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PROPOSED CHANGES IN NEW YORK CIVIL PROCEDURE — A SYNOPSIS*

TABLE OF CONTENTS

GENERAL**

FIVE bills drawn by the Advisory Committee on Practice and Procedure were prefiled at the 1960 session of the New York Legislature. These five bills constitute a comprehensive revision of the statutes and rules governing civil procedure in New York State.[1] If enacted as proposed, this revision will

*Note: This synopsis was prepared from the bills submitted to the New York State Legislature in 1960. The bills to be submitted to the 1961 session contain a number of changes not reflected in this synopsis. The following members of the Buffalo Law Review participated in the preparation of this synopsis: David C. Fielding, Henrik H. Hansen, Roger E. Pyle, Eugene W. Salisbury, Joseph F. Shramek and Alan H. Vogt.

**This synopsis was prepared from the original bills as submitted to the legislature. It does not reflect any changes which may have been made in the proposal subsequent to submission or in committee. Because the official legislative documents covering the Third and Fourth Reports of the Advisory Committee on Practice and Procedure were not available at the time of the preparation of this article, advance printings of the documents by Edward Thompson Company (McKinney's Session Law News of New York, 1959 Pamphlet No. 5, Advance Copy, State of New York, Fourth Preliminary Report of the Advisory Committee on Practice and Procedure, 1960) were utilized.

1. Sen. Int. No. 26 (1960). Proposed Civil Practice Law; Sen. Int. No. 27 (1960). Proposed Rules of Civil Procedure; Sen. Int. No. 28 (1960). Amendments to Consolidated Laws to conform with new procedure and to transfer certain sections from the Civil Practice Act; Sen. Int. No. 29 (1960). Amendments to the Unconsolidated Laws to conform with new procedure; Sen. Int. No. 30 (1960). Transfer of one section of the Civil Practice Act to the Unconsolidated Laws. Four preliminary reports with supporting studies were

become effective September 1, 1963 and will be the first such all encompassing change in New York civil procedure since 1848. The proposal modifies and simplifies the overall structure of the law governing New York procedure. In some instances it codifies existing case law and in others it makes substantial changes from existing statutory and case law. It changes the wording of many sections, eliminates others and combines still others. It transfers many sections to the consolidated and unconsolidated laws and proposes changes in other sections of those laws to conform with the changes in procedure.[2]

The proposed revision is premised upon a change in emphasis in the use of statutes and rules to regulate civil procedure. Only those portions of the procedural system which reflect basic policy determinations or effect substantive rights are included in the Civil Practice Law.[3] All of the details are contained in the proposed Rules of Civil Procedure. While this may not be a change from the policy underlying the present Civil Practice Act and Rules of Civil Practice, the proposal evidences a shift in the degree to which matters of detail are governed by rule rather than statute.

Under the existing system rules are promulgated by the combined efforts of the four departments of the Appellate Division, subject to a power in the legislature to modify by statute.[4] The proposal places the rule-making power in the Judicial Conference subject to a similar power of legislative over-ride.[5] It is doubtful that delegation of the rule making function to the Judicial Conference would be valid without a constitutional amendment. It is for this reason that the bills contain a proposed amendment to Article VI of the New York state Constitution[6] as well as a change to the Judiciary Law to implement such a delegation.

The integrated structure of the proposal brings together, under a reduced number of major headings, provisions which are now scattered throughout the Civil Practice Act. Both the Law and the Rules utilize a decimal system to further subdivide the material contained in the principal Articles of the Law and Titles of the Rules.

While the majority of the material contained in the proposed revision is from existing New York statutes and rules either directly or in modified form, the revisors utilize provisions governing procedure in other jurisdictions. In so drawing on foreign provisions, the systems most frequently copied are the

prepared by the Advisory Committee on Practice and Procedure to explain and substantiate the changes proposed. 1957 Legis. Doc. No. 6(b); 1958 Legis. Doc. No. 13; 1959 Legis. Doc. No. 17; 1960 Legis. Doc. No. 20.

2. There are approximately 1730 sections in the Civil Practice Act and 250 Rules of Civil Practice. Under the proposal there are approximately 150 sections to the Civil Practice Law and 400 Rules of Civil Procedure and approximately 300 sections of the Civil Practice Act are transferred to the Consolidated Laws.

3. For example provisions dealing with jurisdiction, venue, statutes of limitations, evidence and appeals, inter alia, are included in the proposed law.

4. N.Y. Judiciary Law § 83.

5. N. Y. Judiciary Law Proposed §§ 232-a, 232-b.

6. Proposed amendment to N.Y. Const. art. VI, § 20. See 1959 Legis. Doc. No. 17, pp. 457-458.

Federal Rules of Civil Procedure, the Illinois Annotated Statutes, and the recently revised New Jersey Rules.

The proposal makes the new law and rules applicable to all actions and special proceedings in the state, unless those actions or proceedings are specifically exempted from their provisions by special court acts governing them.[7] This provision is a change in that the Civil Practice Act is applicable only to courts of record;[8] however, the change is of little actual significance in that actions and special proceedings before courts not of record are in almost all instances governed by special court acts which would exempt them from the proposed provisions.

The following material is a synopsis of the effect of the proposal upon the general areas of civil practice in New York. It is intended to indicate the general structure of the proposed system and to point out the substantial changes which will result if it is enacted. In addition to major changes of substance in the proposal there are many changes in phraseology and instances of consolidation of statutory sections. It is not the intent of this synopsis to detail each such change. If the changes appear to be significant they are discussed, if not, they have been mentioned generally or not at all.

JURISDICTION AND APPEARANCES

The stated objectives of the proposed revision regarding jurisdiction and methods of service are: to benefit the New York litigant by a greater utilization of the state's constitutional power over persons and things, to generally simplify the manner of service, to require the use of the most desirable and effective means of service and to that end eliminate service by publication except where no other method is available, and to eliminate the special appearance thus placing objections to the court's jurisdiction on a level with other preliminary objections.[9]

No attempt is made by the proposal to codify case law as to the circumstances under which New York courts have jurisdiction over the subject matter of a dispute. Four sections of the proposed law deal with jurisdiction. The first of these (Section 3.01) allows the exercise of jurisdiction over persons, property or status as has been allowed under existing law, and neither Section 3.01 nor Section 3.02 is intended to supercede or limit present provisions for acquisition of jurisdiction.[10]

Section 3.02 does, however, make a significant increase in the availability of in personam jurisdiction. It provides a more expanded concept of what acts by a non-domiciliary will give personal jurisdiction to a New York court.

7. Prop. N.Y. Civ. Prac. Law § 1.01; Prop. N.Y.R. Civ Proc. 20.01.
8. N.Y. Civ. Prac. Act § 1.
9. See 1958 Legis. Doc. No. 13, p. 37.
10. Personal jurisdiction over foreign corporations is thus still governed primarily by case law when a cause of action arises out of acts not committed in the state. See Tauza v. Susquehanna R.R. Co., 220 N.Y. 259, 115 N.E. 915 (1917).

Under this section the court obtains personal jurisdiction over a person as to a cause of action arising out of acts within the state if that person: 1. Transacts any business within the state,[11] 2. Commits a tortious act which results in physical injury to person or property,[12] or 3. Owns, uses, or possesses any real property located within the state.[13] In addition, present statutes such as Section 59(a) of the Insurance Law[14] and Section 52 of the Vehicle and Traffic Law would remain in force under the proposal.

The substance of present Civil Practice Act Section 227-a is included in Section 3.03 of the proposed law. Under this section a person not otherwise subject to the state's jurisdiction submits to its jurisdiction by bringing an action here. By its terms such a party is deemed to have appointed his attorney (or the clerk of the court if no attorney) his agent to receive service in any separate action commenced during the pendency of another action and in which he is defendant and another party to the pending action is plaintiff.

The fourth subdivision of the proposed section dealing with jurisdiction (3.04) consists of a statement that a civil action or special proceeding is commenced by service of a summons or notice of petition.[15] This provision is derived from present Section 218 as regards civil actions and is new as regards special proceedings.

As mentioned above, the proposal eliminates the special appearance as a means of raising objections to jurisdiction over a person. Instead, such objections must, under the proposed rules, be raised either by way of a motion under proposed Rule 31.1 or in the answer. If they are not so raised, they are waived.[16] In addition, a new section is introduced which eliminates the possibility of a limited appearance in actions based on *in rem* or *quasi in rem* jurisdiction.[17] Thus, a party cannot appear to defend as to a claim based on *in rem* or *quasi in rem* jurisdiction without submitting himself to personal jurisdiction as to claims beyond that of the *in rem* or *quasi in rem* jurisdiction.

The notice of appearance is retained only in marital actions because a complaint is required to be served with the summons in all other actions.[18]

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11. This provision is broader than Section 210 of the General Corporation Law (only corporations licensed to do business in the state), and Section 229-b of the Civil Practice Act (non-resident individuals doing business within the state).

12. The limitation to tortious acts causing physical injury to person or property apparently excludes actions for libel or slander.

13. Section 3.02 is derived from Section 17 of the Illinois Civil Practice Act.

14. This section is broader than Section 3.02 and is not limited to those causes of action covered by 3.02. Under it, the collection of a premium in New York gives jurisdiction in an action on the contract itself as well as in regard to the premium.

15. Prop. N.Y.R. Civ. Proc. 26.14 provides another method of commencing an action, i.e. an action without pleadings based on a signed statement by all parties.

16. Prop. N.Y.R. Civ. Proc. 28.01(b). This rule alters the present law as contained in Civil Practice Act Sections 237 and 237-a.

17. Id. 28.01(c). This problem is not presently governed by statutory provisions. See 1960 Legis. Doc. No. 20, p. A-314 for a discussion of the problem.

18. Id. 28.02. Based on N.Y. Civ. Prac. Act § 257. Proposed Rule 26.02 contains the provision concerning service of a complaint with a summons.

Provisions governing manner of appearance, and the change of death, disability or removal of a party's attorney are substantially the same as existing provisions and are consolidated in one rule.[19] The present requirement of written authority for the appearance of an attorney in a real property action is similarly continued.[20]

SERVICE

The Proposed Civil Practice Law, Title 25, provides four methods for service of a summons: personal service within the state,[21] personal service without the state[22], service by mail[23] and service by publication.[24] With the exception of service by mail, each of these methods of service is presently available under the Civil Practice Act.[25] Substituted service with leave of court, presently a separate provision of the Civil Practice Act,[26] has been eliminated in the proposed rules inasmuch as the recommended provisions for personal service allow the summons to be delivered to "a person of suitable age and discretion at the place of business, dwelling house or usual place of abode of the person to be served,"[27] without leave of court. It is clear that the proposed rules expand the law of service since they not only encompass all the existing methods of service, including the equivalent of substituted service, without leave of court, but also provide for service by mail, a method of service not generally available under the Civil Practice Act.

The proposed and existing rules deal only with the mechanics and methods of service. However, inasmuch as service is the means of activating the power of the courts, or as is sometimes said, service subjects a party to the jurisdiction of the courts, the law of service is closely connected the law of jurisdiction.

Under the Civil Practice Act, the courts of New York have jurisdiction over a party only to the extent that the party or his property is "present" within the state. A party may be involuntarily subjected to in personam jurisdiction only by personal service within the state or by substituted service upon a resident of the state or by personal service without the state upon a resident. Any other method ot service provides only in rem jurisdiction to the extent that the party's property is actually within the state and subject to the court's power. For this reason personal service without the state and service by publication are specifically restricted in their availability to actions in rem.[28]

Under the Proposed Civil Practice Law, the jurisdiction of the courts of

19. Id. 28.03. Based on N.Y. Civ. Prac. Act §§ 234, 240 and N.Y.R. Civ. Prac. 56.
20. Id. 28.04. Based on N.Y.R Civ. Prac. 55.
21. Prop. N.Y.R. Civ. Proc. 25.02.
22. Id. 25.03.
23. Id. 25.04.
24. Id. 25.05.
25. Cf. N.Y. Civ. Prac. Act §§ 225, 227, 228, 229, 232-a, and 233.
26. Id. §§ 230 and 231.
27. Prop. N.Y.R. Civ. Proc. 25.02(b)(2).
28. N.Y. Civ. Prac. Act §§ 232, 232-a, and 233.

New York would be the same as under the Civil Practice Act,[29] plus additional in personam jurisdiction over non residents who, in person or through an agent, "transacts any business within the state; or commits a tortious act within the state resulting in physical injury to person or property; or owns, uses or possesses any real property situated within the state."[30] Therefore, the proposed expansion of jurisdiction requires a corresponding expansion of the availability of service. The absence of such an expansion would make the increased jurisdiction ineffectual.

To provide for this necessary expansion of the availability of service, the proposed rules provide that personal service without the state and service by publication shall be available in all cases where the courts have jurisdiction, notwithstanding any other prerequisites contained in this section. Therefore, it may be said that the proposed rules of service will allow personal service within or without the state and service by publication in any action where the party to be served will be subject to the court's jurisdiction.[31]

Service by mail, a method not available as a sole means of service under the present Civil Practice Act, is limited by the proposal in its availability, to actions in rem. The proposed rules contain certain other restrictions on the availability of particular methods of service which tend to promote the use of personal service. Personal service, within or without the state, is available in any and all instances where the party to be served is subject to the state's jurisdiction. Service by mail is available only when "service cannot, with due diligence, be made personally within the state. . . ."[32] Service by publication is even more restricted in that it may be used only when the party to be served cannot, with due diligence, be served in any other manner.[33] Normally this will mean that service by publication is available only when the party's address is unknown. Personal service is also encouraged by providing that any method of service other than personal delivery upon the party may allow that party to defend the action within five years after the entry of a default judgment or within one year after a written notice of the judgment is personally delivered to him upon a finding of the court that the party did not personally receive notice of the summons in time to defend.[34]

In light of the foregoing discussion of the general tenor of the proposed rules of service, it is now advisable to examine the changes in the mechanics of the various methods of service. Personal service, within or without the state, is effected by delivery to the party or his duly authorized agent or to

29. Prop. N.Y. Civ. Prac. Law § 3.01.
30. Id. § 3.02
31. Note: Although it is correct to state that a particular method of service is available in all instances where the party is subject to the court's jurisdiction, it must be remembered that the court's jurisdiction may be only quasi in rem. In such instances service must be preceded by an order of attachment and levy.
32. Prop. N.Y.R. Civ. Proc. 25.04.
33. Id. 25.05(a).
34. Prop. N.Y.R. Civ. Proc. 25.06.

a person at the party's place of business or residence.[35] Service by mail is accomplished by the registered or certified mailing of the summons and complaint and is deemed complete when the registered or certified mail is delivered and the return receipt signed or when the return receipt is refused.[36]

To serve by publication, a summons is required to be published together with a brief statement of the objects of the action at least once in each of four successive weeks.[37] Such publication is to commence within twenty days after the granting of the order and is deemed complete on the twenty-eighth day after the first day of publication.[38] It will be noted that these proposed provisions for service by publication shorten the number of publications from six to four, require publication in only one newspaper instead of two and do away with the present requirement of mailing a summons when possible.[39]

Title 25 sets out at length the persons to be served where the party to be joined is an infant, judicially declared incompetent or non-natural entity. Service upon an infant is to be made upon a parent or guardian if they are within the state, or upon a person having care and control of the infant or the infant's employer. Any infant fourteen years or older must also be served.[40] Service upon an incompetent has been revised in the proposed provisions to require special treatment only as to parties judicially declared incompetent; in these instances service is to be made upon the committee and the incompetent.[41] Service upon a partnership is completed by service upon any of the partners.[42] A significant change is found in the provision for service upon a corporation in that the proposed provisions make no distinction between foreign and domestic corporations. Service upon a corporation would be made by serving an officer, director, managing or general agent or any other agent authorized by appointment or law to receive such service.[43] The proposed rules also provide the various persons to be served where the party is a governmental subdivision, court, board or commission.[44]

When the proposed rules speak of a "summons" it means the summons and all papers required to be served in the same manner, i.e. subpoenas and supplemental summons.[45] Amendments of a summons and/or proof of service may be granted at any time in the court's discretion and upon such terms as it deems just.[46] Except in matrimonial actions in all instance when service is

35. Id. 25.02(b)(2), 25.03.
36. Id. 25.04.
37. Id. 25.05(b).
38. Id. 25.05(c).
39. Cf. N.Y. Civ. Prac. Act §§ 232-b, 234; N.Y.R. Civ. Prac. 50.
40. Prop. N.Y.R. Civ. Proc. 25.02(c).
41. Id. 25.02(d); Cf. N.Y. Civ. Prac. Act § 226.
42. Id. 25.02(e).
43. Id. 25.02(f).
44. Id. 25.02(f) and (g).
45. Id. 25.02(a).
46. Id. 25.02(b).

made by any method other than service by publication, the summons must be accompanied by a compaint.[47]

Proof of service shall be in the form of a certificate by a sheriff or other authorized public officer or in the form of an affidavit of any other person who makes the service setting forth the date, place, manner of service and stating who was served.[48]

FORM, FILING AND SERVICE OF PAPERS

Proposed Title 32 provides uniform rules covering the form, filing and service of all papers served or filed in an action or special proceeding.

Captions are to be required on all papers served or filed.[49] Present practice requires captions only on the complaint.[50]

Papers will need no longer be subscribed; indorsement only will be uniformly required.[51] Under the proposed rule, if an affidavit or exhibit is in a foreign language, it must be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate.[52]

Since the adverse party has the original and the translation, his opportunity to object to the accuracy of the translation is adequate.

Except as otherwise required, original papers need not be served or filed, for copies are allowed.[53] The time to object to any defect in form has been extended from one day to two, as being a more reasonable period.[54]

Except as otherwise provided, papers required to be filed must be filed with the clerk of the court in an action, and with the clerk of the county in a proceeding.[55]

The age limitation and party prohibition with respect to serving a summons have been extended to the service of all papers, so that papers may be served by any person eighteen years of age or older who is not a party.[56] Service of papers upon an attorney can be effected by serving him personally;[57] by mailing the papers to him at his last known mailing address from any post office within the state;[58] if his office is open, by leaving it with the person in charge or in a conspicuous place there;[59] if his office is not open, by depositing it in his mail drop or box;[60] or by leaving it at his residence with a person

47. Id. 26.02.
48. Id. 25.02(c).
49. Prop. N.Y.R. Civ. Proc. 32.01(c).
50. N.Y. Civ. Prac. Act § 255-1.
51. Prop. N.Y.R. Civ. Proc. 32.01(d).
52. Id. 32.01(b).
53. Id. 32.01(e).
54. Id. 32.01(f).
55. Id. 32.02.
56. Id. 32.03(a).
57. Id. 32.03(b)1.
58. Id. 32.03(b)2.
59. Id. 32.03(b)3.
60. Ibid.

of suitable age and discretion if service cannot be made at his office.[61] If a party has no attorney, or his attorney cannot be served, the party may be served in the same manner as an attorney, except that he may not be served at his office.[62] As a last resort, service may be made by filing the paper as if it were a paper required to be filed.[63]

STATUTES OF LIMITATION

Article 5 of the proposed Civil Practice Law concerns the time within which various types of actions must be commenced. The principal change which this article works on existing law is that the applicable periods are generally shortened. The revisors did not attempt to revise the periods of limitation which are now contained in laws, codes, and charters other than the Civil Practice Act, but indicated their feeling that such a change should be made.[64]

The sections dealing with periods of limitation have been reorganized by the proposal and the number of periods have been reduced.[65] The table on page 503 compares the proposed periods of limitation with those now existing.

The provisions relating to application, computation and tolling of the statutes of limitation are substantially the same as those under existing law[66] with the following exceptions: The provisions extending the periods in the event of the plaintiff's disability have been shortened;[67] the deferment of the application of the statutes because of an inability to obtain personal jurisdiction over a defendant in an *in rem* action (where such personal jurisdiction is unnecessary) are eliminated;[68] the provisions dealing with statutes of limitation in time of war are put in the statute on a permanent basis rather than a temporary basis;[69] certain provisions dealing with title and possession of real property now contained in the Civil Practice Act provisions on statutes of limitation are removed to the Real Property Law.[70]

In addition to the above mentioned changes, new provisions are proposed which would:

Allow interposition of a counterclaim otherwise barred if it arose from the same transaction or occurrence as the plaintiff's claim and the interposition

61. Id. 32.03(b)4.
62. Id. 32.03(c).
63. Id. 32.03(d).
64. 1958 Legis. Doc. No. 13, p. 43.
65. Prop. N.Y. Civ. Prac. Law §§ 5.11-5.18. Cf. N.Y. Civ. Prac. Act §§ 31-34, 44-53, 1226, 1286.
66. Id. §§ 5.01-5.07. Cf. N.Y. Civ. Prac. Act §§ 12, 20, 21, 57.
67. Id. § 5.08. Cf: N.Y. Civ. Prac. Act §§ 43, 60. The extension is reduced from five to three years if the period is less than three years and to the length of the disability if the period is less than three years. The maximum period of extension is ten years except in the instance of infancy.
68. Id. § 5.07(3).
69. Id. § 509. Cf. N.Y. Civ. Prac. Act §§ 13, 27, 28-a.
70. Civil Practice Act §§ 35-42 are transferred to proposed Real Property Law §§ 260-a —260-i. Section 59 is transferred to proposed Personal Property Law Section 33(d).

STATUTES OF LIMITATION
(For Particular Actions)

Cause of Action	NEW YORK CIVIL PRACTICE ACT Period*	Authority	PROPOSED NEW NEW YORK CIVIL PRACTICE LAW Period*	Authority
Action by the state in relation to real property.	40	Sec. 31	10	5.12a
Action in relation to real property claimed through letters patent or grant from the state.	40	Sec. 32	10	5.12a
Action to recover principal or interest upon bonds as defined in CPA Sec. 47-b.	20	Sec. 63	20	5.11
Action upon a money judgment rendered in a court of record or duly docketed.	20	Sec. 44	20	5.11b
Action for dower.	20	Sec. 33	5	5.13(1)
Action for ejectment after annulment of letters patent.	20	Sec. 33	10	5.12b
Action for the recovery of real property.	15	Sec. 34	10	5.12a
Action to redeem real property from a mortgage.	15	Sec. 46	10	5.12c
Action exclusively within equity jurisdiction.	10	Sec. 53	5	5.13(1)
Action by the people founded upon the spoliation or other misappropriation of public property.	10	Sec. 1226	5	5.13(5)
Action not otherwise specially provided for.	10	Sec. 53	5	5.13(1)
Action upon a contract.	6	Sec. 48(1)	5	5.13(2)
Action upon a judgment rendered in a court not of record, if not docketed.	6	Sec. 48(7)	5	5.12d
Action for damages for personal injuries other than resulting from negligence.	6	Sec. 48(3)	3	5.14(7)
Action upon a sealed instrument (except as provide in C.P.A. Sections 47-a and 47-b).	6	Sec. 47	5	5.13(3)
Action upon bond and/or mortgage secured by real property.	6	Sec. 47-a	5	5.13(4)
Action to recover a chattel.	6	Sec. 48(4)	3	5.14(5)
Action to recover upon a liability created by a statute, except a penalty or forfeiture.	6	Sec. 48(2)	3	5.14(2)

*In years.

