

## Course of Costs of Course

Daniel H. Distler

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# THE COURSE OF COSTS OF COURSE\*

*Daniel H. Distler†*

## I. INTRODUCTION: THE TERMINOLOGY

In order to deal with the New York statutes relating to costs, it is necessary to bear in mind the distinctions between the terms, "costs," "taxable costs," "statutory costs," "fees," "disbursements" and "additional allowances," as these terms are used in the New York law of costs.

The word "costs" has three meanings. In its broadest sense it includes all items of litigation expense. A second and more common meaning is more accurately denominated "taxable costs" and includes only those items that may be "taxed as costs," *i.e.*, included in a bill of costs. These items are, for the most part, expenditures for which the winning party can compel the loser to reimburse him. Attorneys have come to think of "costs" in a third way: as an arbitrary creation of statute, referred to as "statutory costs" to distinguish it from other items in the bill which represent actual reimbursement. Although decisions and texts often employ the term ambiguously, the New York Civil Practice Act uses "costs" in this last, narrow sense.<sup>1</sup>

In fact, statutory costs represent the vestige of a true reimbursement for an actual disbursement.<sup>2</sup> Just as the legal fees of a clerk of court are today included as a disbursement in a bill of costs, so the legal fees of an attorney were included prior to 1848. In that year, the Field Code abolished the fee bill, which, in prescribing the costs which may be assessed upon the losing party and awarded to the winning party, established the fees of attorneys.<sup>3</sup>

Field attempted to replace these legal fees with a group of taxable

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\* This article is adapted from a study prepared by the author for the New York State Advisory Committee on Practice and Procedure.

† See contributors' section, masthead p. 138, for biographical data.

<sup>1</sup> For limited purposes, however, the word "costs" in the statute is construed to include disbursements. See, e.g., *Phipps v. Carman*, 26 Hun 518 (N.Y. Sup. Ct. Gen. T. 2d Dep't 1882) (failure to pay motion disbursements stays proceedings, despite payment of motion costs); see also note 86 *infra*. In this article, unless the context indicates otherwise, the word "costs" is used to mean statutory costs; but it should be borne in mind that an award of costs ordinarily entitles the party to his taxable disbursements and sometimes to additional allowances, while a denial of costs ordinarily deprives him of these important items.

<sup>2</sup> They were clearly so specified in the original Field Code. See N.Y. Sess. Laws 1848, ch. 379, § 258: ". . . But there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity, for his expenses in the action; which allowances are in this act termed costs."

<sup>3</sup> N.Y. Sess. Laws 1848, ch. 379, § 258; see First Report of the Commissioners on Practice and Pleadings 204-08 (1848); see also 3 N.Y. Jud. Council Rep. 313 (1937) (setting forth statutes). The present counterpart of section 258 of the original Field Code is section 474 of the Judiciary Law.

items that would, in the aggregate, bear a reasonable relationship to the actual attorney's fee. His original scheme had two parts: arbitrary amounts for items of work performed by the attorney<sup>4</sup> and a discretionary "commission," a percentage of the amount "at risk," *i.e.*, the amount claimed or recovered.<sup>5</sup> The Legislature, however, restricted the percentage award to "difficult or extraordinary" cases<sup>6</sup> and a similar limitation appears in the present counterpart of the section, section 1513 of the Civil Practice Act.<sup>7</sup> The arbitrary amounts were retained;<sup>8</sup> with respect to trial costs, the present counterpart of Field's section is section 1504 of the Civil Practice Act. While they have been increased from time to time,<sup>9</sup> no realistic attempt has been made to relate them to today's actual attorney's fees. The connection is now virtually severed, as is more than apparent to any attorney who has tried to explain to his client why one hundred fifty dollars was awarded as a reimbursement for a perfectly reasonable attorney's fee of several thousand dollars.

In New York, statutory costs totalling over one hundred dollars are not uncommon,<sup>10</sup> but in most other American jurisdictions, they amount to little more than the few dollars allowed an attorney for his fees in the early nineteenth century,<sup>11</sup> while in some jurisdictions they do not exist at all.<sup>12</sup> In England, by contrast, the amount taxable as costs has kept pace with the litigant's actual expenses, including his attorney's fees.<sup>13</sup>

<sup>4</sup> First Report of the Commissioners on Practice and Pleadings 209 (1848). The provision was altered slightly by the Legislature (see Second Report of the Commissioners on Practice and Pleadings 17-18 (1848)) and enacted as N.Y. Sess. Laws 1848, ch. 379, § 262.

<sup>5</sup> First Report of the Commissioners on Practice and Pleadings 207, 210 (1848). While the percentage award was discretionary, the arbitrary amounts were awarded as of course. See note 6 *infra*.

<sup>6</sup> N.Y. Sess. Laws 1848, ch. 379, § 263. See Second Report of the Commissioners on Practice and Pleadings 18 (1848). In addition to being "difficult or extraordinary," the action must have been one for the recovery of money or real or personal property in which a trial was had. These limitations, which were in Field's original proposal, apparently were intended to restrict these costs to legal, as contrasted with equitable, actions. See text accompanying notes 33-43 *infra*. The 1848 Legislature's changes also included clarification of the phrase "the court may allow" by rewording it, "the court may in its discretion . . . make an allowance."

<sup>7</sup> The phrase now reads "difficult and extraordinary." See N.Y. Jud. Council Rep. 320 (1937) (reviewing the history and implementation of present section 1513).

<sup>8</sup> See note 4 *supra*.

<sup>9</sup> The increases have been minor and most of the amounts in sections 1504 through 1510 of the Civil Practice Act are identical with those in effect under section 3251 of the Code of Civil Procedure. Indeed, the total increase from the amounts specified in the 1848 Field Code is insignificant. One major change in statutory costs occurred in 1951, when section 1504-a of the Civil Practice Act was enacted. N.Y. Sess. Laws 1951, ch. 502. While it does not substantially increase the amount of costs, this new section, applicable only to New York city, vastly simplifies the computation. See N.Y. Legis. Ann. 44 (1951).

<sup>10</sup> Under section 1504-a of the Civil Practice Act, for example, statutory costs after a trial in New York city are \$150. See also note 88 *infra*.

<sup>11</sup> See Note, 53 Colum. L. Rev. 78, 81 & nn.19, 20, 24 (1953).

<sup>12</sup> *Id.* at 80-82.

<sup>13</sup> See generally Goodhart, "Costs," 38 Yale L.J. 849 (1929); Dayes' Handy Book of

The word "fees" in the New York law of costs refers now only to the amounts that the statute permits clerks of court,<sup>14</sup> sheriffs,<sup>15</sup> and officials<sup>16</sup> other than attorneys to charge for particular services. When a party seeks reimbursement from the adverse party for these expenditures, they are included in the bill of costs as "disbursements."<sup>17</sup> The latter term also covers other expenditures that may be included under the statute in a bill of costs,<sup>18</sup> all of which may be referred to as "taxable disbursements."

In certain types of cases, as well as in "difficult and extraordinary cases," an additional sum may be included in the bill of costs in the discretion of the court.<sup>19</sup> Just as today's "statutory costs" are the descendants of the arbitrary amounts of Field's plan, these items are the modern counterpart of his percentage allowance which was also intended to compensate for attorney's fees incurred.<sup>20</sup> In addition to those in Field's original plan, the Civil Practice Act includes sums to which a plaintiff entitled to costs is also entitled as of right in particular actions.<sup>21</sup> Whether discretionary or of right, and whether in the form of arbitrary sums or percentages of the amount involved, all of these sums are now designated "additional allowances."

In summary, a New York litigant entitled to or awarded "costs" receives actual reimbursement<sup>22</sup> for those necessary expenditures taxable by statute, including fees of officials other than attorneys, and, in addition, a sum in lieu of actual reimbursement for his attorney's fees consisting of "statutory costs" based upon the proceedings held and, in some cases, "additional allowances," either as of right or in the discretion of the court, based upon the nature and size of the recovery.

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Solicitors' Costs (9th ed. Carr 1954). On the other hand, the English practice restricts to a large extent the amount that an attorney may charge for his services. Reasonable attorneys' fees may be included as taxable costs in only one American jurisdiction. See Alaska Comp. Laws Ann. § 55-11-55 (1949). In limited classes of cases, of course, attorneys' fees may be awarded in New York and other jurisdictions.

<sup>14</sup> See, e.g., N.Y. Civ. Prac. Act. §§ 1552-57-s.

<sup>15</sup> See, e.g., N.Y. Civ. Prac. Act §§ 1558-59.

<sup>16</sup> See, e.g., N.Y. Civ. Prac. Act § 1544 (stenographers); *id.* at §§ 1545, 1546 (referees); *id.* at § 1550 (surveyors or commissioners); *id.* at § 1560 (coroners); *id.* at § 1561 (county treasurers and New York city treasurer); *cf. id.* at §§ 1539, 1540 (witnesses); *id.* at § 1551 (printers).

<sup>17</sup> See, e.g., N.Y. Civ. Prac. Act §§ 1518(1), 1518(3), 1518(8).

<sup>18</sup> See, e.g., N.Y. Civ. Prac. Act §§ 1518(2), 1518(6), 1518(7).

<sup>19</sup> N.Y. Civ. Prac. Act § 1513. See also *id.* at § 1514-a.

<sup>20</sup> See text accompanying notes 5-7 *supra*.

<sup>21</sup> N.Y. Civ. Prac. Act § 1512 (percentage); *id.* at § 1512-a (\$50).

<sup>22</sup> In fact, reimbursement under section 1518 of the Civil Practice Act often falls short of actual reimbursement, because the "legal" fee which may be taxed is often less than the amount necessarily expended. See, e.g., *Miss Susan, Inc. v. Enterprise & Century Undergarment Co.*, 66 N.Y.S.2d 266 (Sup. Ct. N.Y. County 1946), *rev'd* on other grounds, 273 App. Div. 768, 75 N.Y.S.2d 538 (1st Dep't 1947) (only statutory stenographer's fees allowed as disbursement). Such divergences are, of course, repetitions of the experience with attorney's fees.

