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RECENT DEVELOPMENTS IN PLEADING AND PRACTICE IN NEW YORK

HAROLD R. MEDINA*

For the fourth time it is my privilege to address this Association on the subject of "Recent Developments in Pleading and Practice in the State of New York", prior addresses having been made, after respective intervals of two years, in 1941, 1943 and 1945.[1] Despite the continuance of World War II during a part of the period now under consideration, and despite the confused and chaotic economic conditions which have prevailed since the end of hostilities, the course of procedural reform has run on without abatement, largely due to the painstaking and thorough work of the Judicial Council, in cooperation with various committees of the leading Bar Associations.

From the mass of material thus available it has been difficult to make a choice of subject matter for this address. Some of the changes are so comprehensive that they might well be the subject of separate, detailed discussion. In any event, there has been selected for treatment on this occasion a variety of subjects which it is thought are the most interesting and important. Every lawyer should make it a point to study the text of the new and amended sections of the Civil Practice Act and the new and amended Rules of Civil Practice, referred to below, and also the very comprehensive and detailed reports of the Judicial Council, the Law Revision Commission and other bodies responsible for recommending the various changes.

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*An address by Harold R. Medina of the New York Bar at the Association of the Bar of the City of New York on January 7, 1947, under the auspices of the Committee on Post-Admission Legal Education.

[1]1945: Medina, *Current Developments in Pleading, Practice and Procedure in the New York Courts* (1945) 30 CORNELL L. Q. 449; 1943: 36 L. Lib. J. 73 (1943); 1941: N. Y. L. J., Feb. 10, 1941, p. 630, col. 1; N. Y. L. J., Feb. 11, 1941, p. 648, col. 1; N. Y. L. J., Feb. 13, 1941, p. 670, col. 1; N. Y. L. J., Feb. 14, 1941, p. 690, col. 1; N. Y. L. J., Feb. 17, 1941, p. 730, col. 1; N. Y. L. J., Feb. 18, 1941, p. 748, col. 1; N. Y. L. J., Feb. 19, 1941, p. 766, col. 1; N. Y. L. J., Feb. 20, 1941, p. 784, col. 1.

Jurisdiction of Courts

A number of vitally important amendments have been made in the law relating to service by publication, service out of the state in lieu of publication and personal service without the state without an order.

Service by Publication

Old Section 232 has been repealed and there has been substituted in its place three new sections, Section 232, Section 232-a and Section 232-b. These three new sections respectively define *when, against whom* and *upon what papers* an order for service of summons by publication may be made.

Section 232, in describing the actions in which publication may be made, sets forth three subdivisions; the first relates to matrimonial cases; the second to actions where the complaint demands judgment excluding defendant from a vested or contingent interest in or lien upon specific real or personal property, and allied matters; and the third to an action for a sum of money only where there has been a levy upon property of the defendant within the state pursuant to a warrant of attachment.

The persons against whom publication may be made, as enumerated in Section 232-a, are largely those specified in the old Section 232. Certain changes, however, require comment. With reference to a resident of the state, Subdivision 7 has been assimilated to the attachment practice by including as a ground for publication the fact that a resident "is about to depart" from the state, so that it is no longer restricted to instances where the resident "has departed" or keeps himself concealed within the state for the purpose of defrauding creditors or avoiding service of summons.

The old provisions relative to domestic corporations are eliminated because of the fact that service, in all cases where the name of the domestic corporation is known, may now be made upon the Secretary of State.

There is an entirely new subdivision (Subdivision 4) which permits publication where the defendant is a domestic corporation "whose name remains unknown to the plaintiff after diligent inquiry, or after diligent inquiry the plaintiff is unable to ascertain whether the defendant is a domestic corporation."

Service Out of the State in Lieu of Publication

Section 233 has been clarified by adding the word "Personal" to the title and by including, in the body of the section, the words "in the same manner as if such service were made within the state" so as to bring the language in line with other sections.

Personal Service Without the State Without an Order

Here we find the most important of all the changes made in the period under discussion. It is now permitted to serve a resident without the state and without any order permitting such service, as the basis for a personal judgment. This new type of service is only available, however, in actions for a sum of money and in the other types of actions defined in the first and second subdivisions of Section 232 above described, that is to say matrimonial actions and actions involving vested or contingent interests in or liens upon specific real or personal property and allied matters. This provision has been the subject of considerable criticism, based largely upon the supposed hardship to a resident who is thus served in some distant part of the country. While this question of policy may be debatable, it is believed that thoughtful persons will agree that it is decidedly a step in the right direction.

On the subject of power there is not the least shadow of doubt that the new provision is constitutional and in every way valid. The fact that the defendant must be a resident of the state brings this law within one of the traditional bases for personal jurisdiction and the personal service upon the defendant obviously gives him adequate notice and opportunity to defend, so that there can be no question of any deprivation of due process.

Curiously enough some have thought that this exercise of jurisdiction was in some way an innovation. A letter was recently received from a correspondent who had these comments to make:

> "The change accomplished by new Section 235 sets up a somewhat new concept in the law of jurisdiction. It stems from the decision of the United States Supreme Court in the case of *Milliken* v. *Meyer* (311 U. S. 457) which held that the residence of the defendant within the state issuing process was sufficient to give the courts of that state *in personam* jurisdiction, irrespective of the fact that process was served beyond the territorial boundaries. This departure from old-fashioned notions of jurisdiction may create a temporary furore but a sensible realization of the needs of the times flowing from the change in the habits of the American people as well as the vast improvement in their methods of transportation from state to state will soon reconcile old-fashioned lawyers to the change."

Even the Judicial Council comments that Section 235 as amended "would take advantage of the decision of *Milliken* v. *Meyer*."[2]

As a matter of fact there is absolutely nothing new about this assertion of personal jurisdiction against a resident. Doubtless the word "resident",

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[2]12TH ANNUAL REPORT OF N. Y. JUDICIAL COUNCIL (1946) p. 59.

in accordance with the interpretation of similar statutes, will be construed as referring to a person domiciled within the state. Both in the Restatement of the Law of Conflicts and in the statements of text writers and in decisions of the courts of this and other states the position has been uniformly taken that service out of the state was a proper basis for personal jurisdiction against one domiciled in the state of the forum, provided there was adequate notice and opportunity to defend.