STATUTES OF LIMITATION (*Continued*)

Cause of Action	NEW YORK CIVIL PRACTICE ACT Period*	Authority	PROPOSED NEW NEW YORK CIVIL PRACTICE LAW Period*	Authority
Action to establish a will.	6	Sec. 48(6)	5	5.13(7)
Action to procure judgment on ground of fraud.	6	Sec. 48(5)	5	5.13(6)
Action by or on behalf of corporation against a present or former director, officer, or stockholder, for an accounting, or to procure judgment on ground of fraud, or to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute, unless such action is on to recover damages for waste or for injury to property or for an accounting in connection therewith, in which case the three year statute is applicable.	6	Sec. 48(8)	5	5.13(8)
Action for divorce.	5	Sec. 1153	5	171 Dom. Rel. Law
Action to annul a marriage on grounds of physical incapacity.	5	Sec. 1141	5	141 Dom. Rel. Law
Action to annul a marriage on grounds of fraud.	3	Sec. 49(9)	3	5.14(7)
Action for personal injuries resulting from negligence.	3	Sec. 49(6)	3	5.14(7)
Action upon a statute for a penalty or forfeiture where the action is given to the person aggrieved, or to the person and the people of the state.	3	Sec. 49(3)	3	5.14(2)
Action against a sheriff, coroner, constable, or other officer, for the non-payment of money collected upon an execution.	3	Sec. 49(1)	3	5.14(1)
Action against a constable for official misfeasance or nonfeasance, except an escape.	6	Sec. 49(2)	1	5.15(1)
Action against an executor, administrator or receiver, or a trustee of an insolvent debtor, to recover a chattel or damages for taking or injuring personal property.	3	Sec. 49(5)	3	5.14(5)(6)
Action against a director or stockholder of a moneyed corporation or a banking association to recover a penalty or forfeiture imposed, or enforced a liability created by common law or by statute.	3	Sec. 49(4)	3	5.14(3)
Action to recover damages for a violation of right of privacy under Sec. 51 of the Civil Rights Law.	3	Sec. 49(8)	3	5.14(8)
Action to recover damages for an injury to property.	3	Sec. 49(6,7)	3	5.14(6)

STATUTES OF LIMITATION (*Continued*)

Cause of Action	NEW YORK CIVIL PRACTICE ACT Period*	Authority	PROPOSED NEW NEW YORK CIVIL PRACTICE LAW Period*	Authority
Action for the appointment of a receiver of assets of a foreign corporation.	3	Sec. 977-b		**
Action for assault and battery.	2	Sec. 50	1	5.15(3)
Action for false imprisonment or malicious prosecution.	2	Sec. 50	1	5.15(3)
Action upon a statute for a penalty or forfeiture to the people of the state.	2	Sec. 50	3	5.14(2)
Action for malpractice.	2	Sec. 50	3	5.14(7)
Action upon a statute for a penalty or forfeiture given wholly or partly to any person who will prosecute for the same.	1	Sec. 52	1	5.15(4)
Action upon an arbitration award.			1	5.15(5)
Action against a sheriff or a corner for official misfeasance or nonfeasance other than for the nonpayment of money collected upon an execution.	1	Sec. 51(1)	1	5.15(1)
Action against an officer for an escape.	1	Sec. 51	1	5.15(2)
Action to recover damages for libel or slander.	1	Sec. 51	1	5.13(3)
Action against sheriff by third-party claimant to property seized upon attachment.	6 mo.	Sec. 925	1	5.15(1)
Proceeding against a public body or officer under Article 78 of the Civil Practice Act.	4 mo.	Sec. 1286	4 mo.	5.17
Action against sheriff by third-party claimant to property taken in replevin.	3 mo.	Sec. 1108		**
Notice of motion to vacate, modify, or correct an arbitration award.	3 mo.	Sec. 1463		**

*In years.
**Not yet considered.

of any counterclaim or defense if it was not barred at the commencement of the action;[71]

Make amended pleadings date back for statute of limitations purposes unless the original pleadings did not give notice of the claims in the amended pleadings;[72]

Commence the period in an action for breach of warranty of authority at the time of discovery of "facts constituting lack of authority";[73]

Commence the period in an action based on mistake (as well as fraud) from the time discovery of the mistake or the time when it should reasonably have been discovered.[74]

VENUE

The revisors treat venue as a matter of policy rather than implementation; therefore the provisions governing it are contained in the proposed law rather than in the proposed rules. The general structure and requirements of existing law as to venue are unaltered by the proposal. Under Article 4 the theory that mistakes in venue do not affect jurisdiction and thus may be waived is retained.[75] To this end has been added a section providing for enforcement, on a motion to change venue, of an agreement to fix venue.[76] Moreover, the three bases for venue under existing law, residence, situs of the property in question, and in limited instances,[77] the place where the cause of action arose are continued. However, changes have been made regarding which basis controls in various types of actions.

Under the proposal, except where it is specifically provided otherwise, the proper venue for an action is the county in which either party resides, or if neither party is a resident of the state, in the county chosen by the plaintiff.[78] This provision conforms with present Section 182 of the Civil Practice Act. In instances where the joinder of claims or parties cause a conflict concerning venue, a new section would allow the court to order trial at a place for at least one of the parties.[79]

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71. Id. § 5.03(d). Changes N.Y. Civ. Prac. Act § 11.

72. Id. § 5.03(e). Overcomes the effect of Harriss v. Tams, 258 N.Y. 229, 179 N.E. 476 (1932). Cf. Fed. R. Civ. Proc. 15(c).

73. Id. § 5.06(b)(2). The present law in this area is presently uncertain. Moore v. Maddock, 251 N.Y. 420, 167 N.E. 572 (1929).

74. Id. § 5.06(c). There is no existing provision on this area. However, the period appears to commence at the date of the delivery of the instrument rather than the date of discovery of the mistake.

75. Prop. N.Y. Civ. Prac. Law § 4.01. Derived from N.Y. Civ. Prac. Act § 186.

76. Id. § 4.02. This provision codifies the rule of Syracuse Plaster Co. v. Agostini Bros. Bldg. Corp., 169 Misc. 564, 7 N.Y.2d 897 (Sup. Ct. 1938).

77. Id. § 4.07. These are instances of suits against public official as are now set forth in N.Y. Civ. Prac. Act § 1287.

78. Id. § 4.04. Section 4.05 lays a special venue for actions against cities, counties, towns and villages; Section 4.06 does the same for suits against public authorities. The venue so laid is generally the county in which the municipality or the principal office of the authority is located.

79. Id. § 4.02.

As is now the law (Section 183), actions relating to real property are triable where the realty is located.[80] Replevin actions are no longer considered transitory actions under the proposal and therefore, the proper venue for such an action is the county in which the chattels are located.[81]

A new provision is added whereby a domestic corporation or a foreign corporation licensed to do business in New York is deemed a resident of the county in which its principal place of business is located.[82] This provision codifies case law as to domestic corporations[83] (except railroads),[84] but changes it as to foreign corporations licensed to do business in the state, which corporations were heretofore considered non-residents for venue purposes.[85]

Another new provision makes unincorporated associations, partnerships, and individually owned businesses residents of both the county in which their principal offices are located and the county where any officer, partner or individual owner resides.[86] This provision is a departure so far as it parallels the corporation provision giving residence at the place of the principal office.

The provisions of present Section 184-a giving assignees the residence of their assignors for venue purposes is contained in the Proposed Section 4.04(e). The portion of Section 184-a giving an additional residence where the contract was made or the cause of action arose, is however, eliminated.

Under Proposed Section 4.01 an action may be tried in any county designated by the plaintiff unless it is changed on motion by the defendant or by consent or stipulation of the parties. Thus, unless properly contested, under the new procedure as under the present, improper venue is waived. On proper motion the place of trial may be changed for the same grounds as now allowed under Section 187, i.e. improper initial venue, inconvenience of material witnesses, and impossibility of impartial trial.[87] The provision of present Rule 146 requiring a demand for change of venue prior to a motion therefore has been replaced by the sole requirement of a motion to change venue.

In order to discourage the improper placing of venue, a new provision is proposed which gives the court the discretionary power to order plaintiff to pay defendant's costs of moving for a change of venue (including attorney's fees) if the plaintiff's original designation was without probable cause.[88]

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80. Id. § 4.08.
81. Id. § 4.09.
82. Id. § 4.04(c).
83. Jonas Equities v. 614 E. 14th St. Realty Corp., 282 App. Div. 773, 123 N.Y.S.2d 44 (2d Dep't 1953).
84. Railroad corporations are now treated for venue purposes as residents of every county in which they operate or conduct business. Levey v. Payne, 200 App. Div. 30, 192 N.Y. Supp. 346 (1st Dep't 1922); De Groat v. N.Y. Cent. R. Co., 235 App. Div. 816, 256 N.Y. Supp. 853 (2d Dep't 1932).
85. Nash Kelvinator Sales Corp. v. Clark, 276 App. Div. 1056, 96 N.Y.S.2d 354 (4th Dep't 1950); Mills & Gibb v. Starin, 119 App. Div. 336, 104 N.Y. Supp. 230 (1st Dep't 1907); Taller & Cooper v. Rand, 286 App. Div. 1096, 145 N.Y.S.2d 557 (2d Dep't 1955).
86. Prop. N.Y. Civ. Prac. Law § 4.03(d).
87. Id. § 4.10(a).
88. Id. § 4.10(e).

JOINDER OF CLAIMS, CONSOLIDATION, SEVERANCE AND REMOVAL

Under the proposal the substance of the existing procedures concerning joinder of claims,[89] consolidation,[90] and severance[91] have been treated in the three rules in Title 24. While the phraseology of Rules 24.02 and 24.03 generally follows that of Federal Rules of Civil Practice 42(a) and (b), the procedures provided by the three sections do not appear to deviate from existing law.

The now numerous sections concerned with removal of actions are consolidated in Title 22 of the proposal.[92] The general procedures and instances of removal are not changed by the rules in the Title. A minor change is, however, introduced by Rule 22.02(b). This rule is derived from portions of present Sections 110-a and 110-b, and prescribes the manner of filing of orders and the transfer of records in all (rather than only in certain) instances of removal.

PARTIES

Many of the existing provisions concerning parties have recently been changed as a result of Judicial Council recommendations. Principal among these are the provisions governing permissive joinder of parties,[93] interpleader,[94] third party practice[95] and intervention.[96] The proposed rules make no substantive changes in these recently revised areas.

The proposal does, however, make changes in some areas which have not been recently revised. The "real party in interest" provision of Section 210 of the Civil Practice Act has been eliminated. This omission does not seem to change the law because the eliminated phrase has no practical effect except to imply that a beneficially interested party may always bring a suit and is the only party who may do so—an implication which is not always true.[97]

The proposed rules dealing with necessary parties to an action make no substantial changes in existing law. They do however, completely rephrase the existing statutory provisions. The "indispensable" - "conditionally necessary" dichotomy of Section 193 is replaced by a standard as to necessary parties[98] coupled with five enumerated criteria governing excuse of joinder of

89. N.Y. Civ. Prac. Act § 258.
90. Id. §§ 96, 96-a, 97.
91. Portions of Id. §§ 85, 96, 258, 262, 443, 474, 475, 702.
92. N.Y. Civ. Prac. Act §§ 73, 95, 97, 110, 110-a, 110-b, 190, 190-a.
93. Prop. N.Y.R. Civ. Proc. 23.02. Cf. N.Y. Civ. Prac. Act § 212. See 15 N.Y. Jud. Council Rep. 56, 209 (1949).
94. Prop. N.Y.R. Civ. Proc. 23.06. Cf. N.Y. Civ. Prac. Act § 285. See 20 N.Y. Jud. Council Rep. 27, 278, 279 (1954). By the revision (Rule 23.06(g)) interpleader is made available in all courts.
95. Prop. N.Y.R. Civ. Proc. 23.07-23.11. Cf. N.Y. Civ. Prac. Act § 193-2. See N.Y. Jud. Council Rep 58, 370 (1945).
96. Prop. N.Y.R. Civ. Proc. 23.12-23.14. Cf. N.Y. Civ. Prac. Act § 193-b. See 11 N.Y. Jud. Council Rep. 59, 396 (1945).
97. 1957 N.Y. Legis. Doc. No. 66, pp. 207-222.
98. "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judg-

necessary parties. The inclusion of these criteria is an innovation and the criteria themselves are based on those factors which have been emphasized by the case law, i.e. availability of another effective remedy, the prejudice caused by the non-joinder, the availability of other means of avoiding the prejudice, the feasibility of a protective provision in the final judgment, and the effectiveness of a judgment without the presence of the party in question.[99] The wording of the rule may be read to allow the court to determine indispensability any time prior to judgment. The effect of non-joinder or mis-joinder of parties is governed by Rule 22.03. This rule provides that non-joinder unless excused is ground for dismissal without prejudice, but that mis-joinder is not a ground for dismissal. This rule parallels present Sections 192 and 193 and works no change.

Rule 23.05(a) relating to class actions, incorporates the phraseology of present Section 195 concerning the instances in which such actions are allowed.[1] Subsections (b) and (c) are new. Subsection (b) allows the court to make protective orders at any stage of a class action and (c) requires court approval of any compromise, discontinuance or dismissal of a class action.

The proposed rules relating to substitution of parties are patterned after Federal Rule 25. They simplify and to a certain extent modify existing rules on the matter.[2] The underlying principal of the proposed rules is "that substitution of the proper parties may be ordered by the court on its own motion or on the motion of any party or of the person who should be substituted, and that the consequence of failure to substitute is a dismissal of the action as to the party for whom substitution should have been made."[3] Rule 20.15 governs substitution on the death of a party, 23.16 substitution of his committee for an incompetent, 23.17 substitution of a receiver or of the representatives of a dissolved corporation, 23.18 substitution upon the transfer of interest, 23.19 substitution of public officers and 23.20 substitution of indemnitors for executing or attaching officer. The rules do not stipulate any specific time in which substitution must be made; instead the action will be dismissed as to the party for whom substitution should have been made if substitution is not effected within a reasonable time.[4] Rule 23.21 provides for the tolling of procedural limitation periods when substitution is required until 15 days after substitution is effected.

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ment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant." Prop. N.Y.R. Civ. Proc. 23.01(a).

99. Supra note 97, pp. 241-251.

1. The committee's original proposal (1957 report) adopted the change in class action provisions recommended by the Judicial Council in 1952. 18 N.Y. Jud. Council Rep. 80, 217, 223 (1952). However, between the initial report and the proposed bill the committee retracted its position and conformed the proposal with existing statutory law.
2. Cf. N.Y. Civ. Prac. Act. §§ 82-90, 99, 192, 478, 557, 578, 579.
3. Supra note 97, p. 26.
4. Prop. N.Y.R. Civ. Proc. 23.20.

Also included in Title 23 on parties are the rules allowing for the suit of unknown parties[5] for suit by or against a partnership in the partnership name;[6] for suits by or against an unincorporated association by or against the president or treasurer thereof,[7] and for suits against public officers by official title.[8] Each of the provisions is a restatement of existing provisions.

INFANTS, INCOMPETENTS AND POOR PERSONS

Under the proposed rules most of the many existing sections and rules dealing with infants and incompetents are brought together in Title 91. Generally the procedure is the same for the protection of both infants and incompetents and many of the prior distinctions have been eliminated. Certain of the provisions contained in the title represent substantial deviations from existing law. Rule 91.01 provides that a parent or guardian of the property of an infant may represent that infant and that a guardian ad litem need not be appointed.[9] In addition it provides that the committee of an incompetent may similarly represent the incompetent. The section permits appointment of a guardian ad litem for an infant without parents or guardian and for a person incapable of adequately protecting his rights but not judicially declared incompetent and in instances where there is a conflict of interest.[10]

Under the proposal, application for appointment of a guardian ad litem may be made by an infant over fourteen years, by a friend, guardian or committee, by any other party to the action if motion has not been made by another within ten days after completion of service, or by the court on its own initiative.[11] This provision makes certain changes. It allows the guardian of property to move where only the general or testamentary guardian of an infant under fourteen can so move under present law;[12] and the provision concerning application by another party to the action is made applicable to incompetents whether or not judicially so declared.[13]

Existing law requires appointment of a guardian ad litem before a default judgment can be taken against an infant.[14] Proposed Rule 21.03 allows a default against an infant or a judicially declared incompetent if his representative has appeared in the action or after twenty days following appointment of a guardian ad litem. Similarly, applicability of the provision governing the disposition of proceeds of a claim has been expanded to include judicially

5. Id. 23.23. Cf. N.Y. Civ. Prac. Act §§ 215, 232-a(6), 1036, 1055, 1064-69, 1073, Fed. R. Civ. Proc. 25(c). Provision for use of a fictitious name is eliminated by the proposal.
6. Prop. N.Y.R. Civ. Proc. 23.24. Cf. N.Y. Civ. Prac. Act § 222-a.
7. Ibid.
8. Prop. N.Y.R. Civ. Proc. 23.22. Cf. N.Y. Civ. Prac. Act § 213.
9. Cf. N.Y. Civ. Prac. Act § 202.
10. Id. § 208.
11. Prop. N.Y.R. Civ. Proc. 91.02.
12. Cf. N.Y. Civ. Prac. Act § 203.
13. In addition the time before which such a motion can be made is reduced from twenty to ten days. Cf. N.Y.R. Civ. Prac. 39.
14. N.Y. Civ. Prac. Act § 492.

declared incompetents as well as infants, and in addition pertains to the proceeds of all actions not just personal injury claims.[15] Under these proposed provisions the appointment of a guardian or committee of property is unnecessary if the amount of the proceeds is less than $1000,[16] or if the property is deposited in banks or trust companies specified by the court and subject to withdrawal on court order,[17] or if the proceeds are handled in such other manner as the court may direct.[18]

Settlement of all claims both by and against infants and judicially declared incompetents is governed by Proposed Rule 91.07. The distinction between settlement of pending actions by motion[19] and settlement by special proceeding of claims in which no action[20] has been commenced has been retained. Numerous changes are made by the proposed rule: it governs judicially declared incompetents as well as infants; all claims by or *against* infants and judicially declared incompetents are made capable of settlement;[21] the motion or petition for settlement may be made by the parent or guardian of property (or committee in the case of an incompetent) if no guardian ad litem has been appointed. Proposed Rules 91.07(b-f) restate existing provisions concerning affidavits required to be submitted and certain of the steps required before an order approving a settlement will be granted.[22]

The proposed rules dealing with poor persons (Title 94) are essentially a recodification of the present statutes and rules.[23] The distinction making it easier to obtain permission to prosecute than to defend as a poor person is eliminated.[24] The statement presently required that the applicant is not worth more than $300 is also eliminated.[25] Instead the proposal requires that the facts of the applicant's financial position be disclosed to the court for determination of the petition in its discretion.[26] In addition the petitioner is required to disclose the names of others who are beneficially interested in the lawsuit and whether or not they are financially able to pay for it.[27]

PLEADINGS

Title 26 of the proposed rules, which title contains the provisions dealing with pleadings, proposes many deviations from present practice. The principal change therein concerns the contents and manner of statement of pleadings.

15. Prop. N.Y.R. Civ. Proc. 91.06. Cf. N.Y. Civ. Prac. Act § 980-a.
16. Id. 91.06(1). Present Section 980-a allows such treatment of sums not greater than $500.
17. Id. 91.06(2). Cf. N.Y. Civ. Prac. Act § 980-a.
18. Id. 91.06(3).
19. N.Y. Civ. Prac. Act § 294.
20. Id. §§ 1320-1324.
21. Cf. Id. §§ 294, 1320.
22. Cf. Id. §§ 294, 1448(1).
23. Id. §§ 196-199, 558, 1493; N.Y.R. Civ. Prac. 35-37.
24. Id. §§ 196, 198.
25. Id. § 199.
26. Prop. N.Y.R. Civ. Proc. 94.01.
27. Ibid.

In addition, the use of verified pleadings is almost eliminated and as mentioned in the discussion of service, a complaint must be served with the summons in all actions except matrimonials.

The general changes in pleading requirements must be considered in the light of other proposed changes since together they present an integrated change in the methods of bringing a lawsuit to trial. Four other changes which are integrated with the changed pleading requirements are: expanded disclosure and discovery procedure;[28] extended use of the pre-trial conference;[29] elimination of the bill of particulars; and altered procedures concerning motions for accelerated judgment.[30] Each of these changes are explained in appropriate sections of this synopsis.

The present denomination of pleadings is retained by the proposal, i.e. complaint, answer, counterclaim, cross-claim, interpleader complaint and third party complaint, and their functions remain unchanged.[31] Present law allowing liberal joinder of claims and liberal interposition of counterclaims is continued and no compulsory counterclaim provision is included. The only significant change concerning counterclaims which is made is the inclusion of a provision requiring a reply to a counterclaim,[32] but the change is in accord with present statutory interpretation. The proposal adds provisions governing cross-claims and requires an answer to them.[33] No such provisions presently exist, but the requirements are in accord with Federal practice and most state practice.[34]

As to the contents of pleadings in general, the requirements of pleading only material facts, and the prohibitions against pleading either evidence or conclusions are eliminated.[35] Instead pleadings are to consist of "plain concise statements."[36] These "statements shall be sufficiently particular to give the court and parties fair notice of the transactions or occurrences intended to be proved and the nature of each cause of action or defense."[37] To illustrate the requirements of these sections an appendix to the proposed rules will contain a number of sample forms of pleadings.

An additional change relating to pleadings in general is made by the provisions of Rule 26.03 allowing reference to and incorporation of material stated elsewhere in the same pleading by mere reference instead of phrases presently used indicating repetition and reallegation of the material mentioned elsewhere.[38]

Special pleading rules concerning particularity of pleading special matters

28. Prop. N.Y.R. Civ. Proc. Title 34.
29. Id. Title 35.
30. Id. Title 31.
31. Prop. N.Y.R. Civ. Proc. 26.01.
32. Ibid.
33. Ibid.
34. Cf. Fed. R. Civ. Proc. 7(a).
35. N.Y. Civ. Prac. Act § 241.
36. Prop. N.Y.R. Civ. Proc. 26.04.
37. Id. 26.05.
38. Id. 26.04.

are included in Rule 26.06. The rules concerning conditions precedent to a contract, corporate status, and judgments, decisions and determinations are substantially the same as existing rules.[39] In addition rules have been included to require itemization of special damages and in an action on a judgment a statement as to partial satisfaction.