The New York statutory scheme sets forth the rules for determining when a party may recover statutory costs in an action or special proceeding;<sup>23</sup> the amount of "costs," *i.e.*, the statutory costs;<sup>24</sup> the disbursements to which a party entitled to costs is also entitled, *i.e.*, the taxable disbursements;<sup>25</sup> and the circumstances under which a party may receive additional allowances.<sup>26</sup> In addition, there are New York provisions regulating costs on appeals,<sup>27</sup> motions<sup>28</sup> and in particular actions<sup>29</sup> and proceedings.<sup>30</sup> This article, however, is limited to an analysis of the Civil Practice Act sections determining when a party is entitled to recover costs.

## II. COSTS OF COURSE UNDER SECTION 1470 OF THE CIVIL PRACTICE ACT

Section 1470 of the Civil Practice Act is the basic section listing the types of actions in which a plaintiff may recover costs as of course.<sup>31</sup> Section 1475 provides for costs to a defendant as of course in the same types of actions.<sup>32</sup>

<sup>23</sup> N.Y. Civ. Prac. Act §§ 1470-84, 1492, 1493, 1499.

<sup>24</sup> N.Y. Civ. Prac. Act §§ 1504, 1504-a.

<sup>25</sup> N.Y. Civ. Prac. Act § 1518.

<sup>26</sup> N.Y. Civ. Prac. Act §§ 1512-14-a.

<sup>27</sup> N.Y. Civ. Prac. Act §§ 1490, 1491, 1508, 1510.

<sup>28</sup> N.Y. Civ. Prac. Act §§ 1486-88, 1505, 1506, 1509, 1515.

<sup>29</sup> See, e.g., N.Y. Civ. Prac. Act § 1060 (partition); *id.* at § 1173 (divorce or separation); *id.* at §§ 1215, 1220 (usurpation of office or franchise); *id.* at § 1221-b (unlawful practice of law).

<sup>30</sup> See, e.g., N.Y. Civ. Prac. Act § 803 (supplementary proceedings); *id.* at § 1301 (proceeding against body or officer); *id.* at § 1373 (appointment of committee for incompetent); *id.* at § 1431 (summary proceedings).

<sup>31</sup> § 1470. Plaintiff's costs of course. The plaintiff is entitled to costs of course, upon the rendering of a final judgment in his favor, in either of the following actions:

1. An action, triable by a jury, to recover real property or an interest in real property; or in which a claim of title to real property arises upon the pleadings or is certified to have come in question upon the trial.

2. An action to recover a chattel.

3. An action where the people of the state are a party.

4. An action to recover damages for an assault, battery, false imprisonment, libel, slander, or malicious prosecution.

5. An action founded on the spoliation or other misappropriation of public property.

6. An action against an executor or administrator as such.

7. An action against the surviving husband or wife of a decedent and the next of kin of an intestate, or the next of kin and legatees of a testator, to recover to the extent of the assets paid or distributed to them for a debt of the decedent upon which an action might have been maintained against the executor or administrator.

8. An action by an executor or administrator to recover damages for a wrongful act, neglect or default by which the decedent's death was caused.

9. An action against the legatees or devisees to recover a share of the property of a decedent by a subscribing witness to a will or by a child born after the making of the will.

10. An action against the heirs of an intestate or the heirs and devisees of a testator to recover for the debts of the decedent arising by simple contract or by specialty.

11. An action, other than one of those specified in the foregoing subdivisions of this section, in which the complaint demands judgment for a sum of money only.

<sup>32</sup> § 1475. Defendant's costs of course. The defendant is entitled to costs, of course, upon the rendering of final judgment in an action, specified in sections fourteen hundred and seventy to fourteen hundred and seventy-three, unless the plaintiff is entitled to costs

The eleven subdivisions of section 1470 appear to have no logical or consistent organization. It has been said that the line between actions in which costs are as of course (actions listed in section 1470) and those in which costs are discretionary is properly drawn between legal actions and suits in equity,<sup>33</sup> but that "[t]he line of demarcation is not actually that rigid, as the statute sedulously avoids such terminology; however, the generality has practical convenience as a rule of thumb and is frequently employed in that sense."<sup>34</sup>

In order to evaluate the classes of actions listed in section 1470 and determine the extent to which they represent legal, as contrasted with equitable, actions, it is useful to examine the historical derivation of the statute.

#### A. *History of section 1470*

Although costs were originally payable into court by the losing party at law as punishment for wrongfully prosecuting or defending an action, they were soon made payable to the winning party as compensation for his litigation expense.<sup>35</sup> To the extent that the winning party at law was entitled to his costs as of course, while equity exercised its traditional discretion as to costs, a historical basis for the "rule of thumb" exists.<sup>36</sup> The predecessors of section 1470 of the Civil Practice Act, however, do not appear to have been intentionally drafted solely as a catalog of legal causes.

Section 1470 originates, as one of the Field Commission's "radical changes"<sup>37</sup> on the subject of costs, in section 259 [304]<sup>38</sup> of the Field Code, which read:

Costs shall be allowed of course to the plaintiff upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a claim of

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as therein prescribed; but the fact that in any action a plaintiff is not entitled to costs by reason of having brought the action in a court of jurisdiction higher than that in which it might have been brought shall not entitle the defendant to costs.

<sup>33</sup> 23 Carmody-Wait, *Cyclopedia of New York Practice* 56-57 (1956); *Law v. McDonald*, 9 Hun 23 (N.Y. Sup. Ct. Gen. T. 3d Dep't 1876); cf. *Trust v. Person*, 3 Abb. Pr. 84 (N.Y.C.P. 1856).

<sup>34</sup> 23 Carmody-Wait, *op. cit. supra* note 33, at 57; cf. *Murtha v. Curley*, 92 N.Y. 359, 361 (1883).

<sup>35</sup> See Goodhart, "Costs," 38 *Yale L.J.* 849, 851-54 (1929); 3 *N.Y. Jud. Council Rep.* 313, 314-15 (1937); Bradner, *Practice in Matters of Costs* 1-2 (1894).

<sup>36</sup> See Goodhart, *supra* note 35, at 854: "The great difference between equity and common-law costs lay in the fact that in equity costs were in the discretion of the court while at common-law they followed the event."

<sup>37</sup> First Report of the Commissioners on Practice and Pleadings 204 (1848). See text accompanying notes 2-9 *supra*.

<sup>38</sup> In 1849 the entire Field Code was re-enacted. N.Y. Laws 1849, c. 438. In addition to a number of substantive amendments, the 1849 Code renumbered the sections of the original Code. Since the 1849 numbers were in effect for all but the first of the almost thirty years of the Code, they have been indicated in brackets following the original 1848 numbers for the sections discussed in this article.

title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

2. In an action to recover the possession of personal property.

3. In the actions, of which according to section 47 [54], a court of a justice of the peace has no jurisdiction.

4. In an action for the recovery of money, where the plaintiff shall recover fifty dollars or more.<sup>39</sup>

It seems clear that Field intentionally included some equity causes and excluded some legal ones in his statute. Rather than distinguishing on the basis of whether the cause was historically at law or in equity, the statute seems primarily designed to grant a plaintiff mandatory costs unless the action might have been brought in a lower court, a purpose similar to that of present section 1474.<sup>40</sup>

Subdivision 1 of the Field Code section survives virtually intact as subdivision 1 of section 1470, except that the latter is limited to actions "triable by a jury."<sup>41</sup> This limitation, which was added by Throop,<sup>42</sup> has the effect of barring costs as a matter of right in most equitable real property actions.<sup>43</sup>

Subdivisions 2 of the Field Code section and of the present section are also virtually identical; the change from "to recover the possession of personal property" to the present language "to recover a chattel" was also made by Throop, with no apparent intent to change the meaning.

Subdivision 3 of the Field Code section refers to his section 47 [54], which lists those actions of which a Justice of the Peace had no coguizance. The language of the subdivision leaves little doubt that Field intended to deny a right to costs to plaintiffs who might have secured relief in the less expensive Justice Courts, but its effect was to grant a right to costs if relief was specifically unavailable in the Justice Court.<sup>44</sup>

<sup>39</sup> N.Y. Sess. Laws 1848, ch. 379, § 259; First Report of the Commissioners on Practice and Pleadings 208 (1848).

<sup>40</sup> See text accompanying note 105 *infra*.

<sup>41</sup> But cf. N.Y. Civ. Prac. Act § 1484.

<sup>42</sup> See note accompanying N.Y. Code Civ. Proc. § 3228 (Throop ed. 1890).

<sup>43</sup> See 23 Carmody-Wait, *Cyclopedia of New York Practice* 58 & nn.7, 8 (1956).