The bill as proposed by the Judicial Council in 1945 and as passed by the Legislature went one step further.[3] It permitted service by publication "where the defendant is a resident of the state, and the complaint demands judgment for a sum of money only." Under the bill as thus recommended and passed it would have been possible to proceed by publication against a resident in an action for a sum of money only, even if there had been no prior attachment and levy. The *in personam* jurisdiction thus conferred would have been unassailable upon the principles above discussed. Furthermore, the vexing question of whether the then existing sections of the Civil Practice Act should be interpreted as permitting such service would have been put at rest.[4] This clarification, or expansion of jurisdiction if it be such, seems not to be subject to any serious objection. Objection was made, however, and the Governor vetoed the bill in its entirety,[5] as this portion was not separately before him. The effect of all this, as a practical matter, is to eliminate the possibility under existing law of serving a resident defendant by publication in an action for a sum of money only without first obtaining an attachment and making a levy thereunder. In view of the present Section 235 above discussed, the overall result would seem to be sufficiently satisfactory.

There is a further question which may be answered by applying the familiar and well established principles which were reaffirmed in the *Milliken* case. In an action for a sum of money only in which property of defendant has been attached or in a divorce case, Sections 232 and 232-a plainly permit service by publication under certain defined circumstances, against a resident defendant. What is the nature of the jurisdiction thus conferred? Suppose the action is to recover on a $10,000 promissory note, and the property attached is of the value of only $500. The default judgment would be for

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[3] 11TH ANNUAL REPORT OF N. Y. JUDICIAL COUNCIL (1945) pp. 194-5.

[4] Karchman v. Karchman, 224 App. Div. 773, 230 N. Y. Supp. 856 (3d Dep't 1928), *reversing*, 131 Misc. 462, 227 N. Y. Supp. 194 (Sup. Ct. 1928); N. Y. CIVIL PRACTICE ACT § 231 (3); Doctor's Hospital, Inc. v. Kahal, 155 Misc. 126, 277 N. Y. Supp. 736 (N. Y. City Cts. 1934), *aff'd*, 155 Misc. 127, 277 N. Y. Supp. 738 (1st Dep't 1934).

[5] 12TH ANNUAL REPORT OF N. Y. JUDICIAL COUNCIL (1946) p. 58.

the full amount and an execution could be levied upon any property of defendant within the territorial limits of the county or counties in which execution was issued. Similarly a default judgment in the divorce case could include alimony and the judgment for alimony would be a valid and enforceable personal judgment. The reason is that defendant in each case is a resident. While Sections 232, 232-a and 232-b, relating to service by publication, contain no provisions as to the *effect* of the service, the same may be said of Section 235 and the Sections relating generally to the service of process. Where the constitutional basis for personal jurisdiction exists the courts, in the absence of some special and unusual legislative pattern,[6] will give the judgment the validity and effect of a personal judgment.

Let us suppose that a summons alone is served upon a resident out of the state pursuant to Section 235, which plainly requires "that a copy of the verified complaint must be annexed to and served with the summons." Suppose the complaint is unverified, or that the summons is served alone and without any complaint whatever. Will such omissions constitute a jurisdictional defect or may they be corrected, with or without an order?

Here we have a question of "jurisdiction" fundamentally different from the one first above discussed. The question now has to do with a self-imposed limitation on jurisdiction, that is to say a limitation not arising out of the Constitution of the United States but imposed by the state of its own accord. As far as power is concerned, the State of New York is doubtless competent through its legislature and its courts to assert personal jurisdiction over one of its domiciliaries without the state, by the service of a summons alone. Accordingly, we have a simple question of statutory interpretation and it is familiar law that matters of policy have great weight in connection with such interpretation. In all probability, the courts of this state would be disposed to take a strict view of the matter and to hold that a failure substantially to comply with the statute was a jurisdictional defect. If such an interpretation were to prevail, a resident defendant out of the state might simply disregard a summons served upon him without a verified complaint annexed thereto, as required by Section 235. He could also, if he chose to do so, move to set aside the service for failure to comply with the statute. Wherever service of process is void a defendant has this choice of remedies in New York.

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[6] *Cf.* N. Y. VEHICLE AND TRAFFIC LAW § 52: ". . . any such summons against him (a non-resident) which is so served shall be of the same legal force and validity as if served on him personally within the state and within the territorial jurisdiction of the court from which the summons issues."

A more difficult question would arise if the summons and the verified complaint were separately served or if it were otherwise plain that the complaint was not "annexed" to the summons. If they were both served as part of the same transaction, it seems highly improbable that the courts would consider that the service was in any way defective.

Those disposed to criticize the new provisions of Section 235 foresee controversies over domicile, with the attendant inquiry into intent and *bona fides,* such as has caused so much trouble in the field of matrimonial litigation since the *Williams* cases.[7] Perhaps this may be so; but controversies over domicile present no new or unusual problem. Indeed, the questions presented are identical with those now arising under the sections of the Civil Practice Act relating to attachments and also other sections, such as Section 543 relative to judgments by confession.[8]

It is anticipated that Subdivision 4 of the new Section 232-a will cause some difficulty and confusion. While it is stated that this subdivision will be used principally in actions involving specific interests in real or personal property,[9] the subdivision contains no such limitation. Furthermore, it would seem not unlikely that attorneys for plaintiffs will have some difficulty in adequately designating the defendant intended and will also find it far from easy subsequently to straighten out the record in order that the ultimate judgment may be properly entered against the defendant intended.

Third Party Practice

Within the memory of at least a few of those present a misjoinder or defect of parties was subject to demurrer if the defect appeared upon the face of the complaint. The demurrer raised an issue of law, a note of issue was filed and in the course of time this issue was solemnly and separately determined. An appeal not infrequently followed and the whole machinery of justice gradually became pretty well stalled. The strict rule of waiver which applied to a misjoinder or defect of parties if not promptly attacked increased the chaos. Both the bench and bar seemed far more interested in the machinery than in obtaining a clear understanding of the problems of parties and how they should be solved in the interests of justice. This led to constant tinkering with the superficial aspects of the subject, while leaving untouched the central core of ambiguity and uncertainty.

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[7]Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207 (1942); Williams v. North Carolina, 325 U. S. 226, 65 Sup. Ct. 1092 (1945).

[8]Glaser v. Brand, 253 App. Div. 711, 1 N. Y. S. (2d) 646 (1st Dep't 1937); Williams v. Mittlemann, 259 App. Div. 697, 22 N. Y. S. (2d) 822 (2d Dep't 1940); American Cities Co. v. Stevenson, 187 Misc. 107, 60 N. Y. S. (2d) 685 (Sup. Ct. 1946).