Special pleading rules relative to specific actions are contained in Rule 26.07. The first three of these rules require the initial inclusion of matters presently included in bills of particulars: in personal injury and death actions, the items required in present Rule 116 plus the disclosure of the contents of pertinent hospital records or an authorization to inspect them; in actions or defenses based on writings a copy of the portion of the writings relied on; and in actions or defenses based on oral promises or agreements, a statement of the terms of the agreement and certain facts relative thereto. The fourth of these rules is based on present Rule 96 and allows the general statement of the application of allegedly defamatory matter to the plaintiff in a libel or slander action. The last rule relative to specific actions codifies the common law rule that the circumstances constituting the wrong in an action or defense based on fraud or mistake must be stated in detail.[40]

In the large majority of pleadings verification is eliminated by the proposal. In its stead certification by the party's attorney is required on all pleadings.[41] Only if a party is not represented by an attorney,[42] or if verification is specifically required by another rule or statute are pleadings to be verified. When verification is required, the mechanics of verification are basically the same as those presently required.[43] If a pleading is not certified or verified as required (or is certified or verified with intent to defeat the requirements) it may be stricken.[44]

The existing rules concerning commencement of an action without pleadings[45] and concerning amended and supplemental pleadings[46] are retained in substance by the proposal, but are reworded to add clarity and eliminate excess material.

DISCLOSURE

In a complete overhaul of present procedures for pre-trial discovery, the proposed amendment provides for "disclosure,"[47] under Title 34. In line with this total change philosophy, the first subdivision provides for "full dis-

39. Cf. N.Y.R. Civ. Prac. 92 (conditions precedent), 93(1) (corporate status), 95 (judgments, decisions and determinations). The rule on judgments etc. has been expanded to include determinations by administrative tribunals.
40. Cf. Fed. R. Civ. Proc. 9(b).
41. Prop. N.Y.R. Civ. Proc. 26.11(a).
42. Id. 26.11(b).
43. Ibid.
44. Id. 26.11(c).
45. Id. 26.15. Cf. N.Y. Civ. Prac. Act § 218-a; N.Y.R. Civ. Prac. § 118.
46. Id. 26.13. Cf. N.Y. Civ. Prac Act §§ 244-245-b.
47. The word "disclosure" has been chosen as an all-encompassing descriptive title embracing all types of discovery device.

closure . . . of all relevant evidence and all information reasonably calculated to lead to relevant evidence."[48] The manifest purpose of this rule is to render ineffective the bulk of existing statutory and case law limitations and abolish distinctions between parties and witnesses,[49] admissible evidence and other information,[50] the "necessary and material" requirement,[51] and between kinds of cases in which discovery may be had.[52]

Once having made the entire range of actions and proceedings open to pre-trial discovery,[53] the proposal undertakes specific limitations. Privileged matter is not obtainable.[54] Similarly, material prepared for litigation by a party, his attorney, agent, or an expert, ". . . shall not be obtainable unless the court finds that withholding it will result in injustice or due hardship."[55]

In line with the liberal view adopted by the proposal, a party is not expressly limited to any one type of disclosure device nor to the number of times one or more may be used.[56] Further, disclosure is had by stipulation or upon notice, and leave of court is not required.[57] The significance of this latter provision may be readily discerned when it is noted that under present procedures, at least seventeen instances of pre-trial discovery require stipulation or order of court.[58] Proposed restrictions on availability of disclosure are no

48. Prop. N.Y.R. Civ. Proc. 34.01(a).

49. See N.Y. Civ. Prac. Act § 288; see also Brannan v. O'Mara, 193 App. Div. 892, 183 N.Y. Supp. 107 (2d Dep't 1920).

50. South Shore Thrift Corp. v. National Bank, 255 A.D. 859, 7 N.Y.S.2d 393 (2d Dep't 1938)—hearsay; Vaugh v. City of New York, — Misc. —, 132 N.Y.S.2d 919 (Sup. Ct. 1954)—opinion testimony; Metropolitan Life Ins. Co. v. Hugh Grant Drug Co., — Misc.—, 140 N.Y.S.2d 798 (Sup. Ct. 1955)—conclusions of witnesses; In re Lawyer's Mortgage Co., 245 App. Div. 53, 280 N.Y. Supp. 358 (1st Dep't 1935)—parol evidence rule; Rauppins v. City of New York, 285 A.D. 958, 138 N.Y.S.2d 177 (2d Dep't 1955)—prior accidents; Scudero v. Campbell, 288 N.Y. 328, 43 N.E.2d 66 (1942)—subsequent repairs; Milk Tank Service v. Wood, 200 Misc. 333, 107 N.Y.S.2d 166 (Sup. Ct. 1951)—name of insurer.

51. Nicoll v. Columbia Broadcasting System, 207 Misc. 388, 138 N.Y.S.2d 518 (Sup. Ct. 1955); Amster v. Kahn, — Misc. —, 61 N.Y.2d 561 (Sup. Ct. 1946).

52. See N.Y.R. Civ. Proc. 121-a, as amended.

53. Prop. N.Y.R. Civ. Proc. 34.01(a).

54. Id. 34.01(b). There is presently some controversy on whether a claim of privilege will bar the exam or whether the privilege goes only to the questions. The case law of all departments now seems to allow the exam, requiring invocation of the privilege upon questions asked. Ryan v. Regan, 46 App. Div. 590, 62 N.Y. Supp. 39 (1st Dep't 1900); Tobias v. North American Import Co., 133 Misc. 474, 235 N.Y. Supp. 217, aff'd 224 App. Div. 846, 231 N.Y. Supp. 901 (2d Dep't 1928); Triangle Publications v. Ferrare, 4 A.D.2d 591, 168 N.Y.S.2d 128 (3d Dep't 1957); In re Application of Downey, 11 A.D.2d 624 (4th Dep't 1960).

55. Prop. N.Y.R. Civ. Proc. 34.01(c). The express intent of the revisers is to adopt the Hickman doctrine. Hickman v. Taylor, 329 U.S. 495 (1947).

56. Prop. N.Y.R. Civ. Proc. 34.02(a) provides . . . Information is obtainable by one or more of the following disclosure devices: depositions upon oral or written questions, interrogatories, discovery and inspection of documents or property, physical and mental examination of persons and requests for admissions. . . .

57. Id. 34.02(b). A 10-day notice is required for taking deposition by oral questions. Id. 34.07(a).

58. Before Commencement of an action, N.Y. Civ. Prac. Act § 295; to get information to draw a complaint, N.Y.R. Civ. Prac. 122; during trial or after judgment, N.Y. Civ. Prac. Act § 293; of a prisoner under sentence for a felony, N.Y. Civ. Prac. Act § 297; of a doctor or nurse in a personal injury action, N.Y. Civ. Prac. Act § 296-a; of a public corporation which is a party or the original owner of a claim, N.Y. Civ. Prac. Act § 292-a; testimony of a non-party for use on a motion, N.Y. Civ. Prac. Act § 307, N.Y.R. Civ.

longer specifically enumerated, but are categorized. Order of Court is required where discovery is sought prior to the commencement of an action,[59] and also after the trial of action has begun.[60] Leave is also required to take the deposition of prisoners.[61] Where testimony of New York witnesses is sought for use in actions without the state, by virtue of a writ of the foreign court, the proposed procedure provides the same manner of obtaining it as is the case with actions pending in New York.[62]

Safeguards against abuse and incompetence in the use of the discovery devices are found in the broad power of the court to issue protective orders framed in the discretion of the court.[63] When such an order is sought by motion, service of the notice thereof shall operate to suspend the use of the device complained of.[64] In addition to protective orders, the court may, on motion, suppress improperly obtained information,[65] and exercise direct supervision through a judge or referee over discovery procedure.[66] Because of the breadth of proposed Rule 34 in allowing protective devices, the revisers considered special protection for hospital personnel unnecessary.[67]

Under current practice, some difficulty has arisen as to priority in pretrial examinations. Generally, the rule followed is "first come - first served." The First Department gives priority to the plaintiff except in tort actions. The confusion seems to result from the governing rule of civil practice,[68] which merely provides that after notice for examination by one party has been served, the deponent may serve a notice to examine any other party, ". . . such examination to be notices for and to follow at the same time and place." The proposed rule on priority provides normal priority to the defendant but in no case may the deposition be taken, without leave of court, until twenty days after the action has been commenced.[69] Leave of court is required if plaintiff wishes to notice for examination before the expiration of the twenty-day period.[70] The proposal amounts to a codification of the case law of the Second

Prac. 120; to perpetuate testimony for use in a real property action, N.Y. Civ. Prac. Act § 316, N.Y.R. Civ. Prac. 138; to obtain information on location of a chattel in a replevin action, N.Y. Civ. Prac. Act § 1094-a; to obtain deposition for use outside the state, N.Y. Civ. Prac. Act §§ 310, 311; Physical examination, N.Y. Civ. Prac. Act § 306; pursuant to letters rogatory, N.Y. Civ. Prac. Act § 309; for examination under the Debtor-Creditor Law, N.Y. Debtor & Creditor Law § 16; to discover the death of a life tenant, N.Y. Real Prop. Law § 343 et seq.; in Justice Court actions, Justice Ct. Act §§ 202 et seq.; of a witness in the Municipal Court of the City of New York, N.Y.C. Munic. Ct. Code §§ 107 et seq.

59. Prop. N.Y.R. Civ. Proc. 34.02(c).
60. Id. 34.02(d).
61. The proposed procedure applies to all persons confined under legal process rather than only to those under sentence for a felony. Id. 34.06(c); cf. N.Y. Civ. Prac. Act § 297, supra note 58.
62. Prop. N.Y.R. Civ. Proc. 34.02(e).
63. Id. 34.03(a). Sanctions are imposed as well, see proposed Rules 34.24 and 34.25.
64. Id. 34.03(b).
65. Id. 34.03(c).
66. Id. 34.04.
67. II, 1957 Report of the Temporary Commission on the Courts, 132.
68. N.Y.R. Civ. Prac. 121-a.
69. Prop. N.Y.R. Civ. Proc. 34.06(a).
70. Ibid.

Department in attempting to make the practice uniform throughout the state.[71] It should be noted that special circumstances of a plaintiff and protection in the case of defendant's priority are intended to be covered by the breadth of Proposed Rule 34.03, *supra*.[72]

Significant in the proposed change is a provision providing for the taking of deposition upon written questions.[73] This procedure is to be distinguished from proceedings with written interrogatories. The latter, permitted on stipulation or order of court under present practice,[74] is retained as a discovery device under the proposal but is restricted to parties and does not require stipulation or order.[75] Written questions, on the other hand, may be used to take the deposition of parties or witnesses, again without stipulation or order. Although both written questions and interrogatories are answered under oath,[76] the provision for the former recognizes that the answers to interrogatories are generally the collaborative effort of attorney and client.[77] The answers to written questions are given orally before an officer designated for that purpose.[78]

Deponents in any pre-trial examination, upon oral examination or written questions, are examined and cross-examined as on the trial of actions.[79] In this respect current practice has been retained in permitting cross-examination of a party by his own attorney when the examination is had at the instance of an adverse party.[80] Similarly, current practice has been retained in requiring production of books, papers and other matter to be used on examination.[81]

Provisions under the proposed rule for the use of deposition remains, in substance, what it is in current practice.[82] Much of the language of the proposal in this regard is borrowed from the Federal Rules and it should be noted that although the general perspective of revision is to do away with the distinction between parties and witnesses, the distinction has clearly been maintained in the area of use.[83]

The distinction has also been retained in the discovery of documents and property, being permitted from parties only.[84] Here again, however, the device is available on notice as contrasted with procedure under the Civil Practice

71. Desiderio v. Gabrielli, 284 A.D. 976, 135 N.Y.S.2d 1 (2d Dep't 1954). See also Fed. R. Civ. Proc. 26(a).
72. 1957 Report, op cit. supra. note 21 at 131.
73. Prop. N.Y.R. Civ. Proc. 34.08.
74. N.Y. Civ. Prac. Act § 302.
75. Prop. N.Y.R. Civ. Proc. 34.17.
76. See Id. 34.12, 34.19.
77. 1957 Report, op. cit. supra note 67 at 148.
78. Prop. N.Y.R. Civ. Proc. 34.12(b).
79. Id. 34.12(c).
80. N.Y. Civ. Prac. Act § 129-a.
81. The proposal specifies "things", as well as papers and books. Prop. N.Y.R. Civ. Proc. 34.10. The mechanics of the examination are covered in proposed rules 34.12 through 34.15.
82. Prop. N.Y.R. Civ. Proc. 34.16.
83. Ibid.
84. Id. 34.20.

Act.[85] Although the proposal has expressly retained the requirement that the document or property be within a party's "control," no express requirements are enumerated on the subjects of relevancy and admissibility as evidence in chief,[86] ignorance of the facts,[87] or burden of proof.[88] Present requirements in these respects are apparently within the purview of proposed controls on abuse.[89]

As is the case with discovery of things, the requirement of an order to obtain medical examination has been done away with.[90] The physical or mental condition, or the blood relationship must be in controversy and the primary design of reaching personal injury actions under current practice is specifically provided for under the proposed rules, by requiring exchange of reports when demanded.[91] The substance, procedure and effect of admissions, common in current practice has been retained under the proposal with the exception that the new provision is expressly made applicable to proceedings.

Following the rationale of full disclosure before trial in the hope of eliminating unnecessary trials or at least limiting the triable issues, Title 35 of the Proposed Rules of Civil Procedure provides for a compulsory pre-trial conference.[92] Subject to local rules as to the timing of the conference, the rules provide that an attorney for each party with full authority to stipulate and make concessions shall attend and participate in a conference under the supervision of the court to frame the issues, make necessary amendments to the pleadings, obtain admissions, agree on numbers of experts, specify the items of damage to be claimed and outline the proof to be offered at the trial. Failure of a party to appear by attorney may be treated as a default and the court may enter an order against the party accordingly, or in some lesser degree, as an order of preclusion on proof of certain items. The pre-trial conference culminates in an order which then governs the course of the trial in respect to the matters settled at the conference including evidentiary points, issues, admissions and claims for damages.

MOTIONS AND ORDERS

Proposed Title 33 applies to motions and orders generally. While motions and orders are treated separately under present practice,[93] under the proposed title they are treated together.

85. N.Y. Civ. Prac. Act § 324 plus the limited "notice" provisions of § 327.
86. People ex rel. Lemon v. Sup. Ct., 245 N.Y. 24, 156 N.E. 84 (1927).
87. Rosen v. Bendix Home Appliance Co., Inc., 197 Misc. 525, 48 N.Y.S.2d 636 (Sup. Ct. 1950).
88. Crispa v. St. Mary's Cemetery Assoc. 258 A.D. 1020, 17 N.Y.S.2d 70 (3d Dep't 1940).
89. Supra note 63; Prop. N.Y.R. Civ. Proc. 34.22.
90. Id. 34.21; cf. N.Y. Civ. Prac. Act §§ 306, 306-a.
91. Prop. N.Y.R. Civ. Proc. 34.21(b).
92. Except in matrimonial actions and summary proceedings, Prop. N.Y.R. Civ. Proc. 35.01. Proposed Rule 35.03 requires a conference of the attorneys prior to the court supervised pre-trial conference.
93. N.Y. Civ. Prac. Act §§ 113-119, 127-132; N.Y.R. Civ. Prac. 60-67, 70-75.

A motion is defined under the proposed rules as an application for an order, granting relief incidental to the main relief sought in the action or proceeding in which the motion is brought.[94]

The distinction between a judge and a court with respect to motions and orders is abolished by the rule that motions may be made to and orders made by the court or a judge thereof except as otherwise specifically provided, and that "court" refers to both the court and a judge thereof.[95] However, a judge may require that a motion be heard in court if no prejudice would result therefrom.[96] Any distinction in the form, entry and filing between a court order and a judge's order is eliminated.[97]

Supreme Court motions must be made in the county where the action or proceeding is triable or in an adjoining county or in another county in the same judicial district if no justice is available within that county.[98] However, an ex parte motion may be made in any county of the state if no justice is available in the county where the action or proceeding is triable.[99] Outside of New York City, if no Supreme Court justice is available in the county where the action or proceeding is triable, a county judge in the same county may hear the motion, except a motion in a matrimonial action, a trial motion under Title 45, or a motion to dispose of an action.[1]

Motions in a County Court action or proceeding may be made to a Supreme Court justice in the same manner as a motion in a Supreme Court action or proceeding if a county judge of the county is not available.[2] The Supreme Court justice may, however, refer the motion to a County Court judge where the action or proceeding is triable if no prejudice results.[3] However, an ex parte motion may be made in any county court in the state if a county judge of the county is not available.[4]

Present practice requires that the grounds for a motion be specified in the notice of motion in only two instances: on a motion objecting to the pleadings,[5] and on a motion based on mistake, omission, defect or irregularity.[6] Proposed Rule 33.05(a) requires that the grounds for a motion be in the notice of motion in all motions. The time for service of such notice and affidavits is the same as under present law,[7] except: the five day notice provision where all the

94. Prop. N.Y.R. Civ. Proc. 35.01.
95. Id. 33.02.
96. Ibid.
97. Id. 33.10, 33.11(a).
98. Id. 33.03(a).
99. Id. 33.03(b).

1. Id. 33.03(c).
2. Id. 33.04(b).
3. Ibid.
4. Id. 33.04(a).
5. N.Y. Civ. Prac. Act § 280.
6. N.Y.R. Civ. Prac. 62.
7. Prop. N.Y.R. Civ. Proc. 33.05(b); N.Y. Civ. Prac. Act § 117; N.Y.R. Civ. Prac. 60, 64.

attorneys have their offices in the same city or village has been eliminated in favor of an eight-day provision in every case. (Modern mail service rather effectively obliterates distance disadvantages.)[8] A provision that any memorandum of law to be submitted must be served at least two days before the time for the hearing of the motion has been added.[9]

Proposed Rule 33.08, obviously designed to prevent forum shopping, provides that a motion seeking relief similar to that sought on a prior motion must be referred to the judge who decided the prior motion, and that any other motion may be referred to a judge who decided a prior motion in the action.

The court may order a trial by jury or referee on any issue of fact raised on a motion. Where the issue is triable by jury as of right, an opportunity to demand a jury trial shall be made available.[10] A motion to vacate or modify an order must be made on notice to the trial judge who signed it, with two exceptions: such a motion made upon a default may be made to any judge of the court, and such a motion made to an ex parte order may be made ex parte to the judge who signed it, or on notice to any other judge of the court.[11]

Proposed Rule 33.13 provides for the docketing of an order as a judgment.

CALENDAR PRACTICE

The proposed rules make only one significant change regarding calendar practice. Proposed Rule 36.01 provides that the Appellate Division in the First and Second Departments shall consult with each other before adopting the calendar practice rules in those departments, so that New York City will have, insofar as is practicable, uniform rules of calendar practice.

ACCELERATED JUDGMENT

Proposed Title 31 brings under one heading all phases of accelerated judgment: the motions to dismiss before answer, for summary judgment, default judgment and want of prosecution, voluntary discontinuance, judgment by confession, tender, offer to compromise and determination on submitted facts.

Under present practice pre-trial dispository motions testing the legal sufficiency of a claim are not only unnecessarily fractionalized,[12] but often do no more than force a corrected pleading,[13] with consequent extra burdening of attorneys and the courts and little corresponding disposition of cases. Proposed Rule 31.01 provides for one omnibus motion to dismiss one or more causes of action or defenses at any time before service of a responsive pleading, which motion, testing as it does the legal sufficiency of such claim or defense, is

8. Prop. N.Y.R. Civ. Proc. 33.05(b).
9. Ibid.
10. Id. 33.09.
11. Id. 33.12.
12. N.Y.R. Civ. Prac. 106(4), 109(5), 109(6), 111, 112.
13. Consider judicial practice of freely granting leave to amend a defective pleading.

essentially one for summary judgment.[14] All defenses or objections must be made in the one motion, or in the subsequent responsive pleading.[15] In addition to defenses available under present practice, the proposed rule provides an additional objection for defenses founded upon documentary evidence,[16] and for the defenses of collateral estoppel, arbitration and award, and discharge in bankruptcy,[17] which defenses are difficult to fabricate and relatively easy to establish. The omnibus motion originally was intended to abolish merely corrective motions which determined whether a pleader stated rather than had a cause of action or defense, and dilatory defenses were omitted.[18] The only corrective motions retained were the motion to make more definite and certain and the motion to strike scandalous and prejudicial matter.[19] However, the Joint Bar Associations' Committee on the Civil Practice Act prevailed upon the Advisory Committee to retain in the omnibus motion the grounds of lack of jurisdiction over the person and failure to state a cause of action or defense.[20]

Any evidence which could be properly considered on a motion for summary judgment can be submitted on this motion.[21] However, the motion is broader than one for summary judgment, for the court can order an immediate trial of factual issues raised on the motion.[22] If it appears from the opposing affidavits that there are existing but yet unavailable facts essential to the disposition of the motion the court can, in addition to denying the motion and allowing the moving party to assert the objection in his responsive pleading, order a continuance of the motion until the facts are obtained by additional affidavits or disclosure, or can make such further order as is just.[23] As under present practice,[24] timely service of a notice of motion extends the time to serve a responsive pleading until ten days after service of notice of entry of the order.[25]

Present Rule 113, governing summary judgment, is re-enacted without substantial change.[26] Similar to the motion to dismiss for legal insufficiency under proposed Rule 31.01(d), if there are existing but yet unavailable facts essential to the disposition of the motion the court can, in addition to denying the

14. Prop. N.Y.R. Civ. Proc. 31.01(c).
15. Id. 31.01(e).
16. Id. 31.01(a)1.
17. Id. 31.01(a)5.
18. Originally, present motions under §§ 106(4), 109(5), 109(6), 111 and 112, which are directed to the legal sufficiency of a pleading on its face, were omitted from this motion, and made available only on a motion for summary judgment. 1957 Legis. Doc. No. 6(b), p. 83. Prop. N.Y.R. Civ. Proc. 31.01(a).
19. Prop. N.Y.R. Civ. Proc. 26.11.
20. Id. 31.01(a)7, 31.01 (a)8, 31.01(b). Report of Joint Bar Associations' Committee on the Civil Practice Act (December 18, 1959).
21. Prop. N.Y.R. Civ. Proc. 31.01(c).
22. Ibid.
23. Id. 31.01(d).
24. N.Y. Civ. Prac. Act § 283.
25. Prop. N.Y.R. Civ. Proc. 31.01(f).
26. Id. 31.02(a).

motion, order a continuance or make such further order as is just.[27] A motion for summary judgment not granted in its entirety in effect results in a pre-trial hearing.[28] Proposed Rule 31.03 is new, and provides for the service of a notice of motion for summary judgment in lieu of a complaint in an action upon a judgment or instrument for the payment of money only. The nature of such action is such that it is practically uncontroverted and, therefore, requiring an intervening answer if unnecessary.