<sup>44</sup> Since the Justice Court was a court with jurisdiction only over actions specifically enumerated in section 46 [53] of the Field Code, there were at least a few actions as to which jurisdiction was neither expressly prohibited by section 47 [54] nor allowed by section 46 [53]. Although these actions could not have been brought in a Justice Court, costs of course in the Supreme Court were denied, and, if the recovery was less than fifty dollars, the plaintiffs were required to pay the defendants' costs. *Laughran & Dillon v. Orser*, 15 How. Pr. 281 (N.Y. Super. Ct. 1858); *Worden v. Brown*, 14 How. Pr. 327 (N.Y. Sup. Ct. Monroe County 1857). In 1862, the Legislature sought to provide for this *casus omissus* in the statutory scheme by allowing costs in any case where the Justice Court has no jurisdiction, rather than only in cases where jurisdiction was expressly prohibited. N.Y. Laws 1862, c. 460. When the Code of Civil Procedure was adopted, however, the provision was restored to its original form and the gap which the 1862 amendment had closed was reopened. See N.Y. Code Civ. Proc., § 3228(3). Section 1470 of the Civil Practice Act retained this gap by enumerating only those cases where jurisdiction of the Justice Courts was spe-

The provision survived in its original form until 1920, when, in enacting the Civil Practice Act, the reference was replaced by a list—in subdivision 3 through 10 of section 1470—of the actions referred to. Those actions listed in subdivisions 3, 4 and 6 of section 1470 were originally included in the Field reference, while those listed in subdivisions 5, 7, 8, 9 and 10 derive from an 1882 amendment to the Throop Code, which provided that Justices of the Peace had no jurisdiction over certain newly-created actions.<sup>45</sup>

The Field Code reference also included matters of account exceeding four hundred dollars and actions involving the title to real property, since these were also specified in section 47 [54] as not within the jurisdiction of Justices of the Peace. Since actions involving the title to real property were already included in subdivision 1 of section 259 [304] of the Field Code, the reference was redundant, and it was deleted in the Throop revision. The reference to matters of account, however, was retained by Throop but omitted at the time of the enactment of the Civil Practice Act, when the classes of action until then incorporated by reference were specifically listed. No reason appears for this omission; indeed, the Rodenbeck report, wherein the specific listing was first suggested, states only that the references have been supplied and that “[n]o change in substance has been made intentionally.”<sup>46</sup> Perhaps the “matters of account” provision was considered to be encompassed in that for actions for a sum of money only, but the difference in the amount of recovery specified implies that the omission was inadvertent.<sup>47</sup>

The first phrase of the final subdivision<sup>48</sup> of the Field proposal was reworded by Throop to read, “An action, other than one of those specified in the foregoing subdivisions of this section, in which the complaint demands judgment for a sum of money only.”<sup>49</sup> It survives in identical form as subdivision 11 of present section 1470. No explanation is given by Throop for the addition of the word “only”; apparently it was intended to distinguish actions for damages at law from suits in

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cifically prohibited. Thus, in counties which contain only the Supreme Court, a County Court, and Justice Courts, a money action not cognizable in a Justice Court must be brought in a County or Supreme Court and, if the recovery is less than one hundred dollars, the plaintiff will be subject to the severe provisions of section 1472. See text accompanying notes 77 & 79 *infra*.

<sup>45</sup> N.Y. Sess. Laws 1882, ch. 399.

<sup>46</sup> 3 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 507 (1915); cf. Report of the Joint Legislative Committee on the Simplification of the Civil Practice 681-84 (1919).

<sup>47</sup> See also note 62 *infra*.

<sup>48</sup> The second phrase of the subdivision was severed by Throop and now appears separately as section 1472 of the Civil Practice Act. See text accompanying notes 78-79 *infra*.

<sup>49</sup> N.Y. Code Civ. Proc. § 3228(4).

equity where damages were sought in addition to equitable relief.<sup>50</sup> The limitation, however, is contrary to modern concepts of liberal joinder of causes of action. There appears to be no reason why a plaintiff entitled to costs should lose his right to them by joining his money claim with one, perhaps unrelated, for equitable relief.

### *B. Present application of section 1470*

As previously noted, subdivisions 1, 2 and 11 of section 1470 are virtually identical with subdivisions 1, 2 and 4 of the Field Code section and their application does not differ appreciably from that intended by Field. Subdivisions 3 through 10 of section 1470, however, raise serious questions.

Although the existence of subdivisions 3 through 10 is easily explained historically, the present necessity for at least some of them is not immediately apparent. Since subdivision 11 includes all "money-only" actions other than those specified in the preceding subdivisions, separate specification of particular "money-only" actions in subdivisions 4, 7, 8, 9 and 10 seems to serve no purpose. Actually, this is true in the vast majority of cases; the only effect of separate specification of these particular actions is to insulate them from the rather severe penalties<sup>51</sup> which section 1472 imposes upon small recoveries.<sup>52</sup> Moreover, to the extent that subdivisions 3, 5 and 6 include money actions, these subdivisions, too, serve no other purpose.

Subdivisions 3, 5 and 6, however, also include non-money actions in which costs would otherwise not be awarded as of course. Under subdivision 3, for example, a plaintiff is apparently entitled to costs in an action only by reason of the state being a party. As previously noted, the provision derives from a lack of jurisdiction over such actions by the Justice Courts, but the effects of it are strange: The state is entitled to costs as of course in cases where a private plaintiff would not be, and a private plaintiff is entitled to costs as of course against the state where he would not be so entitled were he suing another private person. Presumably, where the state is only one of a number of defendants, the pro-

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<sup>50</sup> *Newcomb v. Hale*, 64 How. Pr. 400, 404 (N.Y. Sup. Ct. Ulster County 1882); 23 *Carmody-Wait, Cyclopedia of New York Practice* 71 (1956); cf. *Selmar Garage Corp. v. Rink Realty Corp.*, 115 N.Y.S.2d 161 (Sup. Ct. Kings County 1952) (although plaintiff recovered less than fifty dollars, costs not denied under section 1472 because complaint also demanded specific performance; discretionary costs awarded), rev'd on other grounds, 282 App. Div. 780, 122 N.Y.S.2d 658 (2d Dep't 1953).

<sup>51</sup> See text accompanying notes 77 & 79 *infra*.

<sup>52</sup> It is also possible that separate specification of these particular actions has the effect of permitting costs to be awarded as of right even though the causes specified are joined with non-money causes of action. Since the specification is in terms of "actions" and not of "causes of action," however, such a possibility would have to rely upon the fact that the specifications, unlike that in subdivision 11 of section 1470, are not qualified by the word "only." See text accompanying notes 48-50 *supra*.

vision makes the private defendants subject to costs. Moreover, by virtue of section 1475, which refers to the actions specified in section 1470, the state, if it successfully defended an action, could collect costs as of course against the plaintiff, although a private defendant could not, and a successful defense which would not entitle a private defendant to costs as of course against a private plaintiff would so entitle him against the state. Furthermore, subdivision 3 includes the actions specified in subdivision 5, so that subdivision 5 is unnecessary.<sup>53</sup>

It should be noted, however, that subdivision 3 of section 1470 is limited by sections 1495 and 1496, which restrict costs against the state where the action is brought upon the relation of a private person or for the benefit of a municipality,<sup>54</sup> and by section 1471, which limits costs in an action for a fine or penalty in which the recovery is small.<sup>55</sup>

Subdivision 6 of section 1470, like subdivision 3, is cast in terms of the parties to an action rather than the nature of the action. It appears to allow costs to a plaintiff recovering against an executor or administrator, regardless of the amount involved or the nature of the action. Again, the provision derives from a lack of other judicial facilities for such actions,<sup>56</sup> but it now seems to operate to compel a decedent's representative to pay costs to a plaintiff who would not have been entitled to them as of course if he had commenced his action before the decedent's death. In *Tutunjian v. Vetzgian*,<sup>57</sup> however, the court stated that subdivision 6 does not apply to equity actions.<sup>58</sup> If the court intended by this that the subdivision only applies in actions where costs are as of course, it is difficult to see any purpose that the subdivision serves other than the one previously noted of insulating small money recoveries from the impact of section 1472.

Even this small remaining function of subdivision 6 of section 1470 is contradicted by the Civil Practice Act, for section 1500 provides that

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<sup>53</sup> The predecessor of subdivision 5 was unnecessary at the time of its enactment. As previously noted, subdivision 5 originates in an 1882 amendment to section 2863 of the Code of Civil Procedure which prohibited jurisdiction of the Justice Courts in an action "brought under" section 1969 of the Code. See text accompanying note 45 supra. Since section 1969, which had been enacted a few years earlier (N.Y. Sess. Laws 1875, ch. 49, § 1), only related to an action "maintained by the people of the state," the provision of section 2863 prohibiting jurisdiction "where the people of the state are a party" already covered the case. Section 1969 survives unchanged as section 1222 of the Civil Practice Act. The present counterpart of section 2863 is section 4 of the Justice Court Act; in subdivisions 1 and 6 it still contains the same redundancy which is difficult to understand because subdivision 6, section 4, of the Justice Court Act, unlike subdivision 5, section 1470, of the Civil Practice Act, is specifically limited to an action "brought by the people of the state."

<sup>54</sup> See also N.Y. Civ. Prac. Act § 1494.

<sup>55</sup> See text accompanying notes 96-99 infra.

<sup>56</sup> See text accompanying notes 44-45 supra.

<sup>57</sup> 274 App. Div. 910, 83 N.Y.S.2d 184 (3d Dep't 1948), aff'd, 299 N.Y. 315, 87 N.E.2d 275 (1949).

<sup>58</sup> See also *Hopkins v. Lott*, 111 N.Y. 577, 580, 19 N.E. 273, 274 (1888).

"[i]n an action brought by or against an executor or administrator in his representative capacity . . . , costs must be awarded as in an action by or against a person prosecuting or defending in his own right." While this language supports the implication of the *Tutunjian* case that subdivision 6 only applies where the plaintiff would otherwise be entitled to costs as of right, it also would seem to allow a defendant executor or administrator costs on a small plaintiff's judgment on the grounds that a non-representative defendant would be so entitled. Section 1500, however, has been construed to apply only "where costs are adjudged in favor of the other party" and to have no application to the representative's right to costs,<sup>59</sup> presumably because the remainder of the section deals with the payment of costs taxed against a representative.<sup>60</sup>

The decision in the *Tutunjian* case and the language of section 1500 may be interpreted to mean that the function of subdivision 6 of section 1470 is to confirm that a plaintiff otherwise entitled to costs as of course is not denied them solely because the defendant is an executor or administrator. Yet, even this is not true in most cases, for section 1499, which is expressly excepted from the provisions of section 1500, provides for a denial of costs in money actions brought against an executor and administrator in his representative capacity, except in limited circumstances.<sup>61</sup> Thus, in the actions to which section 1499 applies, it operates to deny the costs that subdivision 6 of section 1470 seems to grant as of course.<sup>62</sup>

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<sup>59</sup> *Hopkins v. Lott*, 111 N.Y. 577, 580, 19 N.E. 273, 274 (1888) (decided under section 3246 of the Code of Civil Procedure, which contained the identical language).