[9]11TH ANNUAL REPORT OF N. Y. JUDICIAL COUNCIL (1945) pp. 58-9.

The Judicial Council finally submitted a comprehensive scheme for modernizing the whole subject of Party Practice, based in many particulars upon various portions of the Federal Rules of Civil Procedure. This new procedural device has been adopted in its entirety and is now law.

In the limited time available it is necessary to confine the discussion of details to the new Third Party Practice. One or two observations of a general character may, however, be helpful. Whether or not a defect or misjoinder of parties appears upon the face of a pleading it is no longer necessary to attack such defect or misjoinder within any specified time. Rule 102 now contains two separately numbered subdivisions, the first of which covers the subject of indefiniteness and uncertainty. The second subdivision relates specifically to the subject of what is now called "nonjoinder or misjoinder of parties." One should at once get in the habit of discarding the old terminology of "a defect or misjoinder of parties." This second subdivision defines the motion to be made, provides for a stay of proceedings where circumstances make a stay desirable, permits the use of affidavits where the defect does not appear on the face of the pleading under attack, and gives the court discretion to defer the hearing and determination of the motion until the trial. Rule 105, which requires certain motions to be made within twenty days after the service of the pleading to which the motion is addressed, has been amended so as to apply, in the case of Rule 102, only to subdivision 1 relative to indefiniteness and uncertainty. Section 278 has been amended so as to eliminate the automatic waiver in so far as it related to the subject of parties.

The motion under Rule 102 will of course never result in a dismissal. This motion is of a regulatory character. When successfully made it will cause the adversary to serve a new pleading which includes the party or parties improperly omitted or excludes the party or parties improperly joined. Where the order thus made, as a result of a motion under Rule 102, is not complied with, the next remedy is the motion to dismiss. Under the new practice this procedure is governed by Section 193 and Section 180. The latter is an old friend and covers the motion to dismiss for failure to prosecute, which has now been appropriately amended to fit into the scheme of the new Party Practice.

So much for preliminaries. Let us now examine with some care the group of provisions which constitute the new Third Party Practice. They constitute a superb piece of draftsmanship and have the virtue of coining new words to define the various categories of parties so that the old ambiguities may in the course of time disappear, while at the same time constructing a new

machine sufficiently strong and sufficiently flexible to turn out the work.

Just as in the case of the phrase "substituted service" so in the case of the phrase "third party practice" the words are used sometimes with one meaning and sometimes with another. Thus the expression "third party practice" in a general way means that body of procedural rules which governs the bringing in of third parties either on their own initiative or against their will. It is in this general sense that the phrase is used as a heading for this portion of the address. On the other hand, the Civil Practice Act has now established "third-party practice" in a new, limited and specific way, precisely the same as has been done in the case of "substituted service", which under the Civil Practice Act means a particular and specific kind of "substituted service." In other words "third-party practice" in the limited sense of the Civil Practice Act is the practice defined and set forth in the new Section 193-a, entitled "Third-party practice." The use of the hyphen will perhaps serve to fix this point in one's memory. Accordingly we may start by saying that the practice formerly known as "impleader"—not to be confused with "interpleader" (Sections 285 ff.)—is now known and described as "third-party practice."

Using Third Party Practice in the general sense, the old scheme which was altered by the Legislature in 1946, as above stated, included Section 192 for adding or dropping parties, Section 193, Subdivision 1, for adding parties where necessary for a complete determination of the cause; Section 193, Subdivision 2, for adding parties who are or will be liable over, commonly known as impleader; Section 193, Subdivision 3, relative to intervention, which prescribed a method for adding a person not a party on his own application on the ground that he bad an interest in the subject matter; and Section 193, Subdivision 4, for adding parties to obtain complete jurisdiction over all owners interested in an action for damages to real property on the application of the person to be held responsible.

The changes in the entire field were accomplished by the repeal of old Section 193 and the enactment of new Sections 193, 193-a, 193-b and 193-c, and ancillary amendments to Sections 180, 192, 264, 278 and 474. Rules 102 and 105 have been amended and a new Rule 54 added.

The new Section 193 contains three subdivisions. Subdivision 1 sets up two categories of parties and defines each category. The first category is of an "indispensable" party, defined as a person whose absence will prevent an effective determination of the controversy, or whose interests are not severable and who would be inequitably affected by a judgment rendered between the parties before the court. The second category is of a "condi-

tionally necessary" party, defined as a person who is not an indispensable party but who ought to be a party if complete relief is to be accorded between those already parties.

Subdivision 2 sets up the procedure for bringing in indispensable and conditionally necessary parties. With respect to an indispensable party, the court *must* order him brought in. If a party fails or neglects to do so after a reasonable time, the court *must* dismiss the action without prejudice. With respect to a conditionally necessary party, the court *must* also order him to be brought in, if he is subject to the jurisdiction of the court and can be brought in without undue delay. However, the court *has discretion* to proceed without him if his addition would cause undue delay, or if jurisdiction can be acquired over him only by consent or voluntary appearance. If a party fails to bring in a conditionally necessary party after a reasonable period granted to him to do so, the court *in its discretion* may dismiss the action without prejudice.

Subdivision 3 provides that the section in its entirety shall be applicable to all actions, whether legal or equitable. It will be recalled that old Section 193, Subdivision 1 was only applicable to actions in equity.[10]

The new Section 193-a contains six subdivisions. It is entitled "Third-party Practice." It is intended to simplify and liberalize what formerly was 193 subdivision 2, and to eliminate therefrom many of the unjustifiable limitations, and much of the confusion found in the construing decisions. Under the old practice, a party was obligated to show that a third person *"is or will* be liable to such party," and upon such showing he could obtain an order that such third person be brought in. The old practice required an application to the court, and was limited by decisions to a claim which for all practical purposes had to be identical with plaintiff's claim against defendant.[11] Since the third party was not a party to the application, he could then apply to the court to re-examine the issue previously determined without him. This often required two applications to the court. Under the new practice a third-party is brought in without any application to the court.

Subdivision 1 provides that after service of his answer, a defendant may bring in a third-party who is or *"may be"* liable to him, by merely serving a summons and copy of a verified complaint designating himself as "third-party plaintiff," and the new party as "third-party defendant." The only requirement is that the claim against the third-party must be related to the main action by a question of law or fact common to both controversies. This eliminates the old requirement of identity of claim.

