter the proposed rules contained in the title 27 shall be referred to as renumbered in the Fourth Report.

98. Rule 27.2. But cf. Proposed Rule 31.3 which allows plaintiff to serve with the summons in an action a notice of motion for summary judgment in lieu of a complaint. First Report 91.

99. Rule 27.2(a).

100. Rule 27.2(b).

101. Rule 27.2(c).

102. Rule 26.2, First Report 60.

103. Rule 27.2(b).

While pleadings are unnecessary in the many special proceedings which are in reality nothing more than a motion, they serve a useful function in those more elaborate special proceedings which involve a trial. Consequently, aside from time provisions,¹⁰⁴ it was decided to apply the general rules of pleading to special proceedings.¹⁰⁵ But, where no trial is necessary, summary disposition on the papers may be had without a separate motion for summary judgment.¹⁰⁶ To make such disposition possible, affidavits and other papers may be served with the pleadings¹⁰⁷ and a reply is permitted without court order.¹⁰⁸

All papers which have been served are submitted to the court for the hearing.¹⁰⁹ As far as possible, the court makes a summary determination upon the papers,¹¹⁰ and if issues of fact are raised, sets a date for trial.¹¹¹ Without the necessity of queuing up on the regular action calendar, it is contemplated that even jury trials could be had at an early date. The special proceeding terminates in a judgment instead of, as is now the practice, in a final order.¹¹² Since both a final order and a judgment serve the same function, no reason is seen for different terminology or for different appeal and enforcement procedure.¹¹³

From the above summary, it can be seen that the differences in the proposed procedure of a special proceeding from that of an action are few. In most cases, a special proceeding will be conducted largely in the same manner as an action. There will be occasions, however, when there is no Title 27 rule applicable and the procedure of an action would be inappropriate because of the circumstances of the particular case. In order to preserve the summary nature and flexibility of the special proceeding on such occasions, Title 27 gives the court a good deal more control over the litigation than it has in an action.

In an action, for example, it is generally considered good practice to permit all claims of all parties to be adjudicated in the same litigation, and to permit parties to be added freely without court order. But such additional parties and claims may considerably delay the disposition of the main claim. Consequently, under Title 27, leave of court is required for joinder or interpleader after the proceeding is commenced and for all third party practice

104. The answer in a special proceeding must be served at least one day before the petition is noticed to be heard, and any reply at least on that date. Rule 27.2(b).

105. Cf. rules 27.3, rules 27.4, 27.5, rule 27.7. For the same reason it was decided to provide for motions directed to the pleadings. Such motions are returnable on the hearing date.

106. Rule 27.2(b).

107. Rule 27.2(b).

108. Rule 27.3. The proposed rules would allow a reply in an action only upon court order, except where there is a counterclaim. Rule 26.1, First Report 59.

109. Rule 27.9(a).

110. Rule 27.9(b).

111. Rule 27.10.

112. Rule 27.11.

113. See note 93, *supra*.

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and intervention.¹¹⁴ In addition the court at any time may order a severance of a claim, counterclaim or crossclaim or as to a particular party.¹¹⁵

The provisions for service of a summons in an action, which are generally applicable to service of a notice of petition, are designed to give the adversary adequate notice of the action. But in a particular special proceeding a different notice may be both adequate and necessary. Thus, Title 27 authorizes the court to permit service of an order to show cause in lieu of a notice of petition at a time and in a manner specified therein.¹¹⁶

Another instance of court control provided for by Title 27 is the restriction of the free disclosure which, under the proposed practice, would be available in an action without court order.¹¹⁷ Such disclosure often is unnecessary in a special proceeding and can seriously interfere with its summary prosecution. Therefore, it is provided that disclosure in a special proceeding may be obtained only by leave of court.¹¹⁸ Finally, in order to increase the possibility of summary determination, something of the continental principle of judicial investigation¹¹⁹ has been introduced into our practice by permitting the court to require the parties to submit additional proof at the hearing.¹²⁰

Since the many separate statutes providing for procedure in special proceedings would remain in effect, the initial impact of the proposed uniform procedure would be only interstitial. Even so, it immediately would solve a major problem of present practice by filling the considerable procedural gaps left by these statutes. In the future, the effect of the proposed procedure could be considerably expanded, by amending these statutes to conform to it. Because of the flexibility of its application, the uniform procedure also can serve as a valuable device for future procedural reform. Without altering the rules themselves, the legislature, or the court in the exercise of its rule-making function, could expand their applicability to any number of new remedies simply by cross-reference.