<sup>60</sup> In accordance with the quoted language, the predecessor of section 1500 has also been held to be inapplicable where the executor or administrator is not acting in a "representative capacity." E.g., *Mullen v. Guinn*, 88 Hun 128, 34 N.Y. Supp. 625 (Sup. Ct. Gen. T. 5th Dep't 1895). Actually, it is only the latter part of the section that is inapplicable; if the executor or administrator sues or defends in his personal capacity as representative, costs would appear to be the same as with "a person prosecuting or defending in his own right." Thus, section 1500 would more accurately state the rule as to executors and administrators if "in his representative capacity" were deleted from the opening phrase and the qualifying words, "where costs are awarded against an executor or administrator who has sued or been sued in his representative capacity," were inserted after the word "but" which opens the last clause of the section. But cf. *Milliman, The Law of Costs in New York* 236 (1904): "The provisions of [the predecessors of section 1499] . . . apply only to actions arising out of claims of creditors, and matters which constituted a charge against the estate at the time of the death of the deceased. They have no reference to a claim brought into being by the personal act of the representative, or a claim or demand arising solely out of matters independent of the estate of the deceased. In the latter case costs are governed by the provisions of [the predecessor of section 1500]." See also *id.* at 228 & n.66.

<sup>61</sup> See note 69 *infra*.

<sup>62</sup> See 23 *Carmody-Wait, Cyclopedic of New York Practice* 69 (1956); *Bradner, Practice in Matters of Costs and Fees* 57-58 (1894); cf. *Milliman, The Law of Costs in New York* 236-55 (1904) (implying that predecessors of sections 1499 and 1500 are sole criteria in actions against executors and administrators). Section 1499 refers to "an executor or administrator . . . in his representative capacity" and subdivision 6 of section 1470 refers to an "executor or administrator as such," but the two provisions cannot be wholly reconciled on the basis of this verbal difference, because actions against an "executor or administrator as such" would ordinarily include actions against him in a representative ca-

Since it is limited to actions for a sum of money only, section 1499 does not apply to most equity suits or special proceedings.<sup>63</sup> And since it applies only to actions "brought against" an executor or administrator, it does not apply to an action originally instituted against the decedent and continued against the executor.<sup>64</sup> It also does not apply to a claim against the estate created since the death of the decedent, because such a claim is not against the executor or administrator in his representative capacity.<sup>65</sup>

The purpose of section 1499 is to encourage claims to be brought in the Surrogate's Court.<sup>66</sup> This is particularly apparent upon examination of one of its predecessors, section 41, title 3, chapter 6, part 2 of the Revised Statutes, which dealt with proceedings in connection with a decedent's estate. Denial of costs was clearly intended as a penalty for bringing a separate action.<sup>67</sup>

With respect to actions at law, subdivision 6 of section 1470 would only seem to retain vitality where section 1499 does not apply.<sup>68</sup> Even as to those actions to which section 1499 applies, however, the subdivision performs its function of insulating small recoveries from the impact of section 1472. Since section 1472 denies costs where the recovery is small, and section 1499 denies costs<sup>69</sup> on both large and small

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capacity," i.e., on claims arising out of transactions or occurrences with the decedent or which might have been brought against the decedent. See *Buckland v. Gallup*, 105 N.Y. 453, 11 N.E. 843 (1887); *Thompson v. Whitmarsh*, 100 N.Y. 35, 2 N.E. 273 (1885); see also *O'Brien v. Jackson*, 42 App. Div. 171, 58 N.Y. Supp. 1044 (1st Dep't 1899). An early case attempted to reconcile the two provisions on the ground that the provision now in section 1499 purports not to deny costs, but only to give the court the option of charging the executor personally instead of the estate where he unreasonably resisted the claim. *Fish v. Crane*, 9 Abb. Pr. (n.s.) 252 (N.Y. Sup. Ct. 1869). While the Field Code section was more susceptible of this interpretation than section 1499, other cases rejected this theory. See, e.g., *Howe v. Lloyd*, 2 Lansing 335, 9 Abb. Pr. (n.s.) 257 (N.Y. Sup. Ct. 1870). The authors of the Code of Civil Procedure reworded the section to its present form in order to resolve the "vexed question" in conformity with "the apparent weight of authority." Note accompanying N.Y. Code Civ. Proc. § 1835 (Throop ed. 1890). Subsequent cases have assumed that the section was intended to deny costs. See, e.g., *Pursell v. Fry*, 19 Hun. 595, 58 How. Pr. 317 (N.Y. Sup. Ct., 4th Dep't 1880); *Hopkins v. Lott*, 111 N.Y. 577, 19 N.E. 273 (1888). It should also be noted that the Board of Statutory Consolidation omitted the provision that is now subdivision 6 of section 1470 when the references in the prior statute were supplied. See 3 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice in New York 87-88 (1915). Although the omission is unexplained and thus appears to be inadvertent (cf. text accompanying note 46 supra), in view of subdivision 6's conflict with sections 1499 and 1500, it is possible that it was intentionally omitted.

<sup>63</sup> *Matter of Manchester*, 279 App. Div. 254, 110 N.Y.S.2d 107 (3d Dep't 1952).

<sup>64</sup> *Merritt v. Thompson*, 27 N.Y. 225, 234 (1863); *Mitchell v. Mount*, 17 Abb. Pr. 213 (N.Y.C.P. 1863); note accompanying N.Y. Code Civ. Proc. § 1835 (Throop ed. 1890).

<sup>65</sup> *O'Brien v. Jackson*, 42 App. Div. 171, 58 N.Y. Supp. 1044 (1st Dep't 1899); note accompanying N.Y. Code Civ. Proc. § 1835 (Throop ed. 1890).

<sup>66</sup> See 23 *Carmody-Wait, Cyclopaedia of New York Practice* 158 (1956).

<sup>67</sup> "The object of the foregoing provisions is to compel creditors to be vigilant, and to prevent unnecessary costs." Note accompanying 3 N.Y. Rev. Stat. § 37 (2d ed. 1836).

<sup>68</sup> See text accompanying notes 64 & 65 supra.

<sup>69</sup> Although in certain circumstances—such as where the fiduciary unreasonably resists

recoveries, this effect would seem to be negligible. Actually, it is more significant than it seems, because a denial of costs under section 1472 results in an award of costs to the defendant under section 1475, while the defendant would not be entitled to costs where the plaintiff is denied costs under section 1499.<sup>70</sup>

With respect to actions in equity, subdivision 6 of section 1470 may apply, despite the *Tutunjian* decision.<sup>71</sup> If so, it would require executors and administrators to pay costs in actions where the decedent would not have been so required, and thus be in conflict with section 1500.

### C. *Limitation of costs because of a small recovery*

It has already been noted that the right to costs as of course granted by section 1470 is more apparent than real in actions against executors or administrators<sup>72</sup> and that it is limited in some actions in which the state is a party.<sup>73</sup> In addition to these limitations, sections 1471, 1472, 1473 and 1474 operate to deprive a plaintiff of costs where his recovery is less than a specified amount.

#### 1. LIMITATION OF SECTION 1472

As originally drafted by Field, the residual provision now found in subdivision 11 of section 1470 was limited to actions in which the recovery exceeded fifty dollars.<sup>74</sup> Although it could have been argued that actions in which the recovery was less than fifty dollars were therefore not "mentioned" in the section within the meaning of the predecessors of section 1475<sup>75</sup> and 1477,<sup>76</sup> the courts consistently held that a recovery

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the claim—section 1499 provides that the court may award costs, such an award is discretionary; a plaintiff enjoys no right to costs in a case to which section 1499 applies.

<sup>70</sup> *Hopkins v. Lott*, 111 N.Y. 577, 19 N.E. 273 (1888). The court, dealing with the provisions as they appeared in the Code of Civil Procedure, denied costs to the defendant on the grounds that the plaintiff was "entitled" to costs under the provisions now in sections 1470 to 1473, the only sections to which the provisions now in section 1475 applied, notwithstanding that the plaintiff's actual right to costs was defeated by the provision now in section 1499. Cf. note 107 *infra*.

<sup>71</sup> The *Tutunjian* decision disposed of the question of costs as follows: "This being an action in equity, the granting or withholding of costs (Civ. Prac. Act § 1477) rested in discretion. Subdivision 6 of section 1470 of the Civil Practice Act, invoked by the plaintiffs, relates to actions at law. (11 Carmody on New York Practice § 70.)" 274 App. Div. 910, 83 N.Y.S.2d 184, 186 (2d Dep't 1948). The authority cited states that "in the actions enumerated in § 1470 . . . , which in general include all law actions, the prevailing party is entitled to costs as a matter of right. But in all other actions, which include, in general, all equity actions, 'costs rest in the sound discretion of the court . . .'"

<sup>72</sup> See text accompanying notes 55-70 *supra*.

<sup>73</sup> See text accompanying notes 52-55 *supra*.

<sup>74</sup> See text accompanying note 39 *supra*.

<sup>75</sup> Section 260 [305] of the Field Code, which survives virtually unchanged in section 1475 of the Civil Practice Act (see note 32 *supra*), read:

§ 260. Costs shall be allowed of course to the defendant, in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein. [N.Y. Laws 1848, c. 379, § 260.]

<sup>76</sup> Section 261 [306] of the original Field Code read:

of less than fifty dollars not only deprived the plaintiff of his right to costs, but it precluded an award of discretionary costs to him and allowed costs of right to be taxed *against* him by the defendant.<sup>77</sup> Today, the provision denying costs on a small recovery is in section 1472,<sup>78</sup> and its separate statement leaves little doubt that section 1475 is applicable.<sup>79</sup>

At the time of the enactment of the fifty-dollar limitation, jurisdiction of the Justice Courts was one hundred dollars.<sup>80</sup> This difference in amounts was undoubtedly intentional, for, although a plaintiff could bring a money action in the Justice Court where he *claimed* that it involved less than one hundred dollars, he was not penalized in his right to costs if he brought it in the Supreme Court unless he *recovered* less than fifty dollars. A similar gap exists in the present sections.<sup>81</sup>

§ 261. In other actions, costs may be allowed or not in the discretion of the court. [N.Y. Laws 1848, c. 379, § 261.]