[10]Chapman v. Forbes, 123 N. Y. 532, 538, 26 N. E. 3, 5 (1890).
[11]Nichols v. Clark, MacMullen & Riley, Inc., 261 N. Y. 118, 184 N. E. 729 (1933).

Subdivisions 2 to 6 set forth the procedure to be followed after such third-party is brought in. Subdivision 2 permits him to answer the claim asserted against him, and serve copies of his answer upon the third-party plaintiff's attorney and the plaintiff's attorney within twenty days of the service of the third-party complaint upon him. It permits him any defense which he has against plaintiff's original claim, which was not permitted under the old practice. It gives him, for the purpose of contesting plaintiff's claim, all the rights against the plaintiff that any party to an action would ordinarily have, including the right to appeal, another right which he did not have under the old practice.

Subdivision 3 permits plaintiff to amend his pleading to assert against the third-party defendant any claim which plaintiff might have asserted against him originally had he been joined as a defendant. If plaintiff so amends his pleading, the third-party defendant may assert a counter claim against the plaintiff.

All of the foregoing (subdivisions 1, 2 and 3) may be accomplished merely by the service of papers and without application to the court.

Subdivision 4 provides for the first application to the court, and permits the court in its discretion to dismiss the third-party complaint without prejudice, or order a separate trial, or make such other order as may be necessary to further justice or convenience, and in so doing, the court is authorized to consider whether the new controversy will unduly delay the determination of the main action or prejudice any party to the action. Such motion to dismiss may be made by plaintiff or the third-party defendant, after the third-party defendant has appeared, upon notice to all parties who have appeared.

Subdivision 5 regulates the rendition of a verdict in a case when a verdict in plaintiff's favor against the third-party plaintiff might be rendered upon a ground which would not support the claim asserted by the third-party plaintiff against the third-party defendant, and permits the court to instruct the jury to make, in addition to a general verdict, appropriate special findings with respect to the ground of the third-party plaintiff's liability.

Subdivision 6 extends the "third-party practice" to a third-party defendant as well as to the plaintiff, and permits a third-party defendant to bring in a new third-party and permits a plaintiff, when a counterclaim is asserted against him, the same right.

The new provisions specifically applicable to Third-party Practice are to be found in the new Rule of Civil Practice 54. This rule prescribes the form of the summons issued by "the third-party plaintiff" against "the third-party

defendant"; a verified complaint must be served with such summons, "together with copies of all pleadings in the action." Copies of the summons and complaint of the third-party plaintiff must also be served upon the plaintiff or his attorney. The name of the third-party defendant shall be added to the title of the action. Finally, to take care of cases where "the plaintiff" or "a third-party defendant" wishes to bring a "third-party action," it is directed that the prescribed form of summons "shall be amended accordingly."

For the sake of clarity it may be well at this point to identify the various several procedural aspects of this somewhat complicated subject, and then pull them together.

Where "proper" parties have been joined, even though they may be merely "formal" or "nominal" parties, there is no pleading error to correct. If an "indispensable" party has been omitted he must be joined or the proceeding must ultimately be dismissed without prejudice. If a "conditionally necessary" party has been omitted he should be joined, but the court has power to proceed if it should prove impossible to bring him in. "Cross-claims" between those already parties to an action are freely allowed pursuant to Section 264 and "counterclaims", pursuant to Sections 266-271, inclusive. "Third-parties" are impleaded by the new procedure defined in Section 193-a and Rule 54. Those not already parties who desire to be made such may use the remedy of "intervention" provided by Section 193-b.[12] In the case of adverse claimants there is the remedy of "interpleader" by separate action or by motion in a pending action, as provided in Sections 285-287 inclusive. Certain rights to contribution as between joint tortfeasors after judgment are regulated by Section 211-a. The various Sections and Rules which govern these allied matters have created a series of procedural devices for bringing about certain practical results. If they can be studied and examined as mechanisms or tools, such as one would find in a well planned factory, practitioners will come to use them with more skill and dispatch.

It is a pity that someone has not yet figured out a means of bringing into one action all those persons who may be liable for damages in an automobile accident. It will be recalled that as far back as 1928 there was added to the Civil Practice Act Section 211-a which permitted contribution by one joint tortfeasor against another where a money judgment had been recovered generally against two or more defendants in an action for a personal injury or for property damage and one of the judgment debtors has paid more than

[12]The wording of the new Section 193-b permits intervention in actions for a sum of money only, which was not allowed under the old practice.

his pro rata share of the judgment. A very serious attempt was made so to construe this section as to permit, in an action by a single plaintiff against a single defendant, an application by defendant to bring in as parties defendant the owners or operators of other automobiles involved in the accident. The Court of Appeals in *Fox* v. *Western New York Motor Lines, Inc.*, held that this procedure was not permitted by Section 211-a.[13] A reading of the many decisions in the various departments, which preceded the decision of the Court of Appeals in the *Fox* case, plainly indicates the very substantial practical advantages to be obtained from the procedure of bringing the other parties in.[14] A number of bills were introduced in the Legislature following the decision by the Court of Appeals in the *Fox* case[15] but there were so many practical difficulties that none of these bills proved satisfactory. Perhaps a solution will some day be found. It may be that things are better left as they are. In any event, it is well to bear in mind that none of the provisions above discussed in connection with Third Party Practice have any relation to the situation presented in the *Fox* case.

Actions against Partners or Persons Jointly Liable

We turn now to certain miscellaneous changes made in 1945. After Section 229-a was added to the Civil Practice Act in 1938, permitting an action of any type to be brought against a partnership and authorizing service of process on less than all of the partners, it was found that certain further changes were desirable and that there should be a closer correlation between the procedure prescribed in the case of partnerships and that used in actions against persons jointly liable, as prescribed by Article 73 of the Civil Practice Act.

Accordingly Section 229-a was repealed and a new Section 222-a has taken its place. The new section is entitled "Action or proceeding in partnership name", and it provides that "Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons." This accomplished a major

[13]257 N. Y. 305, 178 N. E. 289 (1931), *see also* Ward v. Iroquois Gas Corp., 258 N. Y. 124, 179 N. E. 317 (1932).