There is a new provision that if a case has been assigned to a judge to supervise pre-trial disclosure, all pre-trial motions should be referred to him whenever practicable.[29] Service of a notice of motion under Rules 31.01, 31.02 or 31.03 stays disclosure unless the court orders otherwise.[30]

Proposed Rule 31.05 provides that any party who abuses the accelerated judgment devices by bringing any bad faith motion suffers the penalty of bearing consequent reasonable expenses, including attorney's fees.

Proposed Rule 31.06, governing default judgment, reorganizes the present provisions regarding default judgments, but effects few substantive changes. Under present practice a clerk's authority to enter default judgment in an appropriate action depends on the type of service.[31] The Proposed Rule enables the clerk to enter default judgment in such cases regardless of the type of service.[32] The party is himself required to file an affidavit of the facts constituting the claim in any application for default judgment.[33]

The provision regarding tender has been extended to any kind of claim, and has been rejuvenated by the allowance of reasonable expenses, including attorney's fees, when the claimant recovers less than the amount tendered.[34] Also, the use of tender is enhanced by the provision that tender shall not be made known to the jury.[35]

The provision allowing reasonable attorney's fees when the claimant fails to obtain a more favorable judgment after an offer to compromise is new.[36]

The present provisions concerning offer to liquidate damages conditionally has been eliminated as unnecessary.[37]

An action on submitted facts, presently limited to parties of full age,[38] has been extended to all parties.[39] The affidavit presently required has been replaced by a statement of submitted facts.[40] If the action is commenced in the

27. Id. 31.02(g).
28. Id. 31.02(h).
29. Id. 31.04(a).
30. Id. 31.04(b).
31. N.Y. Civ. Prac. Act §§ 230, 231, 486.
32. Prop. N.Y.R. Civ. Proc. 31.06(a).
33. Id. 31.06(e).
34. Id. 31.10.
35. Ibid.
36. Id. 31.11.
37. N.Y. Civ. Prac. Act §§ 175, 176.
38. Id. § 546.
39. Prop. N.Y.R. Civ. Proc. 31.12(a).
40. Ibid.

Supreme Court it must specify the particular county clerk with whom the papers are filed.[41] A copy of the judgment in such action need no longer be certified to be included in the judgment roll.[42] If the action is commenced in the Supreme Court it need no longer be determined by the Appellate Division; the parties can stipulate to a hearing and determination by special term, or, on the consent of special term, by a specified judge or referee.[43] Under present practice upon a submitted controversy the court may not draw any factual inferences from facts submitted.[44] Proposed Rule 31.12(4)4 expressly allows the court to draw such inferences.

SUBPOENAS, OATHS AND AFFIRMATIONS

Proposed Title 38 provides uniform general rules concerning subpoena practice, oaths and affirmations.

The rules regarding subpoena practice coordinate usage of subpoenas by both judicial and non-judicial bodies,[45] and prescribe their scope, issuance, service, compliance, and consequences of non-compliance.

The scope of the subpoena duces tecum has been significantly broadened to cover the compulsion of "things."[46]

The authority under present practice to issue a subpoena without a court order in a non-judicial proceeding extends only to the chairman or majority of the non-judicial body.[47] The proposed rule extends the authority to issue in such case to any designated member of such body who is authorized to receive evidence or to compel attendance of a witness.[48]

Present practice restricts compelling attendance of any person confined in a penitentiary or jail.[49] The proposed rule, which declares that any prisoner may be subpoenaed by court order, abolishes these restrictions.[50]

Since service of a subpoena operates both to confer jurisdiction and to give notice, proposed Rule 38.03 provides for service of a subpoena in the same manner as a summons.[51] The person served must be paid, or tendered in advance, traveling expenses and one day's witness fees.[52]

A motion to quash, fix conditions or modify a subpoena must be made

41. Ibid.
42. Id. 31.12(b). N.Y. Civ. Prac. Act § 548.
43. Prop. N.Y.R. Civ. Proc. 31.12(b)3.
44. Cohen v. Manufacturers Safe Deposit Co., 297 N.Y. 266, 78 N.E. 604 (1948); Lafrinz v. Whitney, 233 N.Y. 107, 134 N.E. 852 (1922); People v. Hewson, 224 N.Y. 136, 120 N.E. 115 (1918); Gorman's Restaurant v. O'Connell, 275 App. Div. 166, 88 N.Y.S.2d 230 (1st Dep't 1949).
45. Prop. N.Y.R. Civ. Proc. 38.02, 38.08.
46. Id. 38.01.
47. N.Y. Civ. Prac. Act § 406.
48. Prop. N.Y.R. Civ. Proc. 38.02(a).
49. N.Y. Civ. Prac. Act §§ 416-418.
50. Prop. N.Y.R. Civ. Proc. 38.02(b).
51. South Dakota Code § 36.0301 (1939).
52. Prop. N.Y.R. Civ. Proc. 38.03.

promptly in the court in which the subpoena is returnable; if it is not returnable in a court then the motion must be made in Supreme Court.[53]

Under present Section 414, compliance with a subpoena duces tecum by sending a substitute witness is available only to a corporation or a public official. Proposed Rule 38.05(b) allows any person to comply with such subpoena by substituted witness.

There is no change in the provisions particularly applicable to hospital records, medical records of a public body, books, papers and other things of a library or public body.[54]

The failure to comply with a judicial subpoena is, of course, punishable as contempt of court.[55] Provision is made for the enforcement of a non-judicial subpoena by enabling the issuer to move in Supreme Court to compel compliance.[56] In such case the judge can, in addition to ordering compliance, also impose costs not exceeding fifty dollars.[57]

Any person who fails to comply with a subpoena is also liable for a penalty not exceeding fifty dollars, and for damages as a result of non-compliance.[58]

An oath or affirmation may be administered by any person authorized by the Real Property Law to take acknowledgements of deeds, and in addition, any person authorized to take evidence may administer an oath or affirmation for such purpose.[59] The oath or affirmation need not be in any particular form provided it is calculated to achieve its purpose.[60] Oath or affirmation taken outside the state is treated in the same manner as one taken within the state, upon compliance with the procedure required to entitle a deed acknowledged outside the state to be recorded within the state.[61]

TRIAL

Proposed Titles 40-43 prescribe the procedure for trial generally, trial by jury, trial by court and trial by referee. The only important departure from present practice concerns jury trial.

Under present practice there are seven types of actions in which a jury trial is available without demanding a jury.[62] In any other action triable by jury the moving party must apply upon notice to the court for an order directing all questions arising upon these issues to be distinctly and plainly stated for trial.[63] Jury trial can be waived in all cases as prescribed by Section

53. Id. 38.04.
54. Id. 38.06, 38.07.
55. Id. 38.08(a).
56. Id. 38.08(b).
57. Ibid.
58. Id. 38.08(a), 38.08(b).
59. Id. 38.09(a).
60. Id. 38.09(b).
61. Id. 38.09(c).
62. N.Y. Civ. Prac. Act § 425.
63. Id. § 429. Elmira Savings & Loan Ass'n v. Spring, 261 App. Div. 1034, 26 N.Y.S.2d 31 (3d Dep't), *aff'd without opinion,* 287 N.Y. 591, 38 N.E.2d 387 (1941).

426. Under the proposed rule a jury trial is deemed waived in every case triable by jury unless a demand is made in the note of issue.[64]

Any party served with a note of issue not containing a demand has ten days in which to file a demand for a jury trial.[65] The demand need not specify the issues which a party wishes tried by a jury, but if the demand is specific any other party has ten days thereafter to demand a jury trial on any other issues.[66] Jury trial is not waived by joining with a claim another claim based upon a separate transaction not triable by a jury, nor is it waived on a counterclaim by interposing it in an action in which there is no right to trial by jury.[67] Provision is made for the Appellate Division in each department to provide by rule that the filing of note of issue without demand for jury trial does not constitute a waiver.[68] Finally, the trial court may relieve any party from failure to demand a jury trial where no undue prejudice results to the other party.[69]

Proposed Rule 41.03 is new, and provides that when it appears during the course of trial by court, that a plaintiff who sought equitable relief is entitled to legal relief only, the court must give him an opportunity to demand a jury trial of any issues triable by jury. Upon such demand the court must order a jury trial of any such issues, rather than dismiss the complaint, as has, on occasion, been done under present practice.[70]

Under present practice equitable defenses, as distinguished from equitable counterclaims, are triable in the same way as legal defenses.[71] Rule 41.01 abolishes this needless distinction, and provides that equitable defenses, like equitable counterclaims, are triable by court.

Practically speaking, the size of the jury has been reduced from twelve persons to six. Rule 41.04 provides that juries will consist of six persons instead of twelve, unless the party demanding jury trial specifically demands a twelve man jury. The rule also provides that if a jury trial is demanded, but there is no demand for a twelve man jury, any other party can demand a jury of twelve.

The present New York system of voir dire examination of jurors by attorneys can be abandoned in favor of the federal practice of examination by the judge, upon application of any party.[72] The proposed rule expressly provides

64. Prop. N.Y.R. Civ. Proc. 41.02.
65. Id. 41.02(a).
66. Id. 41.02(b).
67. Id. 41.02(c).
68. Id. 41.02(d).
69. Id. 41.02(e).
70. Dudley v. Congregation of Third Order of St. Francis, 138 N.Y. 451, 34 N.E. 281 (1893); Bradley v. Aldrich, 40 N.Y. 504 (1869); Nelson v. Schrank, 273 App. Div. 72, 75 N.Y.S.2d 761 (2d Dep't 1947); International Photo Recording Machines, Inc. v. Microstat Corp., 269 App. Div. 485, 56 N.Y.S.2d 277 (1st Dep't 1945); Poth v. Washington Square Methodist Episcopal Church, 207 App. Div. 219, 201 N.Y. Supp. 776 (1st Dep't 1923).
71. N.Y. Civ. Prac. Act § 424; Bennett v. Edison Elec. Illum. Co., 164 N.Y. 131, 58 N.E. 7 (1900); Susquehanna S.S. Co. v. A. O. Anderson & Co., 239 N.Y. 285, 146 N.E. 381 (1925).
72. Prop. N.Y.R. Civ. Proc. 41.07. *Cf.* Fed. R. Civ. Proc. 47-a.

that the judge examining the jurors may also allow the attorneys or parties to examine.

EVIDENCE

Article 11 and Title 44, the provisions on evidence in the proposal work make three important changes and one significant addition to the present law, concerning judicial notice, hearsay, and the "dead-man statute" and opinion evidence, respectively.

Proposed Rule 44.01, regarding judicial notice, expands present Section 344-a. Under the present statute a court may in its discretion refuse to judicially notice the common law, constitutions and public statutes of a sister state or territory or jurisdiction of the United States. Proposed Rule 44.01(a) would require that judicial notice be taken of these laws without request. Too, under present Section 344-a, a court may judicially notice without request laws of foreign countries, private legislation and ordinances and regulations of this state and the United States. Proposed Rule 44.01(b) requires that judicial notice shall be taken of the same

> ". . . if a party requests it, furnishes the court sufficient information enable it to comply with the request, and has given each adverse party notice of his intention to request it. . . ."

The present hearsay statute, Section 348, renders inadmissible prior testimony and related evidence of a party or witness where that party or witness is unavailable because he is deceased, insane, a non-resident departed from the state or a resident departed because of military or naval service. Such testimony is subject to the same objections available when previously admitted. Proposed Rule 44.08 expands this availability clause to allow the admission of such evidence

> ". . . if a witness' testimony is not available because of privilege, death, physical or mental illness, absence beyond the jurisdiction of the court to compel appearance by its process or absence because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts. . . ."

Abuse of the proposed rule by attorneys who would arrange to have a party or witness unavailable is prevented by the limitation that

> "Such testimony may not be used if the witness' unavailability was procured by, or through the culpable neglect or wrongdoing of, the proponent of his statement."[74]

The proffered testimony is subject to any objection originally available other than that the evidence is hearsay.[75]

The present "dead man statute," Section 347, prevents interested parties from testifying in an action against the representatives of a deceased or insane

74. Prop. N.Y.R. Civ. Proc. 44.08.
75. Ibid.

person on their own behalf regarding conversations had with that deceased or insane person, unless the testimony of the deceased or insane person concerning the same transaction or communication is introduced, or unless the representative is examined in his own behalf concerning the same transaction or communication. Proposed Rule 44.10 abolishes the disability, and thus abolishes the "dead-man statute." However, the proposed rule recognizes the possibility of mistake or fraud and directs that the judge or jury, in weighing such testimony, take into account the inability of the deceased or insane person to contradict a witness, and the fact that the deceased or insane person is not available for cross-examination.

Proposed Rules 44.05 and 44.06, which are new, allow lay and expert testimony in the form of opinions and inferences. Their effect is to allow a witness to testify in a natural and ordinary manner. Proposed Rule 44.05[76] enables a non-expert witness to testify in an ordinary manner, subject to the limitation that the witness' opinions or inferences

> ". . . shall be limited to such opinions or inferences as the judge finds may be rationally based on the perception of the witness and are helpful to a clear understanding of his testimony or to the determination of the fact in issue. . . ."

Cross-examination of the witness is relied on to check the force of any unfounded opinions or conclusions.

Proposed Rule 44.06[77] provides that the questions put to an expert witness need not be hypothetical in form and that "the witness may state his opinion and reasons without first specifying the data upon which it is based." Such data can be compelled by cross-examination.

TRIAL MOTIONS

Proposed Rule 45.01 consolidates in one motion all motions for judgment during trial, i.e., the motion to a complaint under § 482 of the Civil Practice Act, the motion for a directed verdict at the close of the claimant's case and at the close of all the evidence,[78] and the motion for judgment on a party's admissions,[79] including admissions in counsel's opening statements.[80] The proposed rule creates a single motion for judgment on the merits, with respect to any cause of action or any issue. The failure to enact a formulary standard to guide the court in directing a verdict apparently reflects a legislative deference to judicial case-by-case determination of such a standard.[81] Rule 45.01

76. Proposed Rule 44.05 is based on Rule 56(1) of the Uniform Rules of Evidence.
77. Proposed Rule 44.06 is based on 9 of the Model Expert Testimony Act and Rule 58 of the Uniform Rules of Evidence.
78. N.Y. Civ. Prac. Act § 457-a.
79. Id. § 476.
80. 6 Carmody-Wait, Cyclopedia of New York Practice 694-695 (1953).
81. Galloway v. United States, 319 U.S. 372, 395 (1943); Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 246, 54 N.E.2d 809, 811 (1944).

is qualified to the extent that the court may, on motion of any party, order a continuance or a new trial in the interest of justice.[82]

Proposed Rule 45.03 abolishes any procedural distinctions between court actions after trial by an advisory jury and court action after trial by a referee to report, and consolidates into one motion the separate motions for confirmation or rejection, new trial and judgment.

Proposed Rule 45.04 creates a single post-trial motion consolidating the present motions for a new trial and judgment notwithstanding the verdict. This motion is in addition to motions made orally immediately after the decision, verdict or discharge of the jury, which oral motions are exempted because the parties cannot reasonably present their grounds for relief at that time, not having had an adequate opportunity to review the trial.[83] Upon this motion each party must raise every ground for relief available.[84] However, since the motion can be granted on the trial court's own initiative,[85] it can retain jurisdiction to grant the motion until argument or submission of an appeal from the final judgment.[86] The present technicality that the failure to move for a directed verdict at the close of all the evidence precludes the granting of judgment notwithstanding the verdict is apparently eliminated.[87] The court's discretionary power to order a partial retrial has been extended to include every type of action.[88]

Every order granting or denying judgment notwithstanding the verdict must conditionally grant or deny the alternative relief of a new trial, and if the order granting or denying judgment is reversed on appeal, a new trial conditionally granted then is had unless the appellate court otherwise directs.[89]

JUDGMENTS

There are two principal aims of the revisers in the area of "judgments." The first is "to consolidate and restate more simply and concisely the present mass of provisions, which are disorganized, repetitious and over-detailed in certain areas."[90] The second is to provide a central office from which all information concerning a given judgment may be obtained regardless of where it was satisfied.[91] The idea of a central information office was put into the present Civil Practice Act by Chapter 238 of the New York Laws of 1959 following proposals of the Judicial Conference.[92]

82. Prop. N.Y.R. Civ. Proc. 45.02.
83. Id. 45.04(e).
84. Ibid.
85. Id. 45.04(a), 45.04(b).
86. Id. 45.04(d).
87. Id. 45.04(a).
88. Ibid.
89. Id. 45.04(c).
90. 1959 Legis. Doc. No. 17, p. 195.
91. Ibid.
92. 4 N.Y. Jud. Conf. Rep. 125-173 (1959), N.Y. Civ. Prac. Act §§ 500-503, 530, 534, 536-539; 1960 Legis. Doc. No. 20, p. A-329.

The substance of most of the provisions relating to judgments has been placed in Proposed Title 50. There are only eleven rules which for the most part make no change in existing law despite many changes in wording.[93] Substantively, the three important changes of the 1959 amendment are carried over to the proposed rules; *i.e.* the docketing of judgments, the satisfaction of judgments, and the procedure for recording satisfactions.

The keystone of the procedure is Rule 50.08 which deals with the docketing of a judgment. This rule carries over the present provision for docketing a money judgment[94] and in addition calls for docketing a judgment affecting the title to real property. This results in giving notice to persons interested in the real property which is at present usually obtained by *lis pendens*. As under present law, provision is also made for the filing of a judgment with the county clerk of the county in which it was rendered if such judgment was rendered in a court other than the Supreme or County Court. Both present and proposed rules require that a judgment be docketed first in the county in which it was rendered. A transcript may then be filed with clerks of other counties. In furtherance of the single information center policy, the proposed rules go a step beyond the 1959 amendment and require that a clerk who files a transcript notify the clerk who issued it. A notation indicating the filing is then made in the office of origin. Thus, one who is interested in the judgment can discover all the necessary information about it in one place.

The last two rules of Title 50 deal with the satisfaction of a judgment and the recording thereof.[95] Of necessity, they must be read in conjunction with Rule 50.08, the docketing rule. Under the proposed rules, "a *person* other than the party recovering a money judgment *who becomes entitled to enforce the judgment*"[96] must file a copy of the instrument on which his authority is based, acknowledged in the form required to entitle a deed to be recorded.[97] The significance of the rule is twofold: *First,* a uniform method of filing proof of authority is set up, *viz.,* based upon the method of execution of a deed entitled to be recorded, and; *Second,* the group covered is expanded to include anyone who fits the general statutory definition of "judgment creditor,"[98] thus eliminating the need for inclusion of specific persons such as an attorney in fact,[99] an executor, administrator or court appointed guardian.

93. E.g. Prop. N.Y.R. Civ. Proc. 50.01 (definition and content of judgment), 50.02 (judgment upon part of cause of action; upon several causes), 50.03 (effect of judgment dismissing claim), 50.04 (action on judgment), 50.05 (relief from judgment or order).

94. N.Y. Civ. Prac. Act §§ 501, 502.

95. Prop. N.Y.R. Civ. Proc. 50.10, 50.11.

96. See Prop. N.Y. Civ. Prac. Law § 1.04(e). The italicized words are the proposed definition of a judgment creditor.

97. The filing is to be with the clerk of the county in which the judgment was rendered unless it was in an inferior court, and the judgment was not docketed with the county clerk. In that case, it is to be filed with the clerk of the inferior court.

98. Except, of course, the original judgment creditor.

99. Now specifically covered by N.Y. Civ. Prac. Act § 530(3).

A satisfaction piece or partial satisfaction piece must be filed in the same manner and with the same clerk.[1]

The procedure for entry of satisfaction is made to coincide with that of docketing a judgment. Where the judgment is entered in Supreme or County Court, the clerk for that county makes the entry. He also enters the satisfaction of judgments which have been docketed with him from other courts within the county. For judgments not so docketed, the satisfaction is entered by the clerk of the court which entered the judgment. In the case of any judgment docketed with the county clerk, when it is satisfied, the judgment debtor obtains a certificate from that clerk and files it with the clerk of any other court or county where the judgment (or transcript) has been docketed (or filed) and the clerk of that court or county makes an appropriate entry on the docket.

An alternative method of filing an entry of satisfaction is permitted in one instance. Where a judgment is entered in a court other than the Supreme or County Court and is satisfied within the same county, instead of getting a certificate, which might entail injurious delay, the judgment debtor may obtain from the Sheriff, a certified copy of the execution and of the return of satisfaction (or partial satisfaction).[2] The debtor then files it with the county clerk who entered the judgment, who in turn enters the satisfaction on the judgment docket. This procedure is permissive under present law[3] and is retained for the benefit of judgment debtors who need liens released promptly. The principle of centralized information is not lessened since the county clerk still gets the information, but by a different method.

ENFORCEMENT OF JUDGMENTS

The substance of present law relating to the appropriate proceeding for the enforcement of final judgments is carried over without change to the proposed rules.[4] There is a major change, however, in the treatment of orders and interlocutory judgments. Their treatment is assimilated to that of final judgments. Under present law, there is a great deal of confusion, overlapping and apparent contradiction in the law relating to the enforcement of orders, whether the order is for the payment of money or otherwise. The confusion

1. Prop. N.Y.R. Civ. Proc. 50.10(a).
2. The Sheriff returns the execution with indorsement to the court from which it issued. Prop. N.Y.R. Civ. Proc. 50.11(b).
3. N.Y. Civ. Prac. Act § 536.
4. Under present law, final judgments are enforcible by execution, contempt proceedings, or partially by one and partially by the other. The method to be employed in a given case will depend upon the nature of the judgment, e.g. execution under section 504 of the Civil Practice Act for (1) payment of money (2) ejectment or dower (3) recovery of a chattel; contempt under Section 505 for all other final judgments which cannot be enforced in whole or in part by execution. In some circumstances there is a choice, e.g. under Section 505(4) for a judgment requiring the payment into court or to an officer or receiver appointed by the court; under Section 505(5) for a judgment requiring payment of money by a fiduciary for a willful default or dereliction of duty.

stems from the different sources of power which when read literally, seem applicable in many instances to the same situation.[5]

The position of the revisers is that there is no reason why all judicial mandates requiring the payment of money (including motion costs) should not be enforced with equal stringency.[6] Under the proposed rules, a special proceeding terminates in a judgment rather than an order, and all provisions governing judgments and their enforcement are applicable.[7] The enforcement of interlocutory judgments for the payment of money is also assimilated to the procedure for enforcing judgments generally.[8] This changes the present judge-made rule that they may not be enforced either by contempt or execution until the final judgment is rendered.[9]

The mechanics for the enforcement of money judgments are to be found in both the Proposed Civil Practice Law and the proposed rules. Following the over-all format of the revision, basic policy considerations are covered in the Proposed Law. Thus, the definitions of terms used in enforcement are found in Article 1, while Article 13 declares which property is subject to execution. The latter also contains provisions creating and affecting liens and priorities between creditors, as well as provisions affecting jurisdiction and property rights.