A uniform mode of summary procedure is not altogether unprecedented in American practice. A few states have experimented with it.¹²¹ The Virginia notice of motion for judgment form of procedure, for example, was instituted in 1849 to afford a speedy remedy for the collection of liquidated sums on a contract.¹²² It employed simple motion-type procedure and became so popular that its applicability was continuously expanded until it recently

114. Rule 27.1.

115. Rule 27.6.

116. Rule 27.2(d).

117. See Title 34, First Report 114-60.

118. Rule 27.8.

119. See Millar, *The Formative Principles of Civil Procedure*, 18 *Ill. L. Rev.* 1 (1923).

120. Rule 27.9(a).

121. See McMahan, *Summary Procedure: A Comparative Study*, 31 *Tul. L. Rev.* 573 (1957); Millar, *Three American Ventures in Summary Civil Procedure*, 38 *Yale L.J.* 193 (1928).

122. It had been used even earlier, beginning in 1732 as a summary means to recover money from a public officer. Millar, *supra* note 121, at 213.

completely superseded the "ordinary" form of procedure.¹²³ But, in addition to this summary procedure, Virginia has maintained the usual multitude of special proceedings provided for by statute scattered throughout its substantive code.¹²⁴

A more recent example of the use of a uniform summary procedure, which continues to retain its vitality, is New Jersey's action "on order to show cause in lieu of summons."¹²⁵ It also employs procedure similar to that on a motion and must be used in all "actions where the court is permitted to proceed in a summary manner" or where a rule specifically makes the procedure applicable.¹²⁶

Such experiments with a unitary treatment of special proceedings, however, have been rare. In most of our states and in the federal practice the need for a summary procedure has been filled piecemeal as it was recognized with regard to particular remedies. This fragmentary approach has continued to the present day, apparently unaffected by the spirit of uniformity which has swept the country since the advent of code reform.

V. CONCLUSION

The traditional American approach to special proceedings has given rise to difficulties very much like those that resulted from the common law approach to actions. New York's problems of definition and of ascertaining the applicable procedure are typical. The special proceeding, provided for in a variety of forms by a multitude of separate statutes is now as ripe for unitary treatment as was the many-formed action in 1848.

Applicability of the general practice provisions and a uniform mode of procedure are proposed as the first steps in a reform which would abolish the forms of special proceedings in the same way that the Field Code abolished the forms of action. The extent to which this goal can be achieved in New York depends on what eventually is done with the separate statutory provisions which now govern particular special proceedings. In the meantime, the proposals should solve many of the more immediate problems engendered by the present system and provide a readily available means for complete reform.

123. Under the new rules, however, it appears to have lost much of its summary character and become the equivalent of a code action. See Va. Rules of the Sup. Ct. of Appeals 3.1-3.20; Burks, *Common Law and Statutory Pleading and Practice* 289-308 (4th ed. 1952). For the practice before the rules, see Burks, *Pleading and Practice in Actions at Common Law 272-320* (3d ed. 1934); Fowler, *Virginia Notice of Motion Procedure*, 24 Va. L. Rev. 711 (1938); see also *Chisholm v. Gilmer*, 299 U.S. 99 (1936) (upholding the constitutionality of the Virginia procedure and authorizing its use by federal trial courts under the Conformity Act).

124. See Denman, *supra* note 89.

125. N.J.R. Civ. P. 4:85.

126. N.J.R. Civ. P. 4:85. The application of the rule has been strictly confined to cases where the authority of statute or rule is expressed. See *Matter of Aronowitz v. Reyville Textile Corp.*, 21 N.J. Super. 234, 91 A.2d 103 (App. Div. 1952); *O'Brien v. Baldwin*, 2 N.J. Super. 134, 65 A.2d 65 (App. Div. 1949).