Section 1477 of the Civil Practice Act is similar. It reads:

§ 1477. When costs are discretionary. Except as prescribed in the preceding sections of this article, the court, upon the rendering of a final judgment, in its discretion, may award costs to any party in such sum not exceeding the total amount authorized by statute as to the court shall seem just.

<sup>77</sup> Field Code: Laughran v. Orser, 15 How. Pr. 281 (N.Y. Super. Ct. 1858); Worden v. Brown, 14 How. Pr. 327 (N.Y. Sup. Ct. Monroe County 1857). Throop Code: Goldstein v. Dollard, 175 App. Div. 413, 161 N.Y. Supp. 901 (1st Dep't 1916); Mattes v. Pause, 19 N.Y. Supp. 222 (C.P. 1892); Kaliski v. Pelham Park RR., 15 N.Y. Supp. 519 (C.P. 1891). While the latter result is not too apparent from a reading of the applicable sections, it is interesting to note that the proposed Field Code, as reported complete in 1850, expressly so provided: § 869. Costs are allowed of course to the defendant upon a judgment in his favor, in an action for the recovery of money, where the plaintiff recovers less than fifty dollars, and also in the other actions mentioned in section 867. [Commissioners on Practice and Pleadings, Code of Civil Procedure Reported Complete § 869 (1850).]

This section was actually drafted too broadly since under subdivision 4 of section 867 the limitation on a plaintiff's costs in intentional tort actions—like its modern counterpart, section 1471 of the Civil Practice Act—did not contemplate complete denial of costs on a small recovery as would be required in other money actions. See text accompanying note 92 *infra*. Although the Legislature failed to enact the 1850 Field provision, any ambiguity remaining was resolved when the limitation was severed and placed in a separate sentence in the Throop revision as follows: "But the plaintiff is not entitled to costs, under this subdivision, unless he recovers the sum of fifty dollars or more." N.Y. Code Civ. Proc. § 3228(4).

<sup>78</sup> The minimum recovery in section 1472 was increased in 1951 to one hundred dollars. N.Y. Sess. Laws 1951, ch. 160.

<sup>79</sup> Coffee v. Johnson, 24 N.Y.S.2d 588 (Madison County Ct. 1941); Parker v. City of New York, 122 Misc. 660, 203 N.Y. Supp. 817 (Sup. Ct. Queens County 1924). See also Dadabo v. Cartino, 180 Misc. 337, 41 N.Y.S.2d 794 (Sup. Ct. Onondaga County 1943) (consolidation which would have the effect of entitling defendant to costs on plaintiff's judgment denied, unless defendant waives his right); cf. N.Y. Civ. Prac. Act § 1484. In some recent cases, however, there is no indication that the defendant demanded or received costs as a result of a denial of the plaintiff's costs under section 1472. See Seaver v. New York Produce Exchange, 273 App. Div. 519, 78 N.Y.S.2d 121 (1st Dep't 1948); Brown & Bigelow v. Walsh, 191 Misc. 908, 78 N.Y.S.2d 807 (Sup. Ct. N.Y. County 1948); Schechter v. Smith, 185 Misc. 918, 57 N.Y.S.2d 886 (Saratoga County Ct. 1945). See also Gaetjens v. City of New York, 145 App. Div. 640, 130 N.Y. Supp. 405 (2d Dep't 1911).

<sup>80</sup> N.Y. Sess. Laws 1848, ch. 379, § 45.

<sup>81</sup> In the same year that the section 1472 limitation was raised to one hundred dollars (see note 78 *supra*), the jurisdiction of the Justice Court was raised to five hundred dollars. N.Y. Sess. Laws 1951, ch. 764 (amending N.Y. Justice Ct. Act § 3).

## 2. LIMITATION OF SECTION 1473

The second subdivision of Field's section, actions to recover a chattel, survives as the second subdivision of present section 1470. In 1849, however, the plaintiff's right to costs in such actions was limited where the value of the chattel and damages recovered was less than fifty dollars.<sup>82</sup> This limitation was enacted despite the lack of other judicial facilities for such cases, a situation that was remedied in 1860, when the Justice Courts were granted jurisdiction over replevin actions if they involved less than one hundred dollars.<sup>83</sup> Like the money action limitation (now in section 1472), the replevin limitation operated only if the Supreme Court *recovery* did not exceed fifty dollars, although the Justice Courts had jurisdiction of replevin actions where it was *alleged* that the amount involved did not exceed one hundred dollars,<sup>84</sup> and a similar gap also still exists.<sup>85</sup>

Unlike the money action limitation, however, the 1849 limitation on replevin actions (now in section 1473), does not operate to preclude costs entirely. Instead, the amount of costs cannot exceed the value of the chattel plus the amount of the damages recovered, if the total is less than the statutory minimum.<sup>86</sup> This differs fundamentally from the restriction on money actions under which the defendant becomes entitled to costs on a plaintiff's small judgment. Because a prevailing

<sup>82</sup> N.Y. Sess. Laws 1849, ch. 438, § 304(4).

<sup>83</sup> N.Y. Sess. Laws 1860, ch. 131, § 1.

<sup>84</sup> *Ibid.* The statute gave jurisdiction in actions "to recover the possession of personal property claimed the value of which as stated in the affidavit of the plaintiff, his agent or attorney, shall not exceed the sum of one hundred dollars."

<sup>85</sup> Compare N.Y. Civ. Prac. Act § 1473 (\$100) with N.Y. Justice Ct. Act § 3(6) (\$500).

<sup>86</sup> It should be noted, however, that a limitation of costs which does not operate to deny them entirely may not affect a party's right to tax disbursements. Early authority held that a limitation on the amount of "costs" applied to the total of costs and disbursements. See, e.g., *Wheeler v. Westgate*, 4 How. Pr. 269 (N.Y. Sup. Ct. 1850); *Belding v. Conklin*, 4 How. Pr. 196 (N.Y. Sup. Ct. Dutchess County 1849); *Keating v. Anthony*, 1 Code Rep. (n.s.) 233 (N.Y. C.P. 1851); *Warren v. Chase*, 8 Misc. 520, 28 N.Y. Supp. 765 (N.Y. City Ct. 1894); *Marsullo v. Billotto*, 55 How. Pr. 375 (N.Y. Marine Ct. 1878); *Ryan v. Farley*, 3 N.Y. Monthly Law Bull. 78 (C.P. 1881); 23 *Carmody-Wait, Cyclopedia of New York Practice* 194 (1956); *Milliman, The Law of Costs in New York* 3 (1904); *Bradner, Practice in Matters of Costs* 248 (1894). *Contra: Taylor v. Gardner*, 4 How. Pr. 67 (N.Y. Sup. Ct. Albany County 1849); *Newton v. Sweet*, 4 How. Pr. 134 (N.Y. Sup. Ct. Albany County 1849); cf. *Lounsbury v. Sherwood*, 53 App. Div. 318, 65 N.Y. Supp. 676 (2nd Dep't 1900). One of the more recent cases, however, has thrown doubt upon the early rule and indicates that disbursements in full may be recovered although costs are limited. *W. M. Whitney & Co. v. Brown*, 253 App. Div. 180, 1 N.Y.S.2d 754 (3d Dep't 1938); see also 23 *Carmody-Wait, Cyclopedia of New York Practice* 37, 39, 194 (1956). It is interesting that the proposed Field Code, as reported complete in 1850, explicitly limited disbursements as well as costs. In the case of intentional tort as well as replevin actions, section 867(4) stated that plaintiff recovering less than fifty dollars "can recover no more costs and charges than damages." The 1850 Code, however, was never enacted and the words "and charges" have never appeared in the statute. The limitation of section 1474 expressly bars recovery of both costs and disbursements. Moreover, the limitation of section 1472, because it operates to deny costs in full, prevents recovery of disbursements (see N.Y. Civ. Prac. Act § 1518); by virtue of section 1475, it also entitles the defendant to his costs, which, in turn, entitles him to tax his disbursements against the plaintiff.

plaintiff in a replevin action always recovers some costs on his judgment, no matter how small, he cannot become liable to the defendant for the defendant's costs.

In 1951, the minimum amount specified in section 1473, like that in section 1472, was increased to one hundred dollars.<sup>87</sup> Since costs are seldom significantly more than one hundred dollars,<sup>88</sup> section 1473, as so amended, is almost equivalent to a simple provision that costs cannot exceed damages.

### 3. LIMITATION OF SECTION 1471

Among those actions in which costs were as of right under the Field Code because it was expressly provided by statute that the Justice Courts had no jurisdiction, one class of actions, actions to recover for intentional torts, were also affected by the 1849 amendment, which limited costs in cases where the recovery was less than fifty dollars.<sup>89</sup> As in replevin actions prior to 1860, the limitation operated upon a class of cases of which Justice Courts had no jurisdiction at all. Indeed, its modern counterpart, section 1471, still does.<sup>90</sup> While the minimum recovery for replevin and money actions was increased to one hundred dollars in 1951,<sup>91</sup> it remains at fifty dollars for intentional torts, apparently in recognition of the total lack of jurisdiction in the Justice Courts.

Although these actions—which are now listed in subdivision 4 of section 1470—are actions for “money only,” their separate statement insulates them from complete denial of costs under section 1472; costs

<sup>87</sup> N.Y. Sess. Laws 1951, ch. 160.

<sup>88</sup> A 1951 study of several hundred bills of costs under section 1504 of the Civil Practice Act indicated that full costs after a trial in New York city averaged about \$150. The study resulted in the simplification of costs procedure in New York city embodied in section 1504-a of the Civil Practice Act. See N.Y. Leg. Ann. 44 (1951). But see note 86 *supra*.