Although much of the definitions Section[10] is merely a codification of provisions found in the present Civil Practice Act,[11] there are a number of substantive changes. For example, under the Proposed Law, a judgment creditor is simply defined as "a person in whose favor a money judgment is entered or a person who becomes entitled to enforce it."[12] This definition impliedly includes both the original judgment creditor and any assignee or representative of such creditor. It eliminates the requirement that an assignee of a deceased judgment creditor indorse the execution.[13] Another important

5. See Korn, Preliminary Study on Enforcibility of Judgments and Orders by Contempt and Execution, p. 1. There are three sources from which power is derived to enforce orders. Section 1520 of the Civil Practice Act, dealing with motion costs, provides that when *any* sum of money ordered to be paid is not paid within a certain time, an execution against personal property only shall issue. It also provides for punishment for contempt for disobedience of an order where that remedy exists. Rule 74 of the Rules of Civil Practice, on the other hand, provides that an order directing the payment of money, *other than motion costs,* may be *docketed as a judgment.* To further complicate matters, Section 753(a) of the Judiciary Law provides that a court of record may punish for civil contempt, in an action or special proceeding, for the non-payment of a sum of money ordered to be paid, where execution will not lie. Judicial pronouncements in the area have not proved helpful and have resulted in unrealistic distinctions being made between "orders" under Section 1520 and "judgments" under Rule 74. If the former characterization is used, the execution may be against personal property only, while under the latter, execution may be against both real and personal property.

6. 1959 Legis. Doc. No. 17, p. 225.

7. Prop. N.Y.R. Civ. Proc. 27.09.

8. Prop. N.Y.R. Civ. Proc. 60.04.

9. Potter v. Rossitter (#2), 109 App. Div. 35, 95 N.Y.S. 1036 (1st Dep't 1905).

10. Prop. N.Y. Civ. Prac. Law § 1.04.

11. N.Y. Civ. Prac. Act §§ 505(2), 504(1), 642, 644, 649, 658, 778.

12. Prop. N.Y. Civ. Prac. Law § 1.04e.

13. This is presently required under N.Y. Civ. Prac. Act § 654.

change is the broadening of the definition of garnishee to include persons outside the employer-employee relationship. A garnishee is defined for general purposes as "a person who owes a debt to the judgment debtor or a person other than the judgment debtor who has property in his possession or custody in which the judgment debtor has an interest."[14] Another section governs the proper garnishee where specific property is involved.

The provisions of the present Civil Practice Act relating to enforcement against debts[15] and property[16] are for the most part retained. In addition, the alternative methods of levying on a non-negotiable instrument (*i.e.* either seizure of the instrument[17] or service on the debtor[18]) are eliminated. Under the proposed law, a levy must be made by serving the person indebted or the person holding the property represented by the document.[19]

Another important change presented by the Proposed Law is the section dealing with priorities and liens upon personal property in proceedings to enforce money judgments.[20] The new method is substantially the same as the procedure relating to real property. Priority among creditors will be based in the first instance upon the order in which their claims are docketed rather than upon subsequent commencement of an enforcement proceeding.[21] Thus, the theory of rewarding diligence is eliminated from this enforcement area. In practice, it has come to mean merely the commencement of an enforcement proceeding.

The priority may be divested however, by another judgment creditor under certain circumstances. The latter may serve a notice to the senior judgment creditor to satisfy the judgment within sixty days. Unless the former starts a special proceeding against the party serving the demand, his priority is divested. If on the special proceeding, the delay is deemed justified, the court may order the priority continued to a specified date. If it is not justified, the priority will be divested. As an alternative to this, a junior judgment creditor can bring a special proceeding for divestiture of the priority unless the senior creditor permits him to join in a receivership for a long-term payment arrangement.[22] The provisions relating to priorities in real property are substantially similar. The sixty-day divestment rule, of course, does not apply, the lien being for ten years after the filing of the judgment roll.[23] This amounts to no change in present practice.[24]

14. Prop. N.Y. Civ. Prac Law § 1.04g.
15. N.Y. Civ. Prac. Act §§ 913-915.
16. Id. §§ 686-688.
17. Id. § 687.
18. Id. § 687-a(1).
19. Prop. N.Y. Civ. Prac. Law § 13.01(c).
20. Id. § 13.02.
21. This would replace much judge made law as well as N.Y. Civ. Prac. Act §§ 679, 680, 682, 683, 687-a(2), 694(3), 807 and 808.
22. Prop. N.Y. Civ. Prac. Law § 13.02(c).
23. Id. § 13.03.
24. Replacing parts of N.Y. Civ. Prac. Act §§ 478, 509, 510(1), 512 and 514.

Another salutary change is found in the provision for the release of a lien or levy upon appeal.[25] The release will be granted on motion of the judgment debtor with notice to his judgment creditor and sureties. The release may extend to all or specified real or personal property. The main significance of the change is that contrary to present law,[26] if the appeal is not successful, the lien is not "restored." The position of the revisers is that there is no need of "restoration" since the judgment creditor is secured by an undertaking.

The substantive provisions relating to real and personal property exempt from application to the satisfaction of money judgments, generally known as householder's and homestead exemptions, are carried over intact from the present law.[27] They are, however, brought together in two sections, one relating to personal property and the other to real property. At present, these provisions are to be found in widely scattered sections of the Civil Practice Act.[28] The revisers feel that many changes are needed in this area, but due to the policies involved, deem it best to let them be made by the legislature after a special study as to outmoded concepts and changed conditions. No attempt is made to include the rules now found in the Consolidated Laws dealing with special persons, institutions and property.[29]

A completely new provision is made for the enforcement of a judgment after the death of a judgment debtor.[30] Under the Proposed Law, in order to execute against such a person's property, leave must be obtained from the Surrogate's Court which issued the letters testamentary or letters of administration. If such letters have not been issued within eighteen months of death, leave to issue execution or commence enforcement procedure may be made on motion to *any* court from which the execution could issue or the enforcement procedure could be instituted. The sections will apply whether the execution is against personal or real property, there being no requirement that the judgment be a lien on the property. The same period will apply to both real and personal property.

Under existing law in New York, there are three distinct methods of enforcing a money judgment: creditors bill, execution, and summary proceedings. The creditors bill, as a matter of practice is almost never used except to reach a contract to purchase realty or to resolve questions of title.[31] These two functions are provided for elsewhere in the proposed law and, as a result, there will no longer be a need for it.[32] The other two remedies are the primary means used to enforce money judgments. Due to the great degree of conflict

25. Prop. N.Y. Civ. Prac. Law § 13.04.
26. N.Y. Civ. Prac. Act §§ 516-519.
27. Prop. N.Y. Civ. Prac. Law §§ 13.05, 13.06.
28. E.g. N.Y. Civ. Prac. Act §§ 513, 664, 678, 687-a(8), 792, 1196.
29. E.g. N.Y. Banking Law §§ 407, 461.
30. Prop. N.Y. Civ. Prac. Law § 13.08, replacing part of N.Y. Civ. Prac. Act § 655 and all of § 656.
31. N.Y. Civ. Prac. Act §§ 1189-1196.
32. Prop. N.Y.R. Civ. Proc. 62.17; Prop. N.Y. Civ. Prac. Law §§ 13.01, 13.02.

and overlapping between the two, the revisers have completely reorganized the enforcement procedure, retaining what they consider to be the good features and replacing or assimilating the balance. The new rules are found in Title 61 of the Proposed Rules of Civil Procedure. Since the organization of this area is completely new, it is probably best to consider the significant rules in the order in which they appear.

The rule relating to the place of instituting enforcement proceedings carries over, for the most part, present administrative practices as found in Section 777 of the Civil Practice Act.[33]

The proposed rules provide for a restraining notice. Its aim is to provide for a simple method for restraining the judgment debtor from disposing of any of his non-exempt property until the judgment is satisfied, vacated or the time limited for the commencement of an action upon the judgment expires.[34] Under present law, there is no provision for the use of a restraining order alone. When it is permitted, it must be used along with examination.[35] The proposed rules permit its use as an independent enforcement procedure. The notice may be issued either by the clerk of the court or by the attorney for the judgment creditor and must be served either personally or by registered mail, return receipt requested.[36] It may be issued against the judgment debtor or persons who owe him a debt or have property in which he has an interest.[37] Its duration is until the judgment is satisfied or vacated or until the time limited for commencing an action upon the judgment expires. The effect upon persons other than the judgment debtor is a carry-over from existing law and provides that it is effective against them only if they know, or have reason to believe, *at the time of service,* that they are indebted to or have property of the judgment debtor.[38] Only one restraining notice may be served on the same person with respect to the same judgment, unless leave of court is obtained.[39] Al-

33. Thus, where the judgment was entered in any one of ten enumerated city courts, and the respondent resides or has a regular place of business in the county where it is located, the special proceeding is to be instituted in that court or the County Court. Prop. N.Y.R. Civ. Proc. 61.01a(1). If the judgment was entered in the Municipal Court of the City of New York and respondent resides, is employed regularly, or has a regular place of business in New York City, the special proceeding is to be instituted in the City Court of the City of New York. Prop. N.Y.R. Civ. Proc. 61.01a(2). In cases of judgments entered in any other court in the state, the special proceeding is to be instituted either in Supreme Court or County Court in a county where the respondent resides, has a place of business or if there is no such county, then in any county where he can be served or where the judgment was entered. Prop. N.Y.R. Civ. Proc. 61.01a(3). The term "respondent" indicates the adverse party in a special proceeding, Prop. N.Y.R. Civ. Proc. 27.01, and may be the garnishee, employer or other third party. The examinations of a witness or the judgment debtor are not conducted by special proceeding but those persons are treated as if they were respondents for purposes of notice and subpoena. Prop. N.Y.R. Civ. Proc. 61.01b. See Rule 61.08 for examination of judgment debtor.

34. See also Prop. N.Y.R. Civ. Proc. 61.08.

35. See e.g., N.Y. Civ. Prac. Act § 684 (garnishee), § 774 et seq. (supplementary proceedings).

36. Prop. N.Y.R. Civ. Proc. 61.02a.

37. Id. 61.02b.

38. See N.Y. Civ. Prac. Act § 781.

39. Prop. N.Y.R. Civ. Proc. 61.02c.

though this rule is couched in terms of an independent enforcement procedure, is may continue to be used with an examination as under present practice.

The proposed rule relating to disclosure in enforcement proceedings, deals with subpoenas for the examination of judgment debtors, third parties and financial institutions. Under present law, there is some confusion in regard to time limitations in the various examinations, depending upon who is being examined.[40] Under the proposed rules, a subpoena may be served upon any party for examination, at any time before the judgment is satisfied, vacated or barred by the statute of limitations. The examination process is greatly liberalized. For example, the range of questions which may be asked extends to all those "releveant to the satisfaction of the judgment." This is aimed at overcoming the judicially declared rule that examination must be limited to "material means for satisfying the judgment." Another important change is in the use of information subpoenas. Under present law, they may be served only on financial institutions, may be served by ordinary mail and need not be answered under oath. Under the proposed rules, they may be served upon any person, must be served either personally or by registered mail, return receipt requested, and must be answered under oath.[41] Under present law, judgment debtors and "third persons whom the attorney for the judgment creditor has reason to believe has ten dollars or more of the debtor's property," are not paid witness fees. On the other hand, someone summoned as a "witness" is entitled to such fees.[42] In order to obviate the calling of a person as a "third person" solely to avoid the payment of witness fees, the proposed rules provide that any person other than the judgment debtor subpoenaed for attendance, shall be paid a mileage and a witness fee. The judgment debtor gets neither fee. An information subpoena requires the payment of fifty cents to cover mailing and the notary's fee.[43]

Important changes are made in the time and place of the examination. The minimum notice period is extended from three to ten days.[44] The place and person before whom the examination is to be held are governed by the rules regarding disclosure generally.[45] The provision of the present law that subsequent examination of a judgment debtor may be obtained only by court order upon a showing of a lapse of a year since the last examination or that

40. Generally, two years from judgment. N.Y. Civ. Prac. Act §§ 775(2), 779(2), 782(2).

41. Prop. N.Y.R. Civ. Proc. 61.03a(3).

42. N.Y. Civ. Prac. Act §§ 783(3) (debtor), 782(7) (third party), and 783(3) (witness).

43. Prop. N.Y.R. Civ. Proc. 61.03b.

44. N.Y. Civ. Prac. Act § 783(3), Prop. N.Y.R. Civ. Proc. 61.03c.

45. See Title 34 of the Proposed Rules. Thus it will no longer be necessary that such examinations be held in the court room. The justification for this is that although the subpoena form used under present Section 775 of the Civil Practice Act directs that the person summoned appear before a judge, in practice, there is seldom a judge present. In addition, most courts are ill equipped space-wise, for these examinations. Under present Section 791 of the Civil Practice Act, they may be held before a notary or commissioner of deeds with the consent of the party being examined.

there is reason to believe he will acquire or has acquired non-exempt property, is carried over in substance.[46] The proposed rules place discretion in the court to grant or not to grant the order without spelling out what the person requesting it must show.[47] All restrictions on subsequent examination of persons other than the judgment debtor are removed, the position of the revisers being that the fee requirement will deter harassment.

Under present law, payment and delivery orders in supplementary proceedings are dealt with in Section 796 of the Civil Practice Act. It limits the evidence which may be presented on the motion to that appearing from the examination or testimony taken in the special proceeding. The section is only applicable, as far as property in control of a garnishee is concerned, to that which is capable of delivery. In addition, if there is a dispute as to the debtor's right of possession, that question must be determined in a separate proceeding.[48] The granting of the order is discretionary with the court and both money and property are to be turned over to the Sheriff or receiver. The proposed rules change these features. The judgment creditor, under the proposed rules, may bring in evidence extraneous to the examination, in support of his motion. Property in the hands or control of a garnishee which is not capable of delivery may be ordered assigned.[49] If the property in question is money, it shall be turned over to the Sheriff or receiver. If there is any dispute as to the judgment debtor's right to possession, it can be determined on the same motion *or* by a separate "proceeding to determine adverse claims."[50] It should be noted that the judgment creditor proceeds against the judgment debtor by motion but against third persons by special proceeding.[51]

Under present practice, there are two distinct methods by which a judgment creditor may obtain a right to money which is to become due to his judgment debtor in the future. They are garnishment under Section 684 of the Civil Practice Act, and installment payment order under Section 793 of that Act. Although the aims of the two are substantially the same, *i.e.* reaching income, the prerequisites and results are quite different.[52] Under the proposed rules, the methods are amalgamated, following in general, the form and substance of the installment payment order. The proceeding is by motion with notice to the judgment debtor, either in the manner of a summons or by registered mail, return receipt requested. The amount of the payments is

46. N.Y. Civ. Prac. Act §§ 775(1), (2).
47. Prop. N.Y.R. Civ. Proc. 61.03f.
48. Light v. Schupper, 282 App. Div. 1043, 126 N.Y.S.2d 388 (1st Dep't 1953).
49. Prop. N.Y.R. Civ. Proc. 61.04c.
50. See id. 61.17, 61.04a.
51. Id. 61.04b; see generally Title 27, Proposed Rules of Civil Procedure.
52. For example, an execution must be returned unsatisfied in the case of a garnishment but there is no such requirement precedent to getting an installment payment order. The sources of income are more restricted under garnishment than under installment payment. There is a ten percent limitation on garnishment while the limitation on installment payments is in the discretion of the judge. Only one garnishment may be taken at a time regardless of the number of creditors, while installment payments are not so limited and may be ordered even where a garnishment is already in operation.

fixed by the court and except in cases of hardship, at a rate of not less than ten per cent.[53] The order is to provide that in case of default of payment, it may be served upon any person from whom the judgment debtor is receiving or will receive money.[54] The person so served must then withhold the amount of the installment and pay it over to the judgment creditor. Failure to comply is punishable by both contempt and an action by the judgment creditor for accrued installments.[55]

Under existing law, there are a number of ways by which a judgment creditor can reach *debts* due the judgment debtor from third persons.[56] These provisions are all replaced by the proposed rules. Restraint provisions are consolidated in Rule 61.02, while the provisions for payment are consolidated in Rule 61.06. The latter provides that "upon a special proceeding instituted by the judgment creditor, against any person who it is shown, is or will become indebted to the judgment debtor, the court shall require such person to pay to the judment creditor the debt upon maturity. . . ." If there is any dispute as to the debt, it will be disposed of under Title 27, which deals with special proceedings generally. Notice must be given to the judgment debtor and the court may permit him to intervene.

A supplementary proceeding receivership is an entirely separate system for enforcement of judgments under present law.[57] It has two distinct advantages not available to judgment creditors by execution or supplementary proceedings alone. It permits different procedures for obtaining examinations, restraining transfers and collecting debts. It also provides a judgment creditor with a superior lien to one acquired by execution or supplementary proceedings. The filing of a receivership order prevents the debtor from passing title to his personalty even to a bona fide purchaser for value.[58] The receiver's "title extends back by relation" to the commencement of supplementary proceedings

53. Prop. N.Y.R. Civ. Proc. 61.05a. In determining the amount, the court is to take into consideration the needs of the debtor and his dependents, as well as other factors. The payment is ordered paid directly to the judgment creditor rather than to the Sheriff.

54. Id. 61.05b(1), (3).

55. Thus where a judgment debtor is willing to pay the installments, his employer is not put to extra bookkeeping expense. The direction to the Sheriff to return an execution unsatisfied in order to get a garnishment will be eliminated from practice, as will be the fees he receives in such a proceeding. Also eliminated will be the problem of whether money is due under an employment contract of performance as distinguished from the usual employment contract. If it is construed as a contract for performance, under present law, garnishment will not lie. Sheehy v. Madison Square Garden, 266 N.Y. 44, 193 N.E. 633 (1934) (rodeo performer, cause of action held not yet accrued). The proposed rules make no provision for changing the rule that garnishment cannot be had where the debtor is self-employed, employed by an out-of-state employer, or by the Federal government. See Reeves v. Crowninshield, 274 N.Y. 74, 8 N.E.2d 283 (1937).

56. The garnishee may be restrained from paying it by an execution, N.Y. Civ. Prac. Act § 687-a(2), by subpoena, id. §§ 779(2), 781, or by court order, id. §§ 779(1), 795, 799. He may be permitted to pay the debt in satisfaction of the judgment by execution, id. 687-a, or subjected to an action on the debt by the judgment creditor by court order, id. 687-a(6), 795. He may be permitted to pay the debt, id. § 794(1), or be required to do so, id. § 794(2), in both instances by court order.

57. N.Y. Civ. Prac. Act §§ 804-810; N.Y.R. Civ. Prac. 175, 177.

58. N.Y. Civ. Prac. Act § 807.

as against any person who is not a bona fide purchaser for value or creditor without notice.[59] A judgment creditor using a receivership gets priority over those who use other enforcement procedures.

It is the position of the revisers that under existing law, a judgment creditor has ample tools for protection through liens and examination. The proposed rules provide for the appointment of a receiver upon motion of the judgment creditor, with such notice as the court may require.[60] No lien or priority will attach to the appointment, since the judgment creditor already has a lien by virtue of the docketing of his judgment.[61] The concept of "relation back of the receivers title" is eliminated, no title passing to the receiver. The lien upon docketing theory removes its necessity. Among the powers granted to the receiver is the power to sell real *or* personal property to satisfy the judgment. This is in line with the policy of the proposed revision eliminating the requirement of satisfying a judgment out of personal property before selling real property. It also represents a feeling that better prices may be obtained on receiver's sales rather than on Sheriff's sales. The judgment debtor's equity of redemption is eliminated to foster this end. The over-all aim of the new receivership provision is that this costly measure will be resorted to only when absolutely necessary. To help with this, the granting of the motion is discretionary with the court. There is no discretion, however, in extending a receivership once one has already been established.[62]

A new protective device is afforded a party under the proposed rules, for use between the rendering of a verdict and the entry of the judgment. Under Rule 61.08, when a party has received a favorable verdict, he may get an order from the trial judge both restraining disposition of assets and ordering examination, without waiting for the entry of the judgment. Thus, the losing party is prevented from disposing of his assets before the winner can start separate enforcement proceedings. In a proper situation, it would eliminate the need of starting supplementary proceedings altogether. Complementary to this device is a proposed amendment to the Debtor-Creditor Law which would make every conveyance without fair consideration, by a defendant in an action for money damages, fraudulent as to the plaintiff if, after final judgment, the defendant fails to satisfy the judgment.[63]

Under the proposed rules, the formal requirements for an execution are

59. Id. § 808.

60. Prop. N.Y.R. Civ. Proc. 61.07a. A receiver, when appointed, shall be entitled to expenses and commissions, not to exceed four percent of the sums received and disbursed by him. If the judgment creditor is appointed as the receiver, he will get no commissions. The commission provision is a change from existing law in that under the proposed rule, it is based only upon amounts actually recovered by the receiver and excludes amounts recovered by the creditor without assistance. Any court order directing payment will result in payment to the receiver rather than to the Sheriff.