[14]Haines v. Bero Engineering Construction Corp., 230 App. Div. 332, 243 N. Y. Supp. 657 (4th Dep't 1930); Riley v. Wood, 139 Misc. 314, 248 N. Y. Supp. 326 (Sup. Ct. 1931); La Lone v. Carlin, 139 Misc. 553, 247 N. Y. Supp. 665 (Sup. Ct. 1931); Davis v. Hauk & Schmidt, Inc., 232 App. Div. 556, 250 N. Y. Supp. 537 (1st Dep't 1931); Schenck v. Bradshaw, 233 App. Div. 171, 251 N. Y. Supp. 316 (3d Dep't 1931); Dee v. Spenser, 233 App. Div. 217, 251 N. Y. Supp. 311 (4th Dep't 1931); Blauvelt v. Village of Nyack, 141 Misc. 730, 252 N. Y. Supp. 746 (Sup. Ct. 1931).

[15]Senate Int. 84, Jan. 13, 1932; Senate Int. 822, Feb. 9, 1932; Assembly Int. 781, Feb. 3, 1932; Assembly Int. 935, Feb. 9, 1932.

change, in line with Rule 17(b) of the Federal Rules of Civil Procedure. Accordingly, an attorney has the alternative, with respect to a partnership plaintiff or a partnership defendant, to include the names of each of the partners or to use the partnership name alone. As it is often difficult to locate with accuracy the names of all the partners, and as it is still possible to use all the names where they are available, this change is a distinct improvement in the practice.

Section 222-a also contains provisions to the effect that service of summons or other process upon any one or more of the partners shall permit execution and collection of the judgment "out of the real and personal property of the partnership and out of the real and personal property of the person summoned, whose name shall be endorsed on the execution."

A further change, while desirable in every way, has led to an inadvertent error of some consequence in one of the sections applicable to actions against joint debtors.

In the formulation of the new Section 222-a relative to partnerships it was found that the old method of marking on the docket the words "not summoned" against the names of those partners upon whom summons was not served would now be putting the cart before the horse. Accordingly, the old practice was eliminated and in lieu thereof Section 222-a now provides that the clerk with whom the judgment-roll is filed must write upon the docket opposite the name of each defendant *upon whom the summons was served,* the word "summoned".

In the correlation of the provisions relative to partnerships with the article relating to "Actions against persons jointly liable," Section 1197 was amended so as to permit this procedure in any action, "legal or equitable" against two or more defendants upon "a joint obligation, contract or liability." This greatly broadened the scope of old Section 1197. The revision appropriately amended Sections 1197, 1198, 1199 and 1200 with the intention of making the procedure substantially identical with that against partners. In other words it was doubtless the intention to permit a judgment in such an action and an execution collectible against property of any defendant upon whom the summons was served and any property owned jointly by a defendant upon whom summons was served and other defendants jointly liable with him.

It would seem that, by inadvertence, the amendment to Section 1199 failed in part to take cognizance of the fact that judgment docket now contains a designation of the persons "summoned" rather than a designation, as formerly, of those "not summoned".

The point may best be understood by comparing the reading of old Section 1199 with new Section 1199. The old Section is as follows:

> *"Execution; indorsement; enforcement.* An execution upon such a judgment must be issued, in form, against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff containing the name of each defendant who was not summoned and restricting the enforcement of the execution, as prescribed in this section. An execution against the person issued upon such a judgment shall not be enforced against the person of a defendant whose name is so indorsed thereupon. An execution against property issued upon such a judgment shall not be levied upon the sole property of such a defendant; but it may be collected out of the real and personal property owned by him jointly with the other defendants who were summoned, or with any of them, and out of the real and personal property of the latter, or of any of them."

The new Section reads as follows:

> *"Execution; indorsement; enforcement.* An execution upon such a judgment must be issued, in form, against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff containing the name of each defendant who was summoned. An execution against the person issued upon such a judgment may be enforced as provided by law against the person of a defendant whose name is so indorsed thereupon. An execution against property issued upon such a judgment may be levied upon the sole property of a defendant whose name is so indorsed thereupon; and it may be collected out of the real and personal property owned by him jointly with the other defendants who were summoned, or with any of them, and out of the real and personal property of the latter, or of any of them."

It will be observed that the "defendant whose name is so indorsed thereupon" is now a person "summoned" rather than a person "not summoned". Accordingly, the word "him", according to the literal reading of the new Section can only mean a defendant "summoned". The result is that if the Section is to be interpreted literally, there is now no provision authorizing the collection of a judgment upon issuance of an execution in an action against persons jointly liable, out of property owned by a person summoned jointly with other defendants who were not summoned. Perhaps the courts realizing that the error was inadvertent, may construe the Section as it was doubtless intended to be written. In any event, this phraseology should be clarified by the present Legislature.

Other changes relative to this same general subject, including changes in the Justice Court Act, will not be discussed as they are all described in

detail in the comprehensive recommendations contained in the 11th Annual Report of the Judicial Council.[16]

Extension of Time after Corrective or Regulatory Motion

One of the most vexatious ambiguities arose out of conflicting interpretations of Section 283 as it read before the amendment by the Laws of 1945, Chapter 247, which took effect on March 24, 1945. It will be recalled that, from the time the Civil Practice Act first took effect, this Section provided that "if objections to a pleading, presented by motion be not sustained, the moving party may serve an answer or reply . . . as a matter of right, after the decision of the motion and before the expiration of ten days after service of notice of the entry of the order deciding the motion," unless the objections were found to be frivolous. Anyone reading this section would suppose that it related to any type of motion which contained objections to a pleading, whether these objections were in the nature of the old demurrer or whether they were in the nature of a corrective or regulatory motion such as one to make the pleading more definite and certain, to strike out matter as scandalous, repetitious or otherwise improper. Unfortunately, the situation became complicated by the fact that Section 237 relative to appearances provided in substance that the defendant's appearance must be made by the service of a notice of appearance, a copy of an answer or "a notice of motion raising an objection to the complaint in point of law", and it had been repeatedly held that a motion to make more definite and certain or a motion to strike out irrelevant, redundant, scandalous or repetitious matter did not constitute an appearance. Accordingly, in a case where a motion to make more definite and certain was made on the last day to appear or answer, the plaintiff's attorney returned the papers and proceeded to enter judgment by default. This was in 1923 in the case of *255 Fifth Avenue Corporation* v. *Freeman,* and the Court held that the service of the motion papers did not entitle the defendant to the extension under Section 283. This was affirmed without opinion by the Appellate Division, First Department,[17] and the decision was cited with approval in 1928 in *Shipley* v. *Schmitzer.*[18] The Appellate Division of the Second Department held the other way in *DeGroot* v. *Brooklyn Daily Times.*[19]

To resolve this conflict and to establish a more reasonable rule, which

[16] 11TH ANNUAL REPORT OF N. Y. JUDICIAL COUNCIL (1945) pp. 223 *et seq.*
[17] 120 Misc. 472, 199 N. Y. Supp. 519 (Sup. Ct. 1923), *aff'd,* 207 App. Div. 842 (1st Dep't 1923).
[18] 224 App. Div. 730, 229 N. Y. Supp. 915 (1st Dep't 1928).
[19] 230 App. Div. 783, 244 N. Y. Supp. 778 (2d Dep't 1930).

might not serve as a mere trap for the unwary, the Legislature, as above stated, in 1945 amended Section 283 so that it now gives the automatic extension where "objections to a pleading, presented by motion for judgment or by corrective or regulatory motion, be not sustained."