<sup>89</sup> N.Y. Sess. Laws 1849, ch. 438, § 304(4). These intentional torts were: assault, battery, false imprisonment, libel, slander, criminal conversation, seduction and malicious prosecution. The list presently appears in subdivision 4 of section 1470 of the Civil Practice Act, by reason of its appearance in the Code of Civil Procedure section listing actions in which a Justice Court has no jurisdiction; it also appears in section 1471, as a result of the 1849 limitation; and it also appears in the present counterpart of the Justice Court jurisdictional section. In 1947, however, the actions for criminal conversation and seduction were removed from the lists in sections 1470(4) and 1471 of the Civil Practice Act. N.Y. Sess. Laws 1947, ch. 593, § 12. Apparently through oversight, they were not removed from the Justice Court jurisdictional section. See N.Y. Justice Ct. Act § 4(3). Since the Justice Court Act section lists actions in which Justices have no jurisdiction, no harm is done by the inadvertence. Cf. N.Y. Sess. Laws 1950, ch. 491, § 1 (deleting references to criminal conversation and seduction in New York city Municipal Court Code).

<sup>90</sup> See N.Y. Justice Ct. Act § 4(3). Other inferior courts, however, now have jurisdiction over such actions. See, e.g., N.Y. Sess. Laws 1953, ch. 655, § 1, amending N.Y.C. Munic. Ct. Code § 6(1); N.Y.C. Ct. Act § 16, *Kenyon v. Lord & Taylor, Inc.*, 143 N.Y.S.2d 391 (Sup. Ct. N.Y. County 1955). See also 19 N.Y. Jud. Council Rep. 72 (1953).

<sup>91</sup> N.Y. Sess. Laws 1951, ch. 160.

are limited by section 1471 to the amount of the recovery.<sup>92</sup> Thus, actions based upon intentional torts enjoy a privilege over other money actions: Recovery of less than fifty dollars limits, but does not preclude, costs, and recovery of between fifty and one hundred dollars has no effect on the plaintiff's right to costs. Moreover, as in replevin actions, a prevailing plaintiff will always recover some costs, and the defendant therefore enjoys no right to his costs on a plaintiff's judgment under sections 1472 and 1475.

Undoubtedly, the original lack of other judicial facilities for replevin and intentional tort actions, and the fact that a recovery of small damages in replevin or for an intentional tort evokes more sympathy for the plaintiff—and less for the defendant—than a recovery of the same amount of damages in contract or for negligence, resulted in this preferential treatment, when minimal recovery limitations were applied in 1849.<sup>93</sup> In the intervening years, however, other judicial facilities for these actions have become increasingly available. Since 1860, Justice Courts have had jurisdiction over small replevin actions,<sup>94</sup> and many inferior courts, other than Justice Courts, have jurisdiction over actions to recover small sums as damages for intentional torts.<sup>95</sup>

In addition to the tort claims listed in subdivision 4 of section 1470, section 1471 also operates upon actions for a fine or penalty where the state is a party. This class of actions is included in subdivision 3 of section 1470; consequently, section 1472 does not apply to it. The limitation on actions for a fine or penalty has a wholly different ancestry than its neighboring limitation on actions for intentional torts.

In the original jurisdictional section to which the third subdivision of Field's costs section referred, Justices of the Peace were deprived of jurisdiction over actions in which the state was a party "excepting for penalties not exceeding fifty dollars."<sup>96</sup> Thus no right to costs originally existed in actions for small penalties. In 1898, a right was granted, in

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<sup>92</sup> There is some doubt as to the effect of the limitation on disbursements. See note 86 *supra*.

<sup>93</sup> With respect to actions for intentional torts, it is possible that the 1849 amendment had the effect of granting costs rather than limiting them. While all actions for intentional torts were excluded from Justice Court jurisdiction and thus included in the third subdivision of section 259 of the 1848 Code, actions for money only were only included in the fourth subdivision to the extent that the recovery exceeded fifty dollars. Thus, if the fourth subdivision were considered to limit the other subdivisions, costs would not be as of right under the 1848 Code in actions for money only based upon intentional torts where the recovery was less than fifty dollars. The language was altered in the Throop Code and no longer has this ambiguity, for it now only denies costs in money actions "other than one of those specified" in the first ten subdivisions of section 1470. See N.Y. Civ. Prac. Act § 1472; cf. *id.* at § 1470(11); see also note 77 *supra*.

<sup>94</sup> N.Y. Sess. Laws 1860, ch. 131, § 1; Justice Ct. Act § 3(7). See text accompanying note 83 *supra*.

<sup>95</sup> See note 90 *supra*.

<sup>96</sup> N.Y. Laws 1848, ch. 379, § 47(1).

the guise of a limitation,<sup>97</sup> for the predecessor of section 1471 was amended to add actions for small fines and penalties to those actions in which costs were limited to the amount of the recovery.<sup>98</sup> This change, from a complete denial to a limitation of costs, made good sense in this class of actions. More important, it avoided the impact of section 1475, which would otherwise have entitled the defendant to costs on a plaintiff's judgment. There is some indication that the defendant was so entitled under the previous construction,<sup>99</sup> although the absurd result of allowing costs to a defendant against whom the state has recovered a small fine or penalty was apparently never reached by a court.

Another limitation in the Justice Court jurisdictional section, that Justices had no jurisdiction over actions against executors or administrators, was amended in 1895 to add an exception, similar to the original exception in actions for a penalty, granting jurisdiction "where the amount of the claim is less than the sum of fifty dollars, and the claim has been duly presented to the executor or administrator and rejected by him."<sup>100</sup> Thus, a plaintiff bringing such a claim in the Supreme Court was deprived of his right to costs and was held liable for the defendant's costs.<sup>101</sup> The limitation was dropped, however, when the Civil Practice Act was enacted. Although this limited jurisdiction still exists in the Justice Court, subdivision 6 of section 1470 has no monetary limitation.<sup>102</sup> In view of section 1499, however, there is little need for one.<sup>103</sup>

#### 4. LIMITATION OF SECTION 1474

The major impact of section 1475 of the Civil Practice Act, which awards costs to the defendant in actions listed in section 1470 where the plaintiff does not recover costs, is, of course, to allow a defendant costs upon a judgment in his favor. As has been noted, however, it also

<sup>97</sup> Cf. note 93 supra.

<sup>98</sup> N.Y. Sess. Laws 1898, ch. 110, § 1.

<sup>99</sup> The almost identical limitation in section 258(4) [304(4)] of the Field Code was interpreted to entitle a defendant to costs on a plaintiff's small judgment. See cases cited note 77 supra; see also note 101 infra.

<sup>100</sup> N.Y. Sess. Laws 1895, ch. 527.

<sup>101</sup> *Lamphere v. Lamphere*, 31 Misc. 297, 64 N.Y. Supp. 1138 (Sup. Ct. Madison County), aff'd, 54 App. Div. 17, 66 N.Y. Supp. 270 (3d Dep't 1900) (action for \$48, recovery of \$46.50; costs taxed against the plaintiff of \$67; net loss to "prevailing" plaintiff of \$20.50 plus her litigation expenses). The *Lamphere* opinion is unclear as to whether it was decided under the predecessor of section 1472 or under the 1895 provision. In view of the wording of the 1895 provision, it seems possible that Justice Court jurisdiction could be avoided, and costs as of course in the Supreme Court be thereby gained, by not presenting the claim. Of course, it is doubtful if such a stratagem could have been successful, especially because of the provision now in section 1499 of the Civil Practice Act.

<sup>102</sup> The omission of this limitation from the Civil Practice Act was apparently a result of its prior removal from the section listing actions in which the Justice Court had no jurisdiction to the section listing those actions in which jurisdiction could be exercised. See N.Y. Justice Ct. Act §§ 3(9), 4(9). But see note 62 supra.

<sup>103</sup> See text accompanying notes 55-70 supra.

operates to award costs to the defendant upon entry of a judgment in the plaintiff's favor, where the plaintiff is denied costs by section 1472 for failure to recover one hundred dollars in a money action.<sup>104</sup> In contrast, where the plaintiff is denied costs under the more recently-enacted<sup>105</sup> section 1474 because he brought his action in a court higher than that in which it might have been brought, section 1475 indicates<sup>106</sup> that the defendant is not entitled to costs. This distinction which section 1475 makes, between a denial of costs under section 1472 because of a small recovery and a denial under section 1474 for essentially the same reason, presents a number of vexing questions. Although sections 1471 and 1473 also limit costs where the recovery is small, they do not operate to deny costs entirely and thus clearly do not effectuate section 1475's award of costs to the defendant.<sup>107</sup>

Three situations cause difficulty: First, if the plaintiff recovers no more than one hundred dollars in a money action which could have been brought in a lower court, he will be barred from recovering costs because of both section 1472 and section 1474. Second, the plaintiff may not be barred by section 1472 because his action is not of a type there

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<sup>104</sup> Section 1472 applies to a money action other than one specified in the first ten subdivisions of section 1470. This formulation was adopted when the section was severed from the provision now in subdivision 11 of section 1470. See text at notes 74-79 supra. Although subdivision 11 of section 1470 utilizes the same formulation, any change made in it now would not automatically carry over into section 1472.

<sup>105</sup> Section 1474 has its origin in a 1904 amendment to the Code of Civil Procedure recommended by the Commission on the Law's Delays. N.Y. Sess. Laws 1904, ch. 557. Its provisions have been expanded since to include more courts and counties and to increase the minimum recovery amounts. See generally 7 N.Y. Jud. Council Rep. 279-89 (1941). Nevertheless, its provisions are still applicable only in certain courts and counties, while the provisions of sections 1471 to 1473 are applicable in all counties, and presumably to all courts of record. In 1956, the Judicial Conference proposed legislation to amend section 1474 in two respects. The coverage of the section was to be expanded to cover the entire state, uniformly in the Third and Fourth Departments and in the four counties of the Second Department which are least urban. The bill also was designed with two statutory minima: If the plaintiff failed to secure the lesser amount, he was denied costs and the defendant was awarded costs; if the plaintiff secured at least the lower amount but failed to secure the higher, he was only denied costs. See Assembly No. 3422, Int. No. 3181 (1956). While this legislation failed to pass, it seems evident that section 1474 is in need of revision. For example, subdivision 6, which has the effect of denying costs in Schoharie county on a recovery of less than one hundred dollars, has been unnecessary since 1951 as to money actions because of section 1472. Moreover, the subdivision requires a showing that all the parties are residents of the county and that the action could have been brought in a lower court, while the far more severe penalty of section 1472 requires no such showing.