61. Prop. N.Y. Civ. Prac. Law §§ 13.02, 13.03.

62. Prop. N.Y.R. Civ. Proc. 61.07b.

63. Prop. N.Y. Debtor Creditor Law § 273a.

simplified and consolidated into one rule.[64] It may be issued at any time before a judgment is satisfied or vacated or the time limited for the commencement of an action on the judgment expires. It may be issued from the Supreme or County Court in the county in which the judgment was first docketed. Issuance may be *from* either the clerk of the court or the attorney for the judgment creditor and *to* the Sheriff of any county in which levy is required.[65] It will no longer be necessary to file a transcript of the judgment in the county where the execution is desired. The single place of issuance is in line with the policy of having a central location from which all information regarding a judgment may be obtained.[66] This same policy is reflected in requiring the execution to be returned to the clerk of the court from which it was issued.[67]

The mode of levy upon personal property, under the proposed rules, depends upon the character of the property. If it is property which is not capable of delivery (*e.g.* a debt), the levy is by the Sheriff serving a copy of the execution personally upon the garnishee, who must then transfer the interest or pay the debt to the Sheriff.[68] The rule replaces Section 687-a of the Civil Practice Act under which a garnishee who is willing to pay a debt due the judgment debtor, may pay the Sheriff and be discharged to the extent of the payment. The revisers feel that the sanction imposed under Section 687-a is inadequate (*i.e.* permits a judgment creditor to maintain an action against the garnishee but provides for no punishment for contempt). Other provisions of Section 687-a are retained in essence in other rules.[69] Under Section 687-a, the causes of action which might be levied upon are limited to those arising out of contract. The proposed rule expands this, due to the term "debt" which is defined as "any legally assignable cause of action."[70]

If the property sought to be levied upon is capable of delivery, the levy is by the Sheriff taking it into his custody "without interfering with the lawful possession of pledgees and lessees."[71] He must personally serve a copy of the execution upon the person from whose possession or custody the property was taken. This method is an attempt to codify present practice.[72] The pro-

64. Prop. N.Y.R. Civ. Proc. 61.09a. The execution must specify the date of the judgment and the amount due thereon; if obtained in a court other than Supreme or County Court, it must provide the date of the filing of the transcript; where jurisdiction was obtained by attachment, this fact must be stated as well as describing the property and provide that only such property shall be sold. Where the judgment is on a mortgage debt, the execution must describe the mortgaged property and provide that no part of the mortgaged property be levied upon or sold thereunder. This in effect forces an election between foreclosure and suit on the mortgage debt. See Prop. N.Y.R. Civ. Prop. 61.13b, Under present law, the formal requirements for an execution are to be found in scattered sections of the Civil Practice Act, e.g. §§ 222a, 640, 641 and 642.

65. Prop. N.Y.R. Civ. Proc. 61.09b.

66. See Title 50 of the Proposed Rules of Civil Procedure.

67. Prop. N.Y.R. Civ. Proc. 61.09c.

68. Id. 61.10a.

69. E.g. restraint under N.Y. Civ. Prac. Act § 687-a(2), Prop. N.Y.R. Civ. Proc. 61.02; disclosure under N.Y. Civ. Prac. Act § 687-a(3), Prop. N.Y.R. Civ. Proc. 61.03.

70. Prop. N.Y. Civ. Prac. Law § 13.01b.

71. Prop. N.Y.R. Civ. Proc. 61.10b.

72. See 7 Carmody-Waite, Cyclopedia of New York Practice 635 (1953).

posed rules use the term, "any interest of the judgment debtor in personal property." The purpose of this phraseology is to eliminate the specific enumeration of subject property.[73]

The provisions for public sale of personal property by the Sheriff are for the most part unchanged, with the exception of the broad discretion given to that officer as regards time and place of the sale and the lots or units in which the sale shall be made. This discretion is subject to the standard of using his judgment to bring the highest price.[74] Under both present and proposed law, no levy is necessary as a prerequisite to judicial sale of real property, while that property is subject to a judgment lien. That lien is good for ten years after the filing of the judgment roll.[75] The proposed rule also carries over the requirement that after that time, there must be a levy by the Sheriff pursuant to execution.[76]

There is a great change made, however, in the *effect* of a sale of real property at judicial sale. Under existing law, when the property is sold, the judgment debtor doesn't lose title until the redemption period has expired.[77] This is completely changed by the proposed rules. The period of redemption is completely eliminated. In its stead, the *notice* of sale at public auction is extended to eight weeks.[78] The view of the revisers is that while the aim of the redemption period is to make a purchaser pay a fair price, the result is exactly the opposite, since prospective purchasers can't be sure that they will get the property in the long run. They further feel that if a judgment debtor needs more time to raise the required money, he can get an additional delay by a court motion to that effect.[79] Notice must be served on other judgment creditors in order that they may protect their liens by attending the sale.[80] Within ten days after the sale, the Sheriff must execute and deliver to the purchaser, proofs of publication, service and posting of the notice of sale, along with the deed. These proofs may be filed and recorded.[81]

The manner of distribution of proceeds of a judicial sale is necessarily changed from present law due to the proposed change in establishment of liens and priorities following judgment.[82] Under the proposed rules, the procedure

73. See e.g. N.Y. Civ. Prac. Act §§ 679, 686, 687-a, 688. Under present law, pledgees are protected from interference, but not lessees. N.Y. Civ. Prac. Act § 688. The proposed rule is extended to protect that group.

74. Prop. N.Y.R. Civ. Proc. 61.11, replacing N.Y. Civ. Prac. Act §§ 660, 663, 686, 688 and 706.

75. N.Y. Civ. Prac. Act § 510, Prop. N.Y. Civ. Prac. Law § 13.03a.

76. N.Y. Civ. Prac. Act § 512, Prop. N.Y.R. Civ. Proc. 61.12.

77. N.Y. Civ. Prac. Act § 718. Within one year, he may redeem by paying the purchaser the sum paid with ten percent interest from the time of sale. Further, if the debtor doesn't redeem within that time, specified creditors can redeem within another three months. See id. §§ 727-738. It is only after fifteen months from the time of sale that the purchaser is entitled to his deed from the Sheriff. Id. § 748.

78. Prop. N.Y.R. Civ. Proc. 61.13a.

79. See id. 61.18.

80. Id. 61.13c.

81. Id. 61.13d.

82. See generally, Article 13, Proposed Civil Practice Law.

is as follows:[83] All judgment creditors must be given notice of the sale; they must then deliver their executions to the Sheriff. The Sheriff, following the sale, then distributes the proceeds in the order of their priority. If the sale was pursuant to an attachment, the attaching creditor's priority is determined from the date of levy.[84] If any judgment creditor fails to deliver his execution to the Sheriff before the sale, he must bring a proceeding within sixty days to set aside the delivery of the proceeds,[85] provided of course, that he had a superior lien to someone who shared in the proceeds. Any excess is to be paid over to the judgment debtor.[86]

If the property is recovered from the purchaser due to an irregularity in the sale or a vacatur, reversal or setting aside of the judgment upon which the execution or order was based, he may recover the purchase money from the judgment creditors who received the proceeds. When the recovery is based upon an irregularity in the sale, the judgment creditor may enforce his judgment as if no levy or sale had been made and move without notice for an order restoring any lien or priority or amending any docket entry affected by the sale.[87]

Where there are adverse claims to property which is going to be applied to the satisfaction of a judgment, the proposed rules set up a procedure by which any interested party may institute a proceeding against the judgment creditor to determine those claims.[88] The procedure is substantially the same as that used when there are adverse claims to attached property.[89] The proceeding is commenced by serving a notice of petition upon the Sheriff or receiver and upon the judgment creditor in the same manner as a notice of motion.[90] The court may vacate the execution or void the levy, direct the disposition of the property or direct that damages be awarded. It may order a separate trial to determine questions of fact and indicate the person who is to have possession pending the decision. If the claim is determined to be fraudulent, the court may award expenses (including reasonable attorney's fees) to the judgment creditor as well as awarding damages suffered by reason of the claim.

It is the position of the revisers that there is an undue amount of harassment in the present manner of enforcing judgments.[91] The solution, they feel,

83. Prop. N.Y.R. Civ. Proc. 61.14.

84. Under present law, attaching creditors are treated as if they were judgment creditors and priority is from the time of delivery of execution to the Sheriff. See N.Y. Civ. Prac. Act § 960.

85. Prop. N.Y. Civ. Prac. Law § 13.02a2.

86. Id. § 13.02a3.

87. Prop. N.Y.R. Civ. Proc. 61.15, replacing N.Y. Civ. Prac. Act §§ 756, 757.

88. Prop. N.Y.R. Civ. Proc. 61.17.

89. See id. 71.11.

90. Although this is the same as motion practice, the procedure is designated a special proceeding to permit appeal.

91. See introduction to proposed Title 61, Third Preliminary Report of the Committee on Practice and Procedure, 5 McKinney Session Laws of N.Y. A-358 (1959).

is to have a greater degree of court supervision in these proceedings. Thus the proposed rules provide,

> "The court may at any time, on its own initiation or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. . . ."[92]

The rule is aimed at replacing present provisions which the revisers feel are "diverse, overlapping, overly technical and inconsistent."[93]

The proposed rules codify the present law in regard to the arrest of a judgment debtor.[94] A warrant for arrest is obtained by the judgment creditor by motion without notice, showing that the judgment debtor is about to depart from the state or is concealing himself within the state. There must be reason to believe that the debtor has in his possession or control, property in which he has an interest. Upon arrest, the debtor is brought before the court which may then order an undertaking be given to insure his appearance for examination and obedience to any restraining order.[95] Failure to obey the order of the court would render the judgment debtor subject to punishment for contempt.

In order to enforce all of the above mentioned proceedings, the proposed rules provide a catch-all sanction of punishment for contempt. The sanction is provided for failure to comply with a subpoena or restraining order or installment payment order, failure of a judgment debtor to comply with any other order given, false swearing upon an examination or in answering written questions, and willfully defacing a posted notice of sale before the time filed for sale.[96] The proposed rules consolidate and increase present penalties, conforming them generally to the penalties imposed for violation of pre-trial disclosure procedures. The sanction should be of particular help in examination[97] proceedings.

APPEALS

The express intent of the Advisory Committee on Practice and Procedure has been to retain the greater part of statutory and case law with respect to

92. Prop. N.Y.R. Civ. Proc. 61.18.

93. See e.g., N.Y. Civ. Prac. Act §§ 649, 685(4), 687-a(4), 687-a(7), 775(1), 779(1), 781, 784-a, 785 and others.

94. N.Y. Civ. Prac. Act §§ 774(3), 775(3), 776 and 783(4).

95. Prop. N.Y.R. Civ. Proc. 61.19.

96. Id. 61.20.

97. See notes to Proposed Rule 61.20, Third Preliminary Report of the Committee on Practice and Procedure, 5 McKinney Session Laws of N.Y. A-419 (1959). Under present examination practice, even if there is a default, the courts will require only that the violator do what he was supposed to do in the first place. For example, although failure to appear for examination pursuant to court order or subpoena is punishable as a contempt, when debtors flount the order, they are then only required to submit to the examination. Even if they ignore a show cause order, it results only in a fining order limited to $250 per month, to be applied in satisfaction of the judgment.

appellate practice.[98] The proposal codifies appellate practice in Article 16, and Titles 80, 81 and 82.[99]

Beginning with appeals of right to the Court of Appeals, the proposal provides that where the ground of appeal is a dissent, modification or reversal in the Appellate Division, the appellant must have been aggrieved by the order in a ". . . substantial right . . . unless the dissent, reversal or modification involves a portion of the order of the Appellate Division by which the appellant is not aggrieved or which is not otherwise within the power of the Court of Appeals to review."[1] Under present practice, no limitations are placed upon the right to appeal in instances where there is a dissent, reversal, or modification in the Appellate Division.[2] The ground for appeal as of right where the construction of the state or United States Constitutions is directly involved is retained as is the direct appeal from lower courts where the validity of a statute of either of those governmental entities is constitutionally challenged.[3] In the proposed sections, the language has been changed from a court of "original jurisdiction" to a court of "original instance." This change was prompted by the desire to avoid ambiguity and to accomplish what the revisers believed was intended by the drafters of the present provision of the Civil Practice Act.[4]

Under present procedure, if the Appellate Division orders a new trial or hearing, or affirms an order so granting, an appeal lies of right upon the condition precedent that the appellant stipulate that judgment or order absolute be entered against him in the event the appellate division order is affirmed.[5] While this provision is carried into the proposed revision, it is made clear that that is the exclusive method of appeal to the Court of Appeals from the new trial order.[6] The provision is a codification of existing case law to the effect than an appeal by permission is not permitted in such a situation. Appeals, either directly from the court of first instance or from the Appellate Division, from final determinations of the court of first instance, following an interlocutory determination by the Appellate Division, are similarly retained,[7] but applicability of the procedure has been expressly broadened to include all non-

98. 1958 Legis. Doc. No. 13, p. 97.

99. Title 80 deals with appeals generally, while Titles 81 and 82 deal with specific problems of appeals in the Court of Appeals and the appellate division respectively.

1. § 16.01(a). Rule 80.03 deals with the time limitations on appeals; generally it may be said that an appeal of right must be taken within 30 days, Rule 80.03(a), (c). Rule 80.02(a) makes it clear that an appeal in the first instance is taken from the order or judgment of the court of original instance while an appeal from an appellate court determination is from the order of that court.

2. N.Y. Civ. Prac. Act § 588(1). The requirement of finality is preserved. See Prop. N.Y.R. Civ. Proc. 81.01.

3. § 16.01(b). The constitutional question is the only one to be determined on the appeal. See Powers v. Porcelain Insulator Co., 285 N.Y. 54, 32 N.E.2d 790 (1941).

4. 1958 Legis. Doc. No. 13, p. 103.

5. N.Y. Civ. Prac. Act § 588(3).

6. Prop. N.Y. Civ. Prac. Law §§ 16.01(c), 16.02(b)(1).

7. N.Y. Civ. Prac. Act § 588(2).

final determinations ". . . which necessarily affects the final judgment. . . ."[8] This provision is designed to preserve the appeal of right where there has been dissent, reversal, modification or constitutional question involved in the interlocutory appeal but unanimous affirmance of the subsequent proceedings in the matter.[9]

Following the general theme of retention of the substance of present procedure and grounds for appeals, Section 16.02 provides for appeals by permission.[10] While the content of Civil Practice Act Section 589 provides the basis for the proposed section, considerable effort has been devoted to spelling out applicability in cases where the Civil Practice Act is ambiguous or where it has become misleading by reason of amendments to the New York State Constitution without clarification in the Civil Practice Act. In this respect, Proposed Section 16.02(b)(2)(iii) is illustrative of the clarification effort. Civil Practice Act Section 588(3) provides for appeal of right from an order of the Appellate Division granting a new trial or hearing upon appellant's stipulation for judgment or order absolute.[11] The section is applicable in actions or proceedings in other than an inferior court.[12] Neither Section 588 nor 589 of the present act indicates the availability of appeal on such a stipulation when the court of original instance is an inferior court. The proposed section, in conformity with current practice, provides explicitly that such an appeal is available by permission of the Appellate Division.[13]

In providing for appeals to the Appellate Division, Proposed Section 16.03 covers appeals in actions and proceedings from Supreme or County Court. Although there are presently separate provisions for appeals in actions, in proceedings, and from Supreme Court and County Court,[14] any real distinction is negatived by the construction given the provisions.[15] One important substantive change with respect to appeals from non-final orders, has been effected through proposed Section 16.03. On the premise that appeals from intermediate determinations, now liberally allowed,[16] often result in mere delay and expense,[17]

8. Prop. N.Y. Civ. Prac. Law § 16.01(d). Both the present and the proposed provisions require dissent, reversal, modification or constitutional construction on the interlocutory appeal.

9. 1950 Legis. Doc. No. 13, p. 105.

10. An appeal by permission must be taken within 10 days. Prop. Rule Civ. Proc. 80.03(b). Motion for permission to appeal must be made within 30 days if the determination is final, 10 days if it is non-final. Prop. N.Y.R. Civ. Proc. 80.03(d).

11. Supra note 5.

12. "Other than in an inferior court" means in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency.

13. It is also significant that explicit provision is made for appeals from an administrative agency which is not an inferior court for this purpose. Supra note 12.

14. N.Y. Civ. Prac. Act §§ 608, 609, 611, 622(1), 631.

15. 1958 Legis. Doc. No. 13, p. 114. See People v. New York Central R.R., 29 N.Y. 418 (1864).

16. See N.Y. Civ. Prac. Act §§ 609(3), 609(4) and 631.

17. 1958 Legis. Doc. No. 13, p. 116.

the revisers have proposed that only enumerated orders be appealable of right,[18] all others being appealable by permission only.[19]

Proposed Sections 16.04 and 16.05 provide for appeals from courts other than Supreme and County Court, without significant change from current practice.[20]

The scope of review in the Appellate Division and in the Court of Appeals is provided for in Proposed Section 16.06 and accords with the general tenor of the preceding provisions of Article 16, by casting scope in terms of the nature and substance of matters appealable of right and by permission. The Court of Appeals, and the Appellate Division when hearing an appeal from an appellate term, review questions of law only, unless new facts have been found in the "intermediate" appellate court.[21]

It is proposed that security for costs be required on all appeals when demanded by the adverse party, as opposed to the present requirement of Civil Practice Act Section 593 which requires security only in the case of appeals to the Court of Appeals.[22] Of considerable practical importance also is the consolidation of all rules in respect to stays on appeal in Rule 80.09, which provides clearly that the appropriate court may modify an automatic stay, a power equivocally expressed at best under current practice.[23] Following up a 1940 severance of grounds for preference in appellate and trial courts, the revisers have proposed the elimination of enumerated grounds, leaving the granting of preference to the discretion of the court to which the appeal is taken.[24]

To the practitioner, one of the most important changes that has been proposed is the manner of getting the record and other papers before the appellate court.[25] Proposed Rules 80.15 through 80.20 provide for an appendix

18. Prop. Civ. Prac. Law § 16.03(a).

19. Prop. N.Y. Civ. Prac. Law § 16.03(b). Orders presently appealable of right which will require permission of the trial court or the Appellate Division are: order relating to depositions; order granting or refusing discovery of books or papers; order authorizing amendment of the complaint by inserting a new cause of action; order striking a defense from an answer; order striking a denial of a material allegation in a pleading; order imposing conditions upon the allowing of an amendment to a pleading; order on a motion for a change of venue; order denying a motion to compel acceptance of a pleading; order refusing leave to file a supplemental answer; order allowing a supplemental answer setting up a new defense; order granting or denying a motion to make a pleading more definite and certain; order denying a motion that plaintiff elect between causes of action; order relating to costs and fees; order refusing to punish for contempt in failing to pay temporary alimony.

20. Existing Appellate Division and Appellate Term rules requiring application to the appellate term have been included.

21. Prop. N.Y. Civ. Prac. Law § 16.06(b), (c).

22. Rule 80.08.

23. See N.Y. Civ. Prac. Act §§ 594-598, 601. See also Cohen & Karger, Powers of the New York Court of Appeals (rec.Ed.) 684-685.

24. Prop. N.Y.R. Civ. Proc. 80.11. Preferences given otherwise than by leave of court have been unchanged.

25. Under current practice, there are two lengthy parts to the record on appeal, the judgment roll and the "case". In all, these consist of an index (R.C.P.235), a statement of how the case developed (R.C.P.234), the notice of appeal, the judgment roll, exceptions taken by the appealing party, copies of exhibits if ordered to be included, the opinion of

method of accomplishing this.[26] On appeal, all papers filed in the court from which the appeal is taken are forwarded by that court to the appellate court. The parties are then required to have their briefs printed,[27] including an appendix, wherein are reproduced only those portions of the papers in the case which are necessary for determination of the questions that party raises on appeal.[28]

SPECIAL PROCEEDINGS

Under present practice, the provisions governing each special proceeding prescribe the procedure applicable to that particular proceeding, whereas, under Proposed Title 27, the rules generally applicable to special proceedings are assembled in one place so as to provide a uniform summary mode of procedure, except as expressly provided elsewhere.

The initiation of a proceeding is similar to that for a motion. The commencing party is deemed the petitioner, the adverse party the respondent.[29] The proceeding is initiated by serving a notice of petition, accompanied by any supporting affidavits, specifying the time and place of the hearing on the petition.[30] Since service confers original jurisdiction on the court, the notice is to be served in the same manner as a summons.[31]

However, the court may grant a show cause order to be served in lieu of the notice.[32] The hearing on the petition must be held in the county where the proceeding is triable, or in an adjoining county if no justice is available there.[33]

Under present law, the pleading provisions are not generally applicable to special proceedings. Under Proposed Title 26, however, the pleading provisions are the same for special proceedings as well as actions. Accordingly, as the complaint is to be served with the summons in an action, so must the petition and any supporting papers be served with the notice of petition.[34] The petition must comply with the rules for a complaint.[35] Where there is an adverse party an answer must be served, but if there is no adverse party the practice is similar to that on an *ex parte* motion, and an affidavit stating the result of any prior application for similar relief must accompany the petition.[36]

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the court below, if any, or an affidavit of no opinion (R.C.P.234), and the stenographer's minutes of the testimony, at least that portion thereof material to the questions to be raised on appeal. (C.P.A.576).

26. This is a procedure very similar to that used in the United States Court of Appeals for the Second Circuit and is probably somewhat familiar to most New York attorneys.

27. Cheaper forms of reproduction are also authorized. Prop. R. Civ. Proc. 80.19(a).

28. An obvious advantage is that the appellant is under no obligation to designate the portions of the record upon which he relies until he has written his argument for briefing purposes.

29. Prop. N.Y.R. Civ. Proc. 27.01.

30. Id. 27.02(a).

31. Id. 27.02(c).

32. Id. 27.02(d).

33. Id. 27.02(e).

34. Id. 27.02(b).

35. Id. 27.03.

36. Ibid.

A party must reply to a counterclaim denominated as such, and can reply to new matter in an answer.[37]

The time for service corresponds with that for motion practice. The notice, petition and accompanying affidavits must be served at least eight days before the time at which the petition is noticed to be heard. The answer and any supporting affidavits must be served at least one day before such time. If the notice of petition is served ten days before the time at which the petition is noticed to be heard, and so demands, the answer must be served at least five days before such time. Any reply to such answer must be served at least one day before the hearing time.[38]

After a proceeding is commenced, no party can be joined or interpleaded and no third party practice or intervention is allowed, except by leave of court.[39] The court can also sever any claim, counterclaim or cross-claim, or sever as to any party and require the severed portion to proceed as an action or as a separate special proceeding.[40] Since party provisions, provisions as to joinder of claims, counterclaims and cross-claims, and provisions as to severance and separate trial are already intended to be applicable to special proceedings,[41] the expression of these powers in this title apparently emphasizes that the court has the control necessary to preserve the summary nature of the proceeding.

Motions made before the time at which the petition is noticed to be heard shall be noticed to be heard with the petition, thus shortening the time for notice of pre-hearing motions.[42]

Objections in point of law to any pleading may be raised by answer or motion.[43] Defects in papers may be corrected on motion or order to show cause.[44] Abbreviated time periods preserve the expeditious nature of the proceeding.[45]

Contrary to present law,[46] and contrary to the proposed rules covering actions which allow disclosure to be obtained on notice,[47] disclosure can only be obtained by leave of court, except for a notice under Rule 34.23 for which special provision is made.[48]

At the hearing, all the relevant papers are to be furnished to the court, as is the rule on motion practice.[49] This rule facilitates the submission of evidence necessary for the summary determination which the court must make

37. Ibid.
38. Id. 27.02(b).
39. Id. 27.01.
40. Id. 27.06.
41. Id. Titles 23 and 24.
42. Id. 27.07.
43. Id. 27.05(c).
44. Id. 27.05(a), 27.05(b).
45. Id. 27.04, 27.05.
46. N.Y. Civ. Prac. Act § 308; N.Y.R. Civ. Prac. 121.
47. Prop. N.Y.R. Civ. Proc. 34.02(b).
48. Id. 27.08.
49. Id. 27.09(a), 33.05(c).

in every case,[50] which determination is the equivalent of a mandatory summary judgment without motion. To the extent that there are triable issues of fact the court must try them forthwith and render its determination, but an opportunity must be given to demand a jury trial where issues are triable as of right by a jury.[51]

Since there appears to be no justification for distinguishing between a final determination in a special proceeding and an action, the distinction has been abolished. The court's final determination is a judgment, not an order, to conform to the final determination in an action.[52]

PROVISIONAL REMEDIES

There have been several substantial changes offered by the Proposed Revision in the area of provisional remedies.