In this connection it may be well to express the thought that a statutory scheme which defines a motion for judgment addressed to the complaint as an appearance and a motion addressed to the complaint for the correction of a defect therein as not an appearance is overtechnical and unwise. The whole subject of appearances and jurisdiction is technical enough as it is. Doubtless the problem is not as simple as it sounds and there are many ramifications. It would seem, however, that the subject could profitably be reexamined.

Waiver of Jury Trial

Another amendment of real practical significance was made in 1945 to Subdivision 5 of Section 426, which applies only to the five counties of the City of New York. This subdivision regulates the procedure in connection with the demand for a jury trial and the manner in which a jury trial may be waived. It is long, technical and confusing. Much of the trouble was caused by the fact that the subdivision, prior to 1945, required the service of a *separate* demand for a jury trial *simultaneously* with a note of issue. This was held by the First Department, Appellate Division, to be a final and irreparable waiver irrespective of inadvertence or excusable error.[20] The Second Department, Appellate Division, however, held that the Court had the power to relieve a party from such a waiver, where it could be shown that it was due to inadvertence or excusable error and had caused no undue delay or prejudice to the rights of any other party to the action.[21]

Subdivision 5 of Section 426 as amended permits "demand for trial by jury" to be part of the note of issue and the conflict between the two Departments is resolved by the addition of the following sentence at the end of the subdivision: "The Court in its discretion may relieve a party from a

[20]Craig v. The City of New York, 228 App. Div. 275, 239 N. Y. Supp. 328 (1st Dep't 1930); Goldstein v. Langenieux, 230 App. Div. 445, 245 N. Y. Supp. 222 (1st Dep't 1930); Keane v. Connecticut Fire Insurance Company of Hartford, 232 App. Div. 655, 247 N. Y. Supp. 1004 (1st Dep't 1931); Shulberg v. Chemical Bank & Trust Company, 246 App. Div. 807, 285 N. Y. Supp. 1059 (1st Dep't 1936).

[21]New York Investors, Inc. v. Laurelton Homes, Inc., 230 App. Div. 712, 243 N. Y. Supp. 246 (2d Dep't 1930); Schapira v. National City Bank, 170 Misc. 1065, 11 N. Y. S. (2d) 693 (Sup. Ct. 1939); Bartless v. Pino-Lytol Chemical Co., Inc., 39 N. Y. S. (2d) 355 (Sup. Ct. 1942), *aff'd*, 266 App. Div. 684, 41 N. Y. S. (2d) 220 (2d Dep't 1943).

failure to comply with the provisions of this subdivision if no undue delay or prejudice to the rights of another party would result."

It may not be out of place to sound a note which has been referred to in practically every one of the prior addresses of this series. Either one is a believer in the jury system or one is not. I happen to be one of those who not only believes in the system but who regards it as one of the greatest bulwarks of American liberties and one which has more than almost any other provision of law to do with the proper functioning of the democratic process. In recent years a desire for expedition of judicial business, a desire to get convictions in criminal cases at any cost and, to some extent, a belief on the part of the property class that juries are not entirely fair to it has led to a series of laws, of which Subdivision 5 of Section 426, just above discussed, is a typical example restricting and, as I think, emasculating the jury system. In particular, protest is made against the blue ribbon juries and against the 5-6 verdicts. There is no point in elaborating on this subject on this occasion, but it seems elementary that a jury should be a true cross section of the community and that a jury is a jury of twelve, the unanimous judgment of all of whom can alone determine questions of fact. To permit ten members of a jury of twelve forthwith and without discussion to impose their will upon the other two is neither sensible nor, in the long run desirable. Perhaps disagreements may thus be reduced to a minimum. Doubtless the decision by a judge without a jury is commonly made with more expedition and dispatch. But the sacrifice of the traditional give and take as between twelve representative members of community life, in a discussion in which all may participate so that the views of this cross section may be truly represented, is not only traditional but also sound and valuable. It is seldom right to alter fundamental principles on the ground of so-called expediency.

New Section 112-g

In 1946 a new section was added to the Civil Practice Act, reading as follows:

> "§ 112-g. *Tender of benefits by party rescinding transaction.* A party who has received benefits by reason of a transaction voidable because of fraud, misrepresentation, mistake, duress, infancy or incompetency, and who, in an action or proceeding or by way of defense or counterclaim, seeks rescission, restitution or other relief, whether formerly denominated legal or equitable, dependent upon a determination that such transaction was voidable, shall not be denied relief because of a failure to tender before judgment restoration of such benefits; but the court may make a tender of restoration a condition of its judgment."

The purpose of this section was to make applicable to actions at law the same rules applied in courts of equity that no action for a rescission of a transaction voidable because of fraud, misrepresentation, mistake, duress, infancy or incompetency would fail because of a failure to tender, before judgment, restoration of the benefits received in connection with the transaction sought to be avoided. The section as enacted was added to the group of sections dealing with election of remedies.

The Law Revision Commission made an extended study of this question and reported thereon to the Legislature in 1939.[22] At that time the conclusion of the Commission was that the doctrine of election of remedies, within limits, had a practical justification, but there were many instances where the doctrine had been carried beyond the necessities of the situation and substantial injustice had resulted.

The Commission was of the opinion, however, that the decisions made by the Court of Appeals in *Schenck* v. *State Line Telegraph Co.*, where Judge Cardozo had said: "Election of remedies presupposes a right to elect,"[23] and in *Clark* v. *Kirby*, where Judge Crane had said: "If the remedy chosen be insufficient or inadequate or useless the rule has not barred the plaintiff from taking other timely methods to obtain his rights"[24] would discourage, and in new and doubtful cases, would restrict, the application of the doctrine. It, therefore, did not recommend any general legislation but confined its recommendations to four instances where the rule, in the opinion of the Commission, had become so imbedded in the law that legislative enactment was required to overcome the effect of prior decisions.