<sup>106</sup> Since the original purpose of sections 1471, 1472, and 1473 was also to discourage bringing an action in a higher court, the language of the last clause of section 1475 might be read to include them. See note 32 supra. The provision now in the last clause of section 1475, however, was originally part of the subdivision that contained the provisions now in section 1474. It read: "The fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs. . . ." N.Y. Code Civ. Proc. § 3228(5).

<sup>107</sup> Thus it would make no difference whatsoever if the reference in section 1475 to "sections fourteen hundred and seventy to fourteen hundred and seventy-three" (see note 32 supra) were replaced with a more accurate reference to sections 1470 and 1472 only.

specified or because his recovery exceeds one hundred dollars, but he may nevertheless be barred by section 1474, because he recovered less than an amount stated in section 1474 and could have brought his action in a lower court. Third, the plaintiff may have recovered less than one hundred dollars in a money action and, while barred by section 1472, he could not have brought his action in a lower court so that he is not barred by section 1474.

*Parker v. City of New York*<sup>108</sup> is an illustration of the first situation. It was there held that the defendant was entitled to costs under section 1475, since the plaintiff was barred by section 1472. The fact that the plaintiff was also barred by section 1474 was held irrelevant in determining the defendant's right to costs. In effect, the court read section 1475 as if the word "solely" appeared before "by reason of having brought the action in a court of jurisdiction higher than that in which it might have been brought."<sup>109</sup>

The *Parker* case assumed, undoubtedly correctly, that the quoted language in section 1475 was intended to refer to section 1474.<sup>110</sup> Thus, in the second situation, where the plaintiff was denied his costs by section 1474 but not by section 1472, a defendant could not recover costs. Even without the language in section 1475, however, such a result is dictated by the same reasoning which bars the defendant where costs are denied the plaintiff by section 1499, *i.e.*, that section 1475 only refers to whether a plaintiff is entitled to costs under section 1470 to 1473.<sup>111</sup>

Apparently, then, the limitations of sections 1471, 1472 and 1473 operate independently of other limitations; and since they operate on different classes of cases, they are independent of each other.<sup>112</sup> Their operative fact is the size of the recovery, while section 1474 requires, as does section 1499, a showing of other facts. Consequently, in the third situation, where the plaintiff is not barred from recovering costs by section 1474, but is barred by section 1472, he must pay the defendant's costs under section 1475.

Such a rule seems harsh. For example, in *Worden v. Brown*<sup>113</sup> the plaintiff recovered \$33.16 in the Supreme Court, which was admitted

<sup>108</sup> 122 Misc. 660, 203 N.Y. Supp. 817 (Sup. Ct. Queens County 1924).

<sup>109</sup> See also *Streat v. Wolf*, 132 App. Div. 872, 874, 117 N.Y. Supp. 449, 450, modified, 135 App. Div. 81, 119 N.Y. Supp. 779 (1st Dep't 1909); *Lipshen v. Epstein*, 183 App. Div. 806, 170 N.Y. Supp. 555 (2d Dep't 1918).

<sup>110</sup> See note 106 *supra*.

<sup>111</sup> See notes 71 & 107 *supra*.

<sup>112</sup> Cf. *Miller v. Koven*, 127 Misc. 85, 215 N.Y. Supp. 263 (Sup. Ct. N.Y. County 1926) (limitation of section 1473 on amount of costs does not operate as a grant of costs as so limited, where section 1474 applies); see also *Parker v. City of New York*, 122 Misc. 660, 662, 203 N.Y. Supp. 817, 818 (Sup. Ct. Queens County 1924) (dictum).

<sup>113</sup> 14 How. Pr. 327 (N.Y. Sup. Ct. Monroe County 1857).

to be the only tribunal that had jurisdiction. Despite this, the plaintiff had to pay the defendant's costs which were apparently substantially more than the recovery.<sup>114</sup> A plaintiff having a small claim against joint obligors who reside in different counties is thus in a difficult position. It may be wholly impossible to serve the defendants in the same county in order to give a lower court jurisdiction over both of them. Even in cases not involving joint obligors, where a plaintiff resides a great distance from the defendant, while the action could be brought in the defendant's home county, penalizing the plaintiff's use of the Supreme Court in his own county is harsh, especially since the small size of the claim makes travel to a distant county impractical. It is well to emphasize that where the plaintiff's recovery exceeds one hundred dollars, not only is the defendant denied costs against the plaintiff, but, under section 1474, the plaintiff is not required to institute the action in the defendant's local court in order to preserve his own right to costs. Costs are denied to the plaintiff by section 1474 only if he could have brought the action in a lower court in the county where the action was actually brought.<sup>115</sup>

A dictum in *Gruber v. Wilson*<sup>116</sup> states that although section 1472 prevents the plaintiff in a small case from recovering costs, the defendant does not become entitled to costs "where the action cannot for jurisdictional reasons be brought in any other court."<sup>117</sup> While such an interpretation avoids hardship to plaintiffs with small claims, the dictum is wholly contrary to the weight of authority in the interpretation of sections 1472 and 1475.

#### D. Costs in multiple actions

The basic rule of section 1470 is that a plaintiff is entitled to costs "upon the rendering of a final judgment in his favor," that of section 1475 is that a defendant is entitled to costs "upon the rendering of a final judgment . . . , unless the plaintiff is entitled to costs," and that of section 1477 is that the court may award costs "upon the rendering of a final judgment." Where there is one plaintiff suing one defendant upon a single cause of action, there is a single judgment to which these rules are simple to apply. Under modern liberal joinder, however, multiple parties and multiple causes of action are not uncommon, and the problems of costs are accordingly complex.

<sup>114</sup> See also *Laughran v. Orser*, 15 How. Pr. 281 (N.Y. Super Ct. 1858); cf. cases cited in note 77 supra.

<sup>115</sup> E.g., *Reilly v. Stevens*, 258 App. Div. 984, 17 N.Y.S.2d 527 (2d Dep't 1940); *Hayward v. Clifton*, 221 App. Div. 802, 223 N.Y. Supp. 873 (2d Dep't 1927); *Waldstreicher v. Solomon*, 127 App. Div. 364, 111 N.Y. Supp. 500 (2d Dep't 1908); see also *Francis v. Lowe*, 179 Misc. 677, 39 N.Y.S.2d 728 (Sup. Ct. N.Y. County 1943).

<sup>116</sup> 276 N.Y. 135, 11 N.E.2d 568 (1937).

<sup>117</sup> Id. at 141, 11 N.E.2d at 570.

Where all the defendants or all the plaintiffs are united in interest in a single cause of action, they are treated as a single party; one judgment containing one bill of costs is entered for or against them all.<sup>118</sup>

Where there are separate or severable claims, even between single parties, however, the result may be several judgments. For example, an action may be dismissed or partial summary judgment may be rendered as to one cause of action and the remainder of the action may continue to another judgment. Moreover, a single judgment in favor of either the plaintiff or the defendant may represent the difference between the recoveries on a successful claim and a successful counterclaim, and a single judgment in favor of the plaintiff may represent his success on some claims but his failure, and the defendant's success, on others.

Where the parties on the same side are not united in interest or assert or defend different claims, the problems increase. The basic rule that only one bill of costs is awarded in a single action is strained by the increasing liberality of joinder in our practice. Appearance by separate attorneys, for example, becomes an important consideration because of the traditional role of costs as reimbursement for attorney's fees.

#### 1. RECOVERIES FOR BOTH THE PLAINTIFF AND THE DEFENDANT

With respect to a single plaintiff's judgment that represents a recovery for the plaintiff on some causes of action, but a failure upon others, section 1483 of the Civil Practice Act provides that each party is entitled to costs against the other unless the issues are substantially the same, in which case the plaintiff only is entitled to costs. The section seems sound, for it operates to award a defendant costs only where his successful defense is unrelated to his unsuccessful one. A similar rule should be employed in other cases where each side "recovers" in a single judgment. Thus, while section 1483 does not expressly so indicate,<sup>119</sup> it should also be applicable to a judgment for the plaintiff resulting from the difference between recoveries on a successful claim and a smaller successful counterclaim. Section 1483 applies to "an action wherein the plaintiff is entitled to costs as of course," which presumably means an action of a kind specified in section 1470, in which the judgment

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<sup>118</sup> See, e.g., *M. Salimoff & Co. v. Standard Oil Co.*, 259 N.Y. 219, 181 N.E. 457 (1932) (alternative holding; multiple plaintiffs); *Pagano v. Giuliani*, 43 N.Y.S.2d 945 (Sup. Ct. Onondaga County 1943) (multiple defendants successful); *Hayman v. Morris*, 179 Misc. 265, 38 N.Y.S.2d 782 (Sup. Ct. N.Y. County 1942) (dictum; multiple defendants successful); *Underwood v. Schulz*, 130 N.Y. Supp. 158 (Sup. Ct. App. T. 1911) (same); *Codding v. Scott*, 1 Misc. 485, 21 N.Y. Supp. 473 (N.Y. City Ct. 1892) (multiple defendants unsuccessful).

<sup>119</sup> Section 1483 specifies that the two or more causes of action it deals with are set forth in a "complaint."

was in the plaintiff's favor.<sup>120</sup> To accord with modern practice, a defendant recovering an affirmative judgment because the amount of his successful counterclaim exceeded the amount of the plaintiff's successful claim should be treated as if he were a plaintiff under section 1483 and the same consideration—similarity of the causes of action—should apply to the plaintiff's right to costs as applies under section 1483 to the defendant's right. However, the provisions of section 1471 through 1474 should not apply to a defendant on a recovery upon a counterclaim, or the excess of the recovery upon a counterclaim over the recovery upon the principal claim. So penalizing the defendant, who did not choose the court, would discourage him from asserting his claim in the same action.