Replevin has not been treated as a provisional remedy, but rather has been treated separately elsewhere.[53] However, notice of pendency is deemed to be so functionally similar to a provisional remedy that it has been included in the Proposal as such. Only provisions creating and limiting provisional remedies and affecting property interests or fundamental public policy are included in the proposed act. The Committee has recommended that some existing provisions be transferred to the Consolidated Laws.[54] Generally, the use of arrest has been restricted by the proposed rules and sections. Attachment on the other hand has been expanded. In this synopsis the Proposed Sections of Title 15 will be treated together with the appropriate proposed rules for each provisional remedy.

ARREST

Under the proposal, an order of arrest may only be granted where the plaintiff has demanded, and would be entitled to, a judgment requiring the performance of an act, the non-performance of which would be punishable by the court as contempt, and where the defendant is a non-resident or is about to depart from the state, by reason of which such judgment or order will be rendered ineffectual.[55] This Section is basically the same as Section 827 of the Civil Practice Act, which is a civil arrest based on extrinsic facts.

50. Id. 27.09(b).
51. Id. 27.10.
52. Id. 27.11.
53. Prop. N.Y.R. Civ. Proc. Title 114.
54. The Committee recommends that Section 915(a) of the N.Y. Civil Practice Act, dealing with pre-judgment attachment of a partnership interest be transferred to Section 54 of the N.Y. Partnership Law, since both are similar. Sections 876(a) and 882(a) are highly specialized labor injunction provisions which do not belong in a general practice act, and they would be more appropriate in the N. Y. Labor Law as new Article 20(a). Sections 977(a)-977(c), dealing with receiverships in specific actions should also be transferred to the Consolidated Laws or considered elsewhere in the proposal, i.e. 977(b) regarding receivers of local assets of a foreign corporation should be transferred to the Corporation Law; 977(a) and (b) are treated in Prop. N.Y.R. Civ. Proc. 65.06.
55. Prop. N.Y. Civ. Prac. Law § 15.02.

The order of arrest is granted in the court's discretion, without notice, before or after service of process or judgment. The contents of the order are substantially unchanged,[56] with the exception that the order must now specify a time not exceeding 48 hours, exclusive of Sundays and holidays, in which the defendant must be brought before the court in the county in which he was arrested, for a hearing. This 48-hour requirement is new.[57] In abolishing the Section 826 grounds of arrest, the proposal contemplates that every civil arrest will be based on a factual determination as well as the nature of the relief sought, and this makes an immediate hearing desirable in every instance.

The provisions regarding the papers to be served on the sheriff and defendant,[58] affidavit requirements,[59] undertakings,[60] the procedure to be followed by the sheriff on arrest,[61] liability of the sheriff,[62] hearing,[63] bail,[64] surety[65] and vacation and modification of the arrest order[66], are derived from existing law and follow it in substance with the following exceptions: the sheriff must now notify the plaintiff by phone or written notice, at least 24 hours prior to the hearing, to appear at such hearing, and if the sheriff does not bring the defendant before the court within the time specified in the order, the defendant will be released;[67] the plaintiff shall have the burden of proof at the hearing of establishing his right to the arrest and detention of the defendant;[68] if the court finds at or after the hearing that the defendant should not be continued in custody, the court will discharge the defendant and vacate the arrest order.[69] This latter provision replaces Section 830 of the Civil Practice Act and gives the court wider discretion than under the former provision.[70] The privilege of a woman from arrest, in certain instances, under Section 829 of the Civil Practice Act is no longer applicable under Title 71, since such privilege was extended only under a Section 826 arrest, and is by its terms inapplicable to

56. Prop. N.Y.R. Civ. Proc. 71.01. Cf. N.Y. Civ. Prac. Act. §§ 838-840, N.Y.R. Civ. Prac. 82

57. Based on a recommendation of the Association of the Bar of the City of New York, 11 The Record 402 (1956).

58. Prop. N.Y.R. Civ. Proc. 71.03-a. Cf. N.Y. Civ. Prac. Act §§ 818, 839.

59. Id. 71.02. Cf. N.Y. Civ. Prac. Act §§ 819, 835, 836.

60. Id. 71.05. Cf. N.Y. Civ. Prac. Act §§ 847, 849, 850, 851, 856, 857, 858, and 855. Section 859 has been omitted since it refers only to a Section 826 arrest. See also Prop. N.Y.R. Civ. Proc. Title 123 regarding acceptance of bail and justification of bail surety.

61. Ibid.

62. Id. 71.07. Cf. N.Y. Civ. Prac. Act § 861, with the exception that the provision for replevin actions is omitted as unnecessary.

63. Supra notes 55, 57.

64. Supra note 60.

65. Prop. N.Y.R. Civ. Proc. 71.06-a-c. Cf. N.Y. Civ. Prac. Act §§ 865, 866, 867, 868, 875(3), 875(1) and 874.

66. Id. 71.08. Cf. N.Y. Civ. Prac. Act §§ 822, 844, 845, 846, and N.Y.R. Civ. Prac. 83. See also Prop. N.Y.R. Civ. Proc. 71.04. Cf. N.Y. Civ. Prac. Act § 841.

67. Id. 71-03a. This provision is new and is based on a recommendation of the Committee on Law Reform of the Association of the Bar of the City of New York, supra note 57.

68. Id. 71.03-b. Based on the same recommendation as note 57 *supra*.

69. Id. 71.04. Cf. N.Y. Civ. Prac. Act § 841.

70. Section 830 limits the court in this instance to discharging only lunatics, idiots and infants under 14.

an arrest under Proposed Section 15.02. If the defendant surrenders, is legally discharged from the condition of the undertaking, or dies, "after the commencement of an action against the bail surety," the court may exonerate the bail surety on such terms as the court may require.[71] The quoted words above replace the requirements of Sections 865, 874 and 875 Civil Practice Act that defendant surrender, die or be imprisoned "before expiration of the time to answer" in an action against the bail. Thus, in addition to the provision allowing exoneration on legal discharge of defendant's undertaking, the proposal gives the court a wider discretion in exonerating the bail and setting terms for such discharge. On any motion to vacate or modify the arrest order, plaintiff will be given reasonable time to make any amendments which would tend to uphold the validity of the arrest.[72]

ATTACHMENT

Under the proposed revision, an order of attachment may be granted in any action except those for divorce, separation or annulment, where plaintiff has demanded and would be entitled, "in whole or in part" or in the alternative,[73] to a money judgment against one or more defendants when (1) the defendant is a foreign corporation, non-resident or non-domiciliary or (2) the defendant is a resident or domiciliary but cannot be served with due diligence, or (3) defendant, with intent to defraud creditors or avoid service, is about to or has departed from the state or is concealed within the state with like intent, or (4) defendant, with intent to defraud creditors, has assigned, disposed of or secreted property, or has removed it from the state or is about to do any of these acts.[74] Subparagraphs 4, 5, and 6 of Section 903 Civil Practice Act involving actions based on fraud have been deleted,[75] since the Committee concluded that the fact the action is based on fraud—especially alleged but not proved—should not be a ground for attachment. The remedy of attachment has been limited to those cases where plaintiff has been unable to acquire jurisdiction in any other way, and cases where the fraud or other act has made it probable that the judgment cannot be enforced. Thus, fraud in secreting assets or disposing of property will create a right of attachment, but fraud in inducing the contract sued upon will not.[76]

Thus, the proposal is a broadening of attachment to include actions which

71. Prop. N.Y.R. Civ. Proc. 71.06-d.
72. Supra note 66.
73. Prop. N.Y. Civ. Prac. Law § 15.03.
74. Ibid. Cf. N.Y. Civ. Prac. Act § 902 and portions of § 903.
75. Section 904 N.Y. Civ. Prac. Act, giving the right of attachment to the State or a State Agency for peculation, has also been deleted, since the facts constituting a civil action for peculation are enough to ground a criminal prosecution, and no purpose is served by also allowing attachment. Its deletion accords with the deletion of peculation as a ground for civil arrest, as well as according with the general purposes of the arrest and attachment proposals, i.e. to abolish their penal characteristics and confine their operation to security for the plaintiff.
76. 1959 N.Y. Legis. Doc. No. 17, p. 147.

are not solely for a sum of money. This is in accordance with the provisions of a vast majority of jurisdictions. Moreover, by allowing all the rights of the parties to be determined in a single action without losing the right of attachment, the proposal conforms with the liberal joinder provisions.

The above attachment section contemplates an order rather than a warrant of attachment, since the latter is clearly a court order. An application for an order of attachment is made on motion,[77] and the provisions of Title 33 regarding motions are applicable to provisional remedies unless inconsistent with Article 15 or Title 72. In this regard it should be noted that motions by the defendant for service of papers upon him,[78] or for vacation or modification of the attachment or levy do not constitute a submission to jurisdiction in the action.[79]

Under Section 15.03(1), the court in exercising its discretion in granting attachment should consider that a foreign corporation, authorized to do business within the state, having offices here and doing a majority of its business here, is, under the views of a majority of other states, not considered a foreign corporation for attachment purposes. The contrary construction is unnecessary for jurisdictional purposes, and its value as a security device is lessened since such a foreign corporation is similar to a domestic corporation.[80]

Section 15.03(2), allowing attachment where a resident or non-domiciliary cannot be served with due diligence, is designed to provide attachment in those cases where, under Section 232(a) Civil Practice Act, service by publication would be allowed. The attempt is to bring the attachment provisions into closer parallel with Section 232(a), since attachment is a prerequisite to publication. Therefore attachment will be permitted where a dissolved domestic corporation cannot be served, where the domestic status or name of a corporation cannot be ascertained or where the representative of an infant or an incompetent cannot be served.[81]

Attachment for jurisdictional purposes of property of a domiciliary is never necessary when his whereabouts are known, since personal service is possible.[82] Moreover, under Proposed Rule 25.02(b)2, personal service can be made on an absent resident by leaving the summons at his residence. Thus, under the broader definition of the jurisdictional basis of attachment in Proposed Rule 15.03(2), attachment will not be allowed against a temporarily

77. Prop. N.Y.R. Civ. Proc. 72.02, 36.09.
78. Id. 72.02-d.
79. Id. 72.12, replacing Sections 952-959 N.Y. Civ. Prac. Act. While Section 952 allows a discharge only after the defendant's general appearance, a discharge as to a non-appearing party would not prejudice the plaintiff, since under this proposed rule the property discharged must be replaced by an undertaking of the defendant, and the plaintiff has notice of the motion and may dispute the valuation of the property at the hearing on the motion. See also Prop. N.Y.R. Civ. Proc. 72.13.
80. Supra note 75.
81. Ibid.
82. N.Y. Civ. Prac. Act § 235; Prop. N.Y.R. Civ. Proc. 25.03.

absent resident or domiciliary unless he cannot be so served despite diligent efforts.

All property or debts against which a money judgment may be enforced under Proposed Section 13.01, is subject to attachment.[83]

A bona fide purchaser for value of property levied upon but not in the sheriff's possession, shall not be divested of title, but the proceeds of the sale are subject to the levy.[84]

The procedural aspects of attaching property under Title 72, and the requisite papers, undertaking and mode of levy have not been materially altered under the proposal.

When two or more orders of attachment are delivered to the sheriff, he must levy pursuant to the order first delivered. This provision is new, and replaces Sections 680-682 Civil Practice Act, made applicable to attachment by Section 960 Civil Practice Act.[85]

The order of attachment may still be granted *ex parte* and prior to the commencement of the action, but now is endorsed by the plaintiff's attorney rather than subscribed.[86] The requirement under Section 903 Civil Practice Act, that if the action is one for damages for breach of contract, plaintiff must allege in his affidavit that he is entitled to a stated sum over and above all of defendant's counterclaims known to him, has been deleted.[87]

The provision for plaintiff's undertaking retains the minimum amount of such undertaking at $250, however, such bond must specifically state plaintiff will pay to the sheriff all of his allowable fees, if it is finally decided plaintiff was not entitled to the attachment. It is clearly stated that plaintiff's attorney will not be liable to the sheriff for such fees.[88] A motion for increased security may be made under Proposed Rule 123.08 by the sheriff, garnishee or other interested person. The condition of the undertaking under Section 907 Civil

83. Prop. N.Y. Civ. Prac. Law § 15.04; see also Section 13.01 as to the proper garnishee. The term judgment debtor as contained in Section 13.01 is construed as defendant under Section 15.04.

84. Id. § 15.05. Real property is excepted from this section, since a notice of attachment of realty is filed and indexed under Section 917(1) N.Y. Civ. Prac. Act, the same as a notice of pendency and gives constructive notice to subsequent purchasers.

85. Id. § 15.06. No lien is acquired under the proposed rules by delivery of the order to the sheriff. See Prop. N.Y.R. Civ. Proc. 61.14 for the priority of these liens. The order of attachment together with the summons and complaint and additional papers on which it was based must be filed within 10 days after it was granted, or it will be invalid, and where such order is granted prior to the commencement of an action, it is only valid if service of summons is complete within 60 days thereafter; see in this regard, Prop. N.Y.R. Civ. Proc. 72.02-c and 72.03.

86. Prop. N.Y.R. Civ. Proc. 72.01. Cf. N.Y. Civ. Prac. Act 817, 818 and replacing Section 815 by making the order explicitly available without notice. The requirement of endorsement by plaintiff's attorney is in conformity with the change under the proposal relating to service and filing of papers, see proposed rule 32.01 and notes thereto.

87. Id. 72.02. Cf. N.Y. Civ. Prac. Act §§ 816, 903.

88. Id. 72.02-b. Cf. N.Y. Civ. Prac. Act § 907; the attorney for plaintiff had been held liable for sheriff's fees under the case law, but there was much judicial dissatisfaction with this situation. See McCloskey v. Bril, 286 App. Div. 143, 142 N.Y.S.2d 5 (1st Dep't), aff'd without opinion, 1 N.Y.2d 735, 135 N.E.2d 53 (1956).

Practice Act, that plaintiff will pay the defendant if the "warrant is vacated," has been deleted in favor of the language "if finally decided that the plaintiff was not entitled to an attachment." This change in language is designed to protect the plaintiff from being forced to pay if the order is vacated for technical defects, or because no longer necessary. In these cases the undertaking will not be applied.

The method of levying upon realty remains essentially the same.[89] However, as to property other than realty, several modifications have been made, with two alternatives open to the sheriff depending on the character of the property sought to be reached. The sheriff may levy on property capable of manual delivery, by seizing the property, and afterward serving a copy of the attachment order upon the person from whom the property is taken.[90] This procedure is conditioned on the plaintiff having furnished indemnity satisfactory to the sheriff or fixed by the court.[91] Where the assets include both property capable of manual delivery and other property, the sheriff serves a copy of the attachment order personally upon the defendant or a garnishee.[92] The effect of such service is to subject all property in the possession of the party served, in which the defendant has an interest, to the levy. An order served on a garnishee is only valid if at the time of the service he owes a debt to the defendant, or is in possession or custody of property which he knows or has reason to believe the defendant has an interest in, or specified by the plaintiff as such property in a notice served with the order. Such service binds the property of the defendant then and thereafter coming into the garnishee's possession, as well as debts due and coming due. All property capable of manual delivery must be delivered to the sheriff, and for 90 days after such levy, or such further time as the court allows, the garnishee cannot assign, transfer or interfere with the property except pursuant to the sheriff's directions under court order.[93] The provision above, allowing a notice to be served specifying property incapable of manual delivery to be attached as belonging to the defendant, represents a return to pre-1940 methods of attaching such property, and replaces many provisions introduced in 1940. Section 910 Civil Practice Act, requiring such a writing to be served on the garnishee, filed and limiting the sheriff to attaching only the particular property specified, has been deleted. The practice of specifying particular property is a sound one,

89. Id. 72.04. Cf. N.Y. Civ. Prac. Act § 917(1). See proposed Section 15.08 and proposed Title 75, as to the effect of filing a notice of pendency.

90. Id. 72.06. Cf. N.Y. Civ. Prac. Act §§ 917(3), 912.

91. Ibid.

92. Id. 72.05-a. The defendant must be personally served, and service is not made by leaving a copy of the order with a person authorized to receive process solely by designation filed pursuant to law, nor can the sheriff serve the Secretary of State or other person who has no control of the property in the garnishee's possession.

93. Id. 72.05-b. A garnishee, however, may collect or redeem an instrument received by him for that purpose, and may sell or transfer property held as collateral or pursuant to a pledge, provided that the proceeds in which the defendant has an interest be retained subject to the levy.

but the sheriff will not be limited, under the proposal, to attaching the specified property.[94] Where the garnishee refuses to deliver property or debts of the defendant, which are capable of manual delivery, to the sheriff, the plaintiff may institute a special proceeding to compel the delivery or payment of the property or debts.[95] This is a substantial modification of present practice in that the provisions of Section 922 Civil Practice Act, regarding an action or proceeding by the sheriff, have been replaced, as well as the provisions of Sections 943-946, which had allowed the sheriff to bring the action jointly with the plaintiff. The provisions in the above sections regarding leave of, and control by the court have also been deleted.

The provision of present Section 920 Civil Practice Act regarding an additional undertaking by the plaintiff to be served on the owner or master of a vessel, where goods loaded on such vessel are sought to be attached, has been expanded to include all common carriers.[96]

The duties of the sheriff after the levy, regarding the holding and inventory of the levied property, are substantially unchanged. However, the sheriff's return must specify the names and addresses of all the persons served with an order whether they admit to having property of the defendant or not.[97] This facilitates the court, on the motion of any interested person, in compelling disclosure by any person or garnishee as to any property of the defendant or any debt owing to him.[98] The garnishee, in addition to being liable to such disclosure proceedings, is required within 10 days of service of the order, to serve the sheriff with a statement specifying the value and amount of all debts owing to the defendant or property of the defendant,[99] and even if the garnishee complies with this requirement, he still may be brought before the court for disclosure proceedings.

Adverse claimants to property or debts levied upon, may institute special proceedings against the plaintiff. The complex provisions of Sections 925-927 Civil Practice Act, plus a major portion of Section 924(1), have been replaced by a single simplified rule in the proposal,[1] allowing any interested person

94. 1959 N.Y. Legis. Doc. No. 17, p. 346. Such notice must still be detailed enough to identify to the garnishee the particular property claimed.

95. Prop. N.Y.R. Civ. Proc. 72.05-d.

96. Id. 72.07. Cf. N.Y. Civ. Prac. Act § 920. Under Section 920 only interstate shipments are affected and plaintiff can attach and unload intrastate shipments without indemnity. The proposal abolishes this distinction and applies to both. As to intrastate shipments, plaintiff can either attach and unload with indemnity, or attach the goods at their destination.

97. Id. 72.08-a-b. Cf. N.Y. Civ. Prac. Act §§ 921, 923, 940 and 973.

98. Id. 72.10. Expanding and simplifying N.Y. Civ. Prac. Act § 919.

99. Id. 72.09. The proposed rule is a redrafting and simplification of N.Y. Civ. Prac. Act § 918, and has replaced the 20-day period with a 10-day requirement, since prompt compliance is necessary so that plaintiff may allege that property has been levied upon to comply with the service by publication or mail provisions under proposed rules 25.04(3), 25.05. If the garnishee has money of the defendant at least in the amount of levy, he may limit his statement to that fact.

1. Id. 72.11. If the adverse claim proves fraudulent, the court may order the claimant to pay plaintiff's expenses in opposing the motion, including reasonable attorney fees and

claiming adversely to bring such proceedings, and giving the court broad powers in such proceedings to vacate, discharge or void the attachment. Such an interested person may also move in the first instance, upon notice to all parties, for an order vacating or modifying the attachment.[2]

An omnibus rule, replacing Sections 923, 941, 942, 947, 970, 971, 972, and part of 973 Civil Practice Act, gives the court broad power, on the motion of any interested party, with notice to the sheriff and parties, to cancel a notice of attachment, direct the sheriff to dispose of, account for, return or release any property debt or proceeds.[3] This broad provision is intended to give added flexibility for any unusual situations, such as perishable property being levied upon.

After an execution is issued upon a judgment against the defendant, the duties of the sheriff regarding any property attached by order, are the same as if it had been acquired on a levy pursuant to an execution.[4]

INJUNCTION

The proposed rules concerning injunction are designed to clarify the terminology while retaining the present structure of the permanent and preliminary injunctions and the temporary restraining order. The provisions under present New York law are similar to Federal Rule 65, and the proposed rules preserve the similarity.

A preliminary injunction may be granted in any action where it appears the defendant threatens to do, or is about to do an act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, or in any action where plaintiff has demanded and would be entitled to a judgment restraining the defendant from the continuance or commission of an act which would produce injury to the plaintiff during the pendency of the action.[5]

A temporary restraining order may be granted pending a hearing on a preliminary injunction where it appears immediate and irreparable harm will result to the plaintiff unless the defendant is restrained prior to and during the hearing.[6]

The requisite motions papers and undertaking as well as the provisions for an order of preliminary injunction or temporary restraining order are unchanged in substance.[7]

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other damages incurred. The treble damage penalty of N.Y. Civ. Prac. Act § 924(1) has been deleted, and the five-day notice under that Section has been replaced by the eight-day notice of proceeding under proposed rule 27.02-b. The special provisions of Sections 964 and 965 dealing with junior attaching creditors, are deleted since they are included in the phrase "any interested party." The rule also applicable to all property, and thus is broader than Section 924; "personal property," and Section 927; "goods and effects".

2. Supra note 78.
3. Prop. N.Y.R. Civ. Proc. 72.14.
4. Id. 72.15, replacing Section 969 N.Y. Civ. Prac. Act.
5. Prop. N.Y. Civ. Prac. Law § 15.07. Cf. N.Y. Civ. Prac. Act §§ 877, 878.
6. Ibid.
7. See Prop. N.Y.R. Civ. Proc. Title 73, Rules 73.01-73.05.

RECEIVER

The proposed rules in Title 74 regarding receivers concern such receivers in their provisionally remedial aspects. The other aspects of receivership are covered elsewhere in the proposal.[8] To emphasize that this Title is meant to cover receivers only as to provisional remedies, the term temporary receiver is utilized throughout. This Title contains the bulk of the rules relating to receivers and such rules are made applicable to other Titles in the proposal by a reference in the latter.