As a result of the Commission's recommendations, Sections 112-a, 112-b, 112-c and 112-d were added to the Civil Practice Act in 1939. These sections respectively provided that the doctrine of election of remedies would not bar a second action where an unsatisfied judgment had been recovered: (1) where a cause of action existed against several persons and one had been unsuccessfully pursued (§ 112-a); (2) where a right of action existed against an agent, and his undisclosed principal, and one or the other was first sued (§ 112-b); (3) where causes of action for conversion or on an express or implied contract existed against several persons and an unsatisfied judgment had been obtained on either theory (§ 112-c), and finally, in the situation where an action had been unsuccessfully brought on a contract, it was provided that an action to reform the same contract could thereafter be maintained (§ 112-d).

[22]Legislative Documents 1939, No. 65.
[23]238 N. Y. 308, 311, 144 N. E. 592, 593 (1924).
[24]243 N. Y. 295, 303, 153 N. E. 79, 82 (1926).

In 1941 a further section was added, 112-e which provided that a claim for damages for fraud would not be deemed inconsistent with a claim for rescission. The section further provided that entire relief could be obtained in one action.

In 1942 a new Section 112-f was added which provided that relief against mistake would not be denied merely because a mistake had been one of law. In this connection particular attention is called to the word "merely". The section was not intended to provide that every mistake of law would be sufficient to justify recovery, but discretion was given to grant relief if the mistake were of such a nature that relief should be granted, despite the fact that the mistake had been one of law.

The particular amendment enacted in 1946 (§ 112-g) was designed to overcome the effect of two decisions in the Court of Appeals. *E. T. C. Corp.* v. *Title Guarantee & Trust Company*,[25] and *Kamerman* v. *Curtis*.[26] These cases held, in substance, that in an action for rescission at law, there must be a tender of benefits received, prior to the institution of the action otherwise the action would fail.

The statute became effective April 10, 1946, upon its approval by the Governor, as by the language of the act, it was provided that "This act shall take effect immediately". The question, therefore, is raised as to whether, in view of this language, it is intended that the statute shall apply to causes of action which came into existence prior to the effective date of the statute; and whether it is applicable to cases pending on that date.

While there is perhaps room for debate as to whether the change is substantive or procedural or a little of both, the language of the Section is such as to make the incidence of its application come at the time of entering the judgment. It is provided that the party "shall not be denied relief." This speaks as of the time of formulating the judgment rather than as of the commencement of the action. Even more forceful is the statement that "the court may make a tender of restoration a condition of its judgment." The entire Section indicates a legislative intent that it be applied to pending cases. Furthermore, the Law Revision Commission seems quite in the right in its insistence that no change of substantive law is made.

Nor is there anything in *Shielcrawt* v. *Moffett*[27] to the contrary. In that case the court was greatly influenced by the undue hardship upon a plaintiff who had already gone through all the arduous preparation for trial without

[25]271 N. Y. 124, 2 N. E. (2d) 284 (1936).
[26]285 N. Y. 221, 33 N. E. (2d) 530 (1941).
[27]294 N. Y. 180, 61 N. E. (2d) 435 (1945).

any provision of law requiring the posting of a bond to cover the expenses, including legal fees, of the corporation defendant on whose behalf the stockholders' action was brought. The peculiar language of the applicable statutes (General Corporation Law Secs. 61-a, 61-b) and their historical development were found by the court to indicate an intent to depart from the general rule, particularly as the statute under consideration in the *Shielcrawt* case provided a remedy where before the statute there was no remedy whatever.

But let us suppose that the pending action was one for "rescission, restitution or other relief," brought just before the Statute of Limitations applicable to the particular cause of action had run, and that prior to the running of the Statute no tender had been made. Let us suppose, further, that the action was commenced either before or after April 10, 1946, when Section 112-g became effective and that no tender was alleged in the complaint and no assertion of the Statute of Limitations in the answer. At the conclusion of the case defendant insists upon a dismissal on the merits for failure to plead or prove a tender. Plaintiff responds by calling the attention of the court to Section 112-g and asks for a conditional judgment as provided in the Section. Defendant in turn asks leave to amend his answer so as to plead the Statute of Limitations as a defense and for leave to present whatever proof may be necessary to support that defense. It would seem that plaintiff is entitled to his conditional judgment. The Section created no new cause of action and the Statute is no defense. It was the "fraud, misrepresentation, mistake, duress, infancy or incompetency" which made the transaction voidable and the tender was fundamentally no more than a circumstance bearing on the relief to be granted. This was so before as well as after the legislature enacted Section 112-g. The change was one of procedure and nothing more. The courts should give such legislation a liberal interpretation in order that justice may be done rather than multiply the technicalities by which justice may be defeated. By parity of reasoning the Statute of Limitations would in no event constitute a defense in the hypothetical case just given.[28]

Appellate Practice

There has been a further liberalizing of the practice on appeals to avoid the inadvertent sacrifice of an opportunity for review due to some misunderstanding by counsel with respect to the finality of the order or judgment from which the appeal is to be taken. Moreover, the tendency to take the mystery out of appellate practice has been continued by a complete clari-

[28] *Cf.* N. Y. CIVIL PRACTICE ACT §§ 245-a, 245-b.

fication and restatement of the practice in obtaining stays on appeal, a subject which has probably caused practitioners many a sleepless night.

Addition of Subdivision 5-c to Section 592

Prior to the recent extensive revision of appeal procedure, effective in 1942, an application for leave to appeal to the Court of Appeals could not be made in the Court of Appeals unless an application for leave to appeal had first been made and denied by the Appellate Division. If the application were first denied in the Appellate Division and thereafter the Court of Appeals denied the application for lack of authority on the ground that an appeal would lie only upon certified questions, that ended the matter, since the Appellate Division had already passed on the question.

However, under the recent revision, it is now possible to make the application in the Court of Appeals, in the first instance, for leave to appeal to that Court. If that application were denied, not on the merits, hut on the ground that an appeal could be taken only after the certification of questions by the Appellate Division, so much time would have elapsed from the time of the decision of the Appellate Division to the time of the decision of the Court of Appeals, that the Appellate Division would be precluded by the lapse of time from entertaining the motion.

The addition of subdivision 5-c to Section 592 covers this situation. Under it, if an application is made directly to the Court of Appeals and the application is denied or dismissed upon the ground that the appeal will lie only if the Appellate Division certifies questions, an application may now be made to the Appellate Division at the same term or at the term next succeeding that in which the order of the Court of Appeals denied leave to appeal for such reason.

Stays on Appeal

The amendments to the sections dealing with stays on appeal, to a large extent codify and clarify the rules which previously existed with regard to the obtaining of a stay, on an appeal to the Court of Appeals or to the Appellate Division without an order.

Many practitioners were of the opinion that in order to obtain a stay under Sections 594 through 598, as they formerly read, it was necessary not only to perform the acts required by the sections but in addition to obtain an order for a stay. I think that now one can go to the particular sections as they have been amended and from reading them know just what must be done in order to stay execution under a judgment from which an appeal

is taken. In addition to clarifying the practice, there have been several important additions effected by the recent amendments.

The most significant change is contained in Section 573 which extends a stay previously obtained until five days after the service of the judgment or order of affirmance. I have many times been on tenter hooks, following an affirmance by the Appellate Division, because I knew that just as soon as the judgment of affirmance was entered my stay disappeared, and I could not obtain a new stay until I had filed my notice of appeal. I could not do that until the judgment was entered. The amendment is a sound one and has long been needed.

Another addition to the law is Section 601. This permits an automatic stay, without an order, if an application to appeal to the Court of Appeals is to be made from a unanimous affirmance or from a reversal where an appeal does not lie without permission. That amendment too, will obviate the necessity for orders to show cause containing intermediate stays pending applications for leave to appeal and will somewhat relieve the pressure in preparing motion papers and briefs on an application for permission to appeal.

Sections 614 and 615 have been completely redrafted and similarly clarify the situation with regard to stays in connection with appeals to the Appellate Division. The practice has been completely conformed to the method of obtaining similar stays on an appeal to the Court of Appeals.

There has, however, been no interference with the right to give the usual 30-day stay without security, with which we are all familiar, and that right is expressly continued in Section 615.

Miscellaneous

Passing reference should be made to a few of the remaining changes. In 1945:

(a) A new Section 1169-a of the Civil Practice Act provides that in declaratory judgment actions to declare the validity or nullity of a foreign divorce, obtained by a husband against a wife who had not appeared in the action, the court is now authorized to award any sums necessary to enable the wife to prosecute or defend the action.[29]

(b) A new Section, 341-a of the Civil Practice Act, provides that written findings and other official records of the death and certain other specified facts by officials or employees of the United States and certain of its adminis-

[29] *Cf.* Gibson v. Gibson, 179 Misc. 661, 41 N. Y. S. (2d) 598 (Sup. Ct. 1943), *aff'd*, 266 App. Div. 975, 44 N. Y. S. (2d) 372 (2d Dep't 1943); Dowsey v. Dowsey, 181 Misc. 253, 43 N. Y. S. (2d) 464 (Sup. Ct. 1943); Lea v. Lea, 182 Misc. 396, 47 N. Y. S. (2d) 645 (Sup. Ct. 1944).

trative agencies authorized to make such findings and records "shall be received in any court, office or other place in this state as evidence" thereof.

(c) The last paragraph of subdivision 1 of Section 922 has been amended to "codify" the ruling made in *Garey* v. *Tobey*,[30] and discussed in the last address of this series,[31] that the time within which an action or special proceeding may be commenced to reduce attached property to the sheriff's custody and to collect, receive and enforce debts and choses in action, is not limited to a single extension of 90 days.

In 1946:

(a) The whole body of law applicable to notaries public has been reconsidered and revised. New Sections 100 to 105-a, inclusive, of the Executive Law place the full responsibility for the licensing and disciplining of notaries public upon the Secretary of State. The details are summarized and the various practical problems discussed in several comprehensive and very helpful articles appearing on the editorial page of the New York Law Journal.[32]

(b) Upon the recommendation of the Executive Committee of the Surrogates' Association Section 354 of the Civil Practice Act, relative to the waiver of the privilege in the case of confidential communications by a deceased patient to a physician or surgeon or a professional or registered nurse, so as to permit any party in interest to waive the privilege in any litigation where the interests of the personal representatives are deemed by the trial judge to be adverse to those of the estate. This change has been long overdue.

(c) Previous uncertainty caused by a conflict of authority has been eliminated by a change in Civil Practice Act Section 1172 which now permits service on the husband in a matrimonial case of an uncertified copy of the judgment or order as a basis for contempt proceedings.

(d) Another conflict in the decisions and practice of the various departments relative to the procedure in entering final judgments in certain matrimonial cases has been eliminated by the amendment of Civil Practice Act, Section 1176 and Subdivision 2 of Section 7-a of the Domestic Relations Law. It is now provided that the interlocutory judgment shall become final automatically after the expiration of three months.

(e) The validity of a provision in a separation agreement for future arbitration of amounts to be paid by the husband for support is now *sub*

[30]268 App. Div. 853, 50 N. Y. S. (2d) 685 (1st Dep't 1944).

[31]Medina, *Current Developments in Pleading, Practice and Procedure in the New York Courts* (1945) 30 CORNELL L. Q. 449, 459.

[32]N. Y. L. J., Aug. 2, 1946, p. 200, col. 1-3; N. Y. L. J., Oct. 21, 1946, p. 962, col. 1-3; N. Y. L. J., Sept. 23, 1946, p. 563, col. 7.

judice in the Court of Appeals on the appeal from a judgment denying such validity in *Robinson* v. *Robinson*.[33]

Conclusion

In the two-year period under discussion there has been a marked tendency on the part of the Legislature to follow the leadership of the Judicial Council, the Law Revision Commission and the Bar Associations in the matter of amendments to the Civil Practice Act and allied statutes. The influence of the Federal Rules of Civil Procedure is also clearly apparent. But a return to normalcy will probably bring the same old tinkering that has constituted such an evil influence in the past. There will always be a certain number of persons with political or other influence trying to tamper with the laws regulating civil practice and procedure for the purpose of serving some special interest in some pending or prospective litigation. Despite all the real progress that has been made, the need was never more present than it is today for placing the responsibility for the civil practice with the Court of Appeals. The federal experience has pointed out the road; and it is devoutly to be hoped that the State of New York will follow this leadership.

[33]271 App. Div. 98, 62 N. Y. S. (2d) 785 (1st Dep't 1946), *rev'd*, 296 N. Y. 778, — N. E. (2d) — (1946).