Since the powers and duties of a temporary receiver should vary with the type of property involved and the type of action, the present wide discretion of the courts has been continued. A temporary receiver may be appointed upon motion by any person having an apparent interest in property which is the subject of an action in Supreme Court or County Court. Such appointment may be had at any time before or after service of summons, anytime prior to judgment or pending an appeal, where there is a danger that property may be removed from the state, lost, injured or destroyed. If such a motion is made by a person not a party to the action, it is deemed to be a general appearance and such party will be joined in the action.[9]

The court can authorize a temporary receiver to hold real and personal property, to sue for and collect and sell all debts and claims for such purposes as the court may direct. The temporary receiver cannot employ counsel unless the court order so directs. The powers of the temporary receiver may be extended or limited on the motion of the temporary receiver or any interested party, or the receivership may be extended to another action involving the same property.[10] Such receivership however, will not continue beyond final judgment unless the court so orders.[11] The temporary receiver must give an undertaking[12] and take an oath before entering upon his duties.[13]

The receiver is also required to maintain written accounts itemizing receipts and expenditures, describing property and naming the depository of receivership funds. On motion of the temporary receiver or any interested party, the court may require the keeping of particular accounts or direct

8. Id. 62.11; See Title 150 dealing with security for costs; rule 61.07 dealing with a receivership to effectuate the collection of a money judgment and rule 60.06 with respect to non-money judgments.

9. Id. 74.01-a. Cf. N.Y. Civ. Prac. Act § 974(1), (3). The notice provisions of rule 33.05-c are applicable to this rule. The provision of Section 974 limiting the persons who can seek the appointment of a temporary receiver to parties to the action has been eliminated, and any interested party can now also get such an appointment. The requirement that the property be in the possession of an adverse party is also deleted.

10. Id. 74.01-b. Cf. N.Y. Civ. Prac. Act § 977; N.Y.R. Civ. Prac. 175, 179, 180. While Section 977 had formerly applied to realty only, the proposal contemplates receivers of both realty and personalty.

11. Id. 74.01-c. This provision is new, but accords with the case law, i.e. Colwell v. Garfield Nat'l Bank, 119 N.Y. 408, 23 N.E. 739 (1890).

12. Id. 74.03.

13. Id. 74.02.

inspection or presentation of accounts. Notice of motion for the presentation of receivership accounts must be served on the surety for the receiver.[14]

On motion by an interested party, or on the court's own initiative, the court which appointed the receiver may remove him at any time.[15]

NOTICE OF PENDENCY

It is to be noted that the term *lis pendens* is not used in the proposal, since this term normally denotes the common law concept of pendency, in which the commencement of the action itself is implied notice and binding on subsequent purchasers.[16]

A notice may be filed in any action in a New York state court, or any Federal court in which New York realty is involved, where the title possession or enjoyment of such property would be affected. Such notice of pendency is constructive notice from the time of filing, to a purchaser from or incumbrancer of any defendant named in the notice, or any defendant against whom the notice of pendency is indexed. A person whose conveyance or incumbrance is recorded subsequent to the filing of the notice of pendency, is bound by all proceedings in the action as if he had been a party to the action.[17]

In any case specified in Section 15.08 of the Proposed Civil Practice Law, the notice of pendency is filed with the clerk of the county in which the property is located, before or after the service of summons. Unless the complaint has already been served, it shall be filed with the notice.[18] A notice of pendency filed before the commencement of an action is effective only if service of summons on the defendant is complete within 60 days after the filing of the notice. If the defendant dies before service is made, the summons may be served upon his personal representative within 60 days after letters are issued.[19]

A notice of pendency is valid for 3 years from the date of filing, but the court on motion may extend the validity for any like period, if such extension order is recorded and indexed before the expiration of the prior period.[20]

14. Id. 74.04. This is a broadening of N.Y.R. Civ. Prac. 181 to include temporary receivers of personal property.

15. Id. 74.05. Cf. N.Y.R. Civ. Prac. 179; N.Y. Civ. Prac. Act § 81.

16. Prop. N.Y. Civ. Prac. Law § 15.08.

17. Except in certain actions or proceedings such as foreclosure under N.Y. Civ. Prac. Act § 1080, or a proceeding to quiet or register title under N.Y. Real Property Law §§ 366, 382, plaintiffs are not required to file a notice of pendency. Section 120 N.Y. Civ. Prac. Act permits the plaintiff to file such a notice in realty actions, and Section 121 abolishes the common law concept of lis pendens and requires the plaintiff to file a notice of pendency as the only method of charging subsequent purchasers with notice of the action. It would appear that the mere commencement of an action not specified in Section 120, would still be implied notice to subsequent purchasers. Section 120 has been held not applicable to actions in the Federal courts, involving New York property, and presumably the common law doctrine would apply. Proposed rule 15.08 has specifically extended the statutory notice of pendency to this area. Since both the present statute and the proposal are concerned only with actions involving realty, the decisional authority applying the common law concept of lis pendens to actions involving personal property, would appear still valid.

18. Prop. N.Y.R. Civ. Proc. 75.01-a. See also 75.01-b, c, regarding filing requirements.

19. Id. 75.02.

20. Id. 75.03. A stale notice of pendency is not effective for any purpose. Therefore,

If service of process is not complete within the time allowed, or if the action has been settled, discontinued or abated, or if the judgment has not been stayed or the time to appeal has expired, the court must direct the cancellation of the notice of pendency on the motion of any aggrieved party.[21] The court may also direct the cancellation on motion, for the failure of the plaintiff to prosecute the action,[22] and may also impose costs of filing and cancellation upon the plaintiff in such case,[23] in addition to the costs of the action. The court may also cancel the notice of pendency in actions other than foreclosure, partition, dower or curtesy, when the moving party gives an undertaking in an amount fixed by the court adequate to secure the plaintiff, or if the action is one for the specific performance of a contract to convey, and plaintiff fails to give an undertaking to indemnify the moving party for any damages he may incur if the notice of pendency is not cancelled.[24]

MISCELLANEOUS TYPES OF ACTIONS

Actions by State

The present provisions for actions or proceedings by the State are found in Civil Practice Act Articles 74, 75, 75-a and 76.[25] Under the proposed rules, these articles are reorganized and consolidated with no changes in substance. The most important feature of the proposed rules is that the bulk of the present provisions are transferred to the applicable parts of the Consolidated Laws, on the theory they are for the most part declarative of substantive powers of the Attorney-General. For example, provisions relating to public officers are transferred to the Executive Law,[26] provisions relating to *quo warranto* proceedings are transferred to the General Corporations Law,[27] and those relating to the unlawful practice of law are transferred to the Judiciary Law.[28]

There are only three provisions in the proposed rules relating to actions by the state. These provide only minor changes from present law. An action brought by the people is to be brought in the name of the State, i.e. "the State" *vice* "the People of the State."[29] In such an action, the proceedings (except as otherwise specifically prescribed), shall be the same as an action by a private

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a person who finds an old notice on searching the records cannot be held to actual notice of the pending action, nor put on duty to see if the action is still pending.

21. Id. 75.04-a (mandatory cancellation).
22. Id. 75.04-b (discretionary cancellation). See also Proposed Rule 31.07.
23. Id. 75.04-c.
24. Id. 75.05.
25. N.Y. Civ. Prac. Act §§ 1202-1282.
26. Id. §§ 1208-1211, 1222-1229. Transferred to Proposed N.Y. Executive Law §§ 63-a, 63-b, 63-c.
27. Id. §§ 1217-1221. Transferred to Proposed N.Y. General Corporations Law §§ 83-88.
28. Id. §§ 1221-a, 1221-b, 1221-d. Transferred to Proposed N.Y. Judiciary Law §§ 476-a, 476-b, 476-c.
29. Prop. N.Y.R. Civ. Proc. 112.01. Cf. N.Y. Civ. Prac. Act § 1202.

person.[30] The provisions for an action brought "on relation of a person" are carried over.[31]

PROCEEDING AGAINST A BODY OR OFFICER

A proceeding against a body or officer is at present governed by Article 78 of the Civil Practice Act.[32] Although the revisors indicated their feeling that the existing law in this area presents a number of major problems, they left the underlying law intact because the drafting of an entirely new statute on the area was beyond the scope of their authority.[33] Thus, their efforts centered on simplification and clarification of present provisions.

The first rule of the Title,[34] describing the nature of the proceeding, is merely a rewording of portions of Article 78 with no change in substance.[35] It retains the historical conception of mandamus, certiorari to review, and prohibition and provides that except as otherwise provided by law, no proceeding under the Title can be used to challenge a non-final determination or one which can adequately be reviewed by appeal.[36] The rule relating to parties is similarly retained with changes in language, but none in substance.[37]

The proposed rules realign and consolidate the questions which may be raised under the proceeding. Under present law, there are eight sections denoting the questions.[38] The proposed rules change it to four, which are:

1. whether the body or officer failed to perform a duty enjoined upon it by law
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of its jurisdiction
3. whether a determination was made in violation of lawful procedure; was affected by an error of law or was an abuse of discretion in the measure or mode of punishment imposed
4. whether the findings of fact necessary to uphold a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law are unsupported by substantial evidence.[39]

Some significant changes are made in the procedure for such an action. In the first place, such an action is denominated a "special proceeding" and as such is subject to the general procedures applicable to that type action as spelled out in Title 27 of the proposed rules. Further, there is a clarification

30. Id. 112.03. Cf. N.Y Civ Prac. Act § 1206. The special rules relating to joinder now found in Civil Practice Act Section 1204 are eliminated. The rules relating to joinder generally will apply. (Titles 23 and 24.)
31. Id. 112.02. Cf. N.Y. Civ. Prac. Act §§ 1203, 155.
32. N.Y. Civ. Prac. Act §§ 1283 et seq.
33. N.Y. Legis. Doc. No. 13 (1958), p. 395.
34. Prop. N.Y.R. Civ. Proc. 111.01.
35. N.Y. Civ. Prac. Act §§ 1283, 1285.
36. Except for summary order punishing contempt in the presence of the court.
37. E.g., a proceeding may be maintained against an officer whose term of office has expired and his successor or other person having custody of the record. Prop. N.Y.R. Civ. Proc. 111.02(a), replacing N.Y. Civ. Prac. Act § 1290.
38. N.Y. Civ. Prac. Act § 1296, sub-sections 1, 2, 3, 4, 5, 5a, 6, 7 and 8.
39. Prop. N.Y.R. Civ. Proc. 111.03.

as to where the proceeding is to be brought. Subject to the venue provisions of proposed rule 4.07, proceedings are brought in Special Term unless it raises only question "4."[40] In such a case, the proceeding is to be brought in the Appellate Division embracing the county in which it would otherwise be brought.[41] Where the proceeding raises question "4" along with any of the other questions, Special Term is to hear the latter. If it decides against the petitioner, it is to transfer the whole proceeding to the Appellate Division which will review the question determined and decide question "4."[42] Once the Appellate Division gets the proceeding, if the papers are sufficient, it is to dispose of all the issues.

Where a triable issue of fact is raised, it is to be tried "forthwith."[43] If the proceeding is instituted in the Appellate Division, the issue of fact is to be tried by a referee or trial term of Supreme Court. Any order made as a result of such trial is to be made by the Appellate Division.

The present provisions relating to stay of proceedings[44] and judgments and appeals[45] are carried over in substance with a slight change in wording[46] to make the over-all procedure coincide with the proposed rules as a whole.

ARBITRATION

The basic legal rights and procedures governing arbitration are not changed by the proposal. However, many of the existing sections on the subject are consolidated. In addition, there are changes in phraseology which may result in minor changes in the law. The function of the arbitration provisions under both the Civil Practice Act and the proposal is to render written arbitration agreements irrevocable and subject to specific performance, as well as to provide for enforcement of awards by the direct entry of judgments upon them as in actions by law. Common law arbitration based on oral agreements is still existent under the proposal, but present sections dealing with it are omitted from the proposed law.

Article 9 of the proposed law is applicable to both commercial and labor arbitration, and under it all written arbitration as to existing and future controversies are enforceable without regard to the justiciable nature of the controversy. Jurisdiction is conferred upon any competent court of the state (rather than solely on the Supreme Court) to enforce such agreements and enter judgment on an award.[47] The first application arising from an arbitrable

40. Prop. N.Y.R. Civ. Proc. 111.03(4); findings of fact unsupported by substantial evidence.
41. Prop. N.Y.R. Civ. Proc. 111.04(b).
42. Prop. N.Y.R. Civ. Proc. 111.04(d).
43. If a jury trial is required, it will be provided for under Title 27 which deals with special proceedings generally. *When* a jury trial is required, remains a question of substantive law.
44. N.Y. Civ. Prac. Act § 1299.
45. N.Y. Civ. Prac. Act § 1300, 1304, 1305.
46. Prop. N.Y.R. Civ. Proc. 111.05, 111.06.
47. Prop. N.Y. Civ. Prac. Law § 9.01. Derived from N.Y. Civ. Prac. Act § 1449 and

dispute is made to the court on motion in a pending action or in a special proceeding brought in the court and county specified in the agreement, or if none is specified the county where one of the parties resides or does business.[48] The 1959 amendment to Section 1458(a) making the statute of limitations a bar to arbitration in certain instances is included in Section 9.02(b) of the proposed law.[49]

Separate provisions in the proposed law govern the procedure for: orders to compel arbitration,[50] orders to stay arbitration,[51] service of notice of intention to arbitrate,[52] appointment[53] and powers of arbitrators,[54] conducting arbitration hearings,[55] delivery of awards,[56] award by confession,[57] modification of awards by arbitrator[58] or court,[59] confirming[60] or vacating[61] of awards by court and judgments on awards.[62]

HABEAS CORPUS

The Proposed Article dealing with habeas corpus as a means of determining the legality of detention is primarily a condensation and simplification of the present provisions of the Civil Practice Act. The grounds for the writ remain the same and the major changes effected by the proposal are in wording and reconciling the provisions with other applicable portions of the proposal.[63]

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parts of §§ 1448 and 1450. The requirement of Section 1448 that disputes be of a nature "which may be subject to an action" is eliminated.

48. Id. § 9.02. Derived from N.Y. Civ. Prac. Act §§ 1450, 1459. The rules governing special proceedings (Title 27) thus apply to proceedings concerning arbitration.

49. N.Y. Laws 1959 c. 235.

50. Prop. N.Y. Civ. Prac. Law § 9.03(a). Derived from N.Y. Civ. Prac. Act § 1450. This section provides that an order granting arbitration automatically stays pending actions on the arbitrable matter. Thus a separate application for a stay (Section 1451) is eliminated. Cf. Uniform Arbitration Act § 2(d).

51. Id. § 9.03(b). Derived from N.Y. Civ. Prac. Act § 1458(2).

52. Ibid.

53. Id. § 9.04. Derived from N.Y. Civ. Prac. Act § 1452.

54. Id. § 9.05. Derived from N.Y. Civ. Prac. Act § 1456 (plus the power to administer oaths from § 358).

55. Id. § 9.06. Derived from N.Y. Civ. Prac. Act §§ 1454-1456. Proposed Section 9.06(c) is a general statement of the manner of taking evidence and is derived from Uniform Arbitration Act § 5(b).

56. Id. § 9.07. Deliverd from N.Y. Civ. Prac. Act § 1460 and Uniform Arbitration Act § 8. The requirement of filing awards is eliminated by this section.

57. Id. § 9.08. Derived from N.Y. Civ. Prac. Act § 1460-a.

58. Id. § 9.09. Derived from Uniform Arbitration Act § 9. This section is new. Under existing law the arbitrator has no power to modify an award. The grounds on which an award may be modified are the same as those on which the court may now modify an award under Section 1462-a, i.e. formal errors.

59. Id. § 9.11(c). The grounds under this section are derived from N.Y. Civ. Prac. Act § 1462-a.

60. Id. § 9.10. Derived from N.Y. Civ. Prac. Act §§ 1461, 1463.

61. Id. § 9.11(b). The grounds under this section are derived from N.Y. Civ. Prac. Act. § 1462.

62. Id. § 9.14. Derived from N.Y. Civ. Prac. Act §§ 1464, 1465.

63. E.g., The nature of the proceeding is that of a special proceeding and thus, except for provisions peculiar to habeas corpus, the provisions applicable generally to special proceedings under Proposed Title 27 are applicable to habeas corpus and are not repeated under this section.

Noteworthy in the substantive changes that have been made is the deletion of writ of certiorari to determine the legality of detention, as such. The purpose served under present practices by use of that writ may be accomplished by use of the writ of habeas corpus and the revisers sought to eliminate a confusing distinction in terminology not bottomed on real substantive differences.[64] The presence or absence at the hearing of the person detained, now generally cited as distinguishing the two writs, may be specifically requested in the petition for the writ of habeas corpus and ordered in the writ as issued.[65]

Checks upon the abuse of the process by repeated unsuccessful use are found in Proposed Section 7.03(b), which gives the judge discretion to deny the writ under such circumstances. Special provision is also included allowing the judge to accommodate detained persons who are too sick or infirm to attend a hearing in the usual courtroom situation.[66]

Significantly, penalties imposed under the Civil Practice Act for noncompliance with the provisions of the statute, are omitted.[67] Only a handful of actions to recover the penalty are reported, and in none of the reported causes have the plaintiffs been successful.[68] Similarly, the bail provisions of the present act in respect to giving bail in connection with the application for a writ of habeas corpus have been altered insofar as it is proposed that the provisions of the Code of Criminal Procedure for giving bail be applicable.[69] In that manner, some uniformity in giving bail is achieved and the "archaic" provisions of the Civil Practice Act are eliminated.

Some increase in the powers of the judges, other than Supreme Court Justices, who otherwise have authority to issue the writ, is found in Proposed Section 7.02(a). Under Section 1241 of the Civil Practice Act, only a Supreme Court Justice may issue a writ on his own initiative for one detained in a county other than that of the judge's residence. It is proposed that any judge having the power to issue the writ have this further power.

Action to Recover a Chattel

Under the heading of "Action to Recover a Chattel," the revisers have consolidated the present provisions for actions to recover a chattel and a replevin proceeding. Underlying the consolidation is the recognition that plaintiffs in such matters are basically seeking to recover a chattel, and the replevy, or physical taking of the chattel into custody, is an incident of the basic relief sought.

Fundamentally, Title 114 of the proposal provides that the action may be brought to try the right to possession of a chattel.[70] Where reduction of the

64. 1959 Legis. Doc. No. 17, p. 50; see N.Y. Civ. Prac. Act § 1261 et seq.
65. Prop. N.Y. Civ. Prac. Law § 7.03(a).
66. Id. § 709 (d).
67. See e.g. N.Y. Civ. Prac. Act § 1235.
68. 1959 Legis. Doc. supra, p. 51.
69. Prop. N.Y. Civ. Prac. Law § 7.10(b).
70. Prop. N.Y.R. Civ. Proc. 114.01.

chattel is sought in an action to recover the chattel, seizure operates to secure plaintiff's relief, *viz.*: as a provisional remedy.[71] If action has been commenced, no jurisdictional problem arises on seizure of the chattel. In order to obviate problems when the action has not been commenced, a plaintiff seeking seizure of the chattel, must deliver to the Sheriff for service, copies of the summons and complaint,[72] along with the usual papers in replevin.[73]

Significantly, the provisions of Section 1093 of the Civil Practice Act have been omitted so that the right to possession of the chattel is determined by the interests of the parties to the action and the defense of superior right in a third person is not available.[74]

Of importance, is a new provision of the Proposed Title which allows for specific delivery of a unique chattel and injunctive protection of plaintiff's rights therein *pendente lite*.[75]

In other respects, the provisions in actions for recovery of chattels are retained with omissions where the rationale or altered wording of the Proposed Title make them redundant or inconsistent. Except as noted, the substance of provisions in the plenary action to recover a chattel and the incidental replevy remains the same.

Miscellaneous

Provisions with respect to relief: Article 6 is a gathering of provisions otherwise scattered throughout the Civil Practice Act. The Article is primarily devoted to situations where the statute negates a common law election of remedies resulting from the choice of remedy.[76] Also included in the Article are provisions specifying no merger of civil and criminal relief for violations of the same right,[77] bar against confession of judgment prior to default in small non-commercial contracts,[78] the right of contribution as between joint

71. Seizure is generally provided for in Proposed Rule 114.02; defendant may re-replevy as under present procedures. Prop. N.Y.R. Civ. Proc. 114.02(f).

72. Summons and complaint are required because of the provisions of Proposed Rule 26.02, discussed elsewhere in this synopsis.

73. These papers are:

a. An affidavit describing and locating the chattel, asserting plaintiff's claim and defendant's wrong, the value of the chattel or chattels, whether action has been commenced and whether defendant has appeared and/or is in default. Prop. N.Y.R. Civ. Proc. 114.02(c).

b. A requisition directing seizure. Id. 114.02(d).

c. An undertaking to insure the person to whom possession is awarded will get the chattel and be paid such money judgment as may be awarded against the party giving the undertaking. Id. 114.02(e).

74. Under Section 1093 of the Civil Practice Act, a defendant, though he has a lesser right to possession than the plaintiff, may keep the property and successfully resist a replevy by asserting the superior right of a third person, even though there is no assurance that he will turn the property over to the third person. With the availability of impleader and intervention procedures, there is no need to perpetuate the defense of superior title in a third person whose rights are not thereby protected.

75. Id. 114.09.

76. N.Y. Civ. Prac. Act § 112.

77. Id. § 9.

78. Id. § 543(2).

tort-feasors,[79] proceedings to enforce valuation and appraisal agreements,[80] and service and judgment against persons jointly liable.[81]

Recovery of penalty or forfeiture: Provisions relating to recovery of penalties and forfeitures are to be found in Article 8. There have been no substantive changes in the rights afforded under present procedure.

Express trust proceedings: Title 113 of the proposal embraces rules in connection with proceedings relating to express trusts. The title covers the substance of present Article 79 of the New York Civil Practice Act. Since the revisers have stressed uniformity in procedure,[82] no duplication of the rules applicable to proceedings generally, now found in Article 79, are included in the proposal.

Declaratory judgments: The power to grant a declaratory judgment is found in Proposed Section 1.05. The Section is a carry over of the provisions of Civil Practice Act Section 473 and Rule of Civil Practice 212. The substance of the provision is unchanged, but the words "justiciable controversy" are used in describing the nature of the actions in which a declaratory judgment is available. In addition certain portions of the section are a codification of present case law.

79. Id. § 211-a.
80. Id. art. 80-B.
81. Id. §§ 1199, 1187, and the last sentence of § 1185.
82. See Proposed Title 27.