At first glance, it would appear that the test of section 1483 should be controlling even where a single action results in more than one judgment. There seems little difference between a judgment for the plaintiff resulting from the defendant's successful defense of the first cause of action alleged and the plaintiff's recovery on the second, on the one hand, and a judgment for the defendant on a successful motion to dismiss the first cause of action and a severance and subsequent judgment for the plaintiff on the second, on the other hand. Accordingly, it has been held that section 1483 controls where a judgment of dismissal for the defendant is entered on the severed part of the claim and the plaintiff continues on the remainder.<sup>121</sup>

Where the first of the two judgments is for the plaintiff, and the second for the defendant, however, other considerations must be taken into account. Since it was within the plaintiff's power to discontinue the remainder of the action, his continuation and failure should entitle the

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<sup>120</sup> While the quoted phrase was substituted for one indicating only that an action of a kind specified in section 1470 was intended, and a judgment for the plaintiff was not required (see N.Y. Code Civ. Proc. § 3234), the fact that section 1483 contemplates recovery by the plaintiff on some causes of action in the complaint and recovery by the defendant on other causes of action set forth in the complaint (see note 119 supra) indicates that the judgment it deals with is one in the plaintiff's favor. The rewording, however, eliminates from section 1483 actions specified in section 1470 in which a plaintiff who recovers judgment is not entitled to costs as of right because he failed to recover a sufficient amount. See N.Y. Civ. Prac. Act §§ 1472-1474.

<sup>121</sup> *Luisoni v. Barth*, 138 N.Y.S.2d 65 (Sup. Ct. N.Y. County 1954). If the cause of action against the defendant is dismissed without prejudice, it is apparently not a "recovery" within the meaning of section 1483. See, e.g., *Wapnik v. Argonne Hat Works, Inc.*, 128 Misc. 395, 219 N.Y. Supp. 116 (N.Y. City Ct. 1926); cf. N.Y. Civ. Prac. Act § 482. In the *Luisoni* case, the defendant had been granted partial summary judgment and the court held that since the judgment finally disposed of the causes of action, it was a "recovery." The *Luisoni* decision stated that the plaintiff would be entitled to costs on the continued action, if he prevailed; it added that "it would be necessary to exclude the particular items allowed at this time" from a bill of costs for the defendant, if the defendant prevailed on the continued action. 138 N.Y.S.2d at 67. It is not clear whether "items" refers only to items of disbursements or whether it also refers to statutory costs.

defendant to costs, regardless of the similarity of the claims. Section 1480 of the Civil Practice Act is designed to meet this problem.

The origin of section 1480 can be traced to a section added in 1851 to the provisional remedy chapter of the Field Code which provided that when the defendant admitted part of the plaintiff's claim, the court could order him to satisfy that part of the claim and could enforce it as it enforces a provisional remedy.<sup>122</sup> Nothing about costs was included. In the Throop revision of 1876, the provision was re-drafted and became section 511 in the article relating to answers of the Code of Civil Procedure. The new language provided that when the defendant admitted part of the claim, the action must be severed and judgment entered for the plaintiff for the part admitted. As to costs, the section provided:

If the plaintiff elects to continue the action, his right to costs upon the judgment is the same, as if it was taken in an action brought for only that part of the claim. If the plaintiff does not elect to continue the action, costs must be awarded, as upon final judgment in any other case.

In drafting the Civil Practice Act, these two sentences became section 1480. In order to indicate the circumstances under which the section applied, the words "after severance and judgment upon a part of his claim" were inserted after the first phrase of the first sentence.<sup>123</sup> Although it was clear that the words "that part of the claim" at the end of the first sentence as it appeared in section 511 referred to a previous sentence which provided that "the action [may] be continued, with like effect, as to the subsequent proceedings as if it had been originally brought for the remainder of the claim," the present section is confusing because the end of the first sentence seems to refer to the inserted words which describe the severed part rather than the remaining part of the claim. This confusion is compounded by the use of the word "judgment" in the inserted words to mean "the judgment on the severed part," where the same word had been already used in the same sentence to mean "the judgment on the remainder." Moreover, unless the first sentence of section 1480 is interpreted by reference to its predecessors, its condition is rendered meaningless by the second sentence.<sup>124</sup>

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<sup>122</sup> N.Y. Sess. Laws 1851, ch. 479.

<sup>123</sup> It was also considered that these words "broadened [the section] to cover any case of severance." See Report of the Joint Committee on the Simplification of the Civil Practice 688 (1919); cf. 3 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice 89 (1915). While this "broadening" does include a plaintiff's judgment other than one on an admitted claim—such as a partial summary judgment for the plaintiff—it has been correctly held that the section is not applicable to severances occasioned by a judgment for the defendant, such as on a motion to dismiss one cause of action. See *Luisoni v. Barth*, 138 N.Y.S.2d 65 (Sup. Ct. N.Y. County 1954) and note 121 *supra*.

<sup>124</sup> The Board of Statutory Consolidation recommended inserting the words, "as to which the action has been continued" at the end of the first sentence which now appears in section 1480 in order to avoid this ambiguity, but the section was never so clarified.

A clarification of the present section's language, however, does not appreciably reduce the many problems that arise in its application. The second sentence, by specifying that costs are awarded on the severed part of the claim if the plaintiff does not elect to continue, implies that costs are not so awarded, if the plaintiff does continue. Yet, Throop's explanatory note to the predecessor section states that "the right of either party to costs, in the action as continued, is unaffected by the plaintiff's *recovery of costs*, or his failure to recover them, *upon the judgment entered after the severance*."<sup>125</sup> Moreover, section 511 of the Code of Civil Procedure originally included a statement that "the defendant is not entitled to costs in any event." If "either party" could have a right to costs in the action as continued, this statement could only be taken to refer to the severed part of the claim.<sup>126</sup> If so, it apparently was intended to avoid the usual rule that a recovery of less than fifty dollars would entitle the defendant to costs.<sup>127</sup> Since the only partial judgment dealt with under Throop's section was one entered on the defendant's admission, it seemed unfair to award him costs, especially if the plaintiff elected to continue. Possibly because of the ambiguity it created, the statement as to the defendant's right to costs was deleted in 1879.<sup>128</sup>

Because the severed claim may be viewed as a separate action which terminated in a judgment, it may be contended that the plaintiff should be entitled to costs on it whether or not he continues. Under that reasoning, however, if the plaintiff's continuation results in another victory, the defendant would be subject to two bills of costs<sup>129</sup>—a result which could hardly have been intended under the Throop Code, where the severance was limited to one occasioned by the defendant's admission of part of the claim. On the other hand, if the plaintiff loses the second judgment, allowing him costs on the first judgment is consistent with a view that the plaintiff's continuation was a second action as far as the defendant is concerned, a view which would entitle the defendant to costs on the second judgment.

An analogy to section 177 of the Civil Practice Act is helpful. That

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See 3 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 89, 507 (1915).

<sup>125</sup> Throop, Notes to the Code of Remedial Justice 101 (1876) (emphasis supplied). The Code of Remedial Justice was renamed the Code of Civil Procedure in 1877. N.Y. Sess. Laws 1877, ch. 416, § 1. Throop's notes also appear in subsequent annual editions of the Code.

<sup>126</sup> See *Bradbury v. Winterbottom*, 13 Hun 536 (N.Y. Sup. Ct. 1st Dep't 1878) (implying that defendant would be entitled to costs if he successfully defended the continued action).

<sup>127</sup> See text accompanying notes 74-79 *supra*.

<sup>128</sup> N.Y. Sess. Laws 1879, ch. 542.

<sup>129</sup> But see note 121 *supra*.

section provides that if the plaintiff fails to accept an offer to compromise and subsequently recovers less than the amount offered, the defendant is entitled to costs from the time of the offer and the plaintiff is entitled to costs for the preceding time.<sup>130</sup> An offer differs from a partial judgment, however, in that the plaintiff who refuses an offer risks recovery of substantially less than that offered, while a plaintiff who secures judgment on part of his claim has nothing to lose by continuing. On the other hand, an offer by the defendant may not be indicative of any weakness in his case or any probability that the plaintiff will prevail, while a partial summary judgment for the plaintiff, whether on the defendant's admission or otherwise, indicates that the plaintiff would have prevailed on that issue had he continued with the whole case.

Although section 1480 is no longer limited to severance as a result of the defendant's admissions,<sup>131</sup> if the plaintiff continues after the partial judgment and recovers another judgment, he should only be entitled to the single bill of costs that he would have secured were it not for the severance. Actually, section 1480 does not even grant the plaintiff this, for, under the first sentence of the section, the plaintiff would be denied costs if the second recovery was less than a minimum amount specified in section 1474, even if the total of his two recoveries was more.<sup>132</sup> Indeed, it is possible that a second recovery of less than one hundred dollars would entitle the defendant to costs under sections 1472 and 1475, despite a previous large partial judgment.<sup>133</sup>

In summary, while it is not clear whether costs are awarded under section 1480 as to a partial judgment for the plaintiff if the plaintiff continues,<sup>134</sup> the right of either party to costs on the second judgment

<sup>130</sup> Cf. N.Y. Civ. Prac. Act § 178 (counterclaim).

<sup>131</sup> See note 123 *supra*.

<sup>132</sup> See *Waite v. Kaldenberg Co.*, 68 Hun 528, 529, 22 N.Y. Supp. 1006, 1007 (Sup. Ct. 1st Dep't 1893) ("If . . . he elects to continue . . . it seems to have been the intention of the legislature to award him costs only in case he succeeds and recovers an amount which would entitle him to costs had he originally brought his action for the amount not conceded to be due").

<sup>133</sup> Moreover, in the case of actions governed by section 1471 or 1473, costs would apparently be limited on a small second judgment.

<sup>134</sup> While most decisions indicate that costs on a plaintiff's partial judgment are not granted at the time of the severance, some of the language used may be interpreted as a postponement, rather than a denial, of his costs. See, e.g., *Mayfair Detectives, Inc. v. Karp Metal Prods. Co.*, 264 App. Div. 410, 411, 35 N.Y.S.2d 544, 546 (1st Dep't 1942) ("The ultimate question of costs must await the trial of those issues."); *Watson v. Dynamic Instrument Corp.*, 153 N.Y.S.2d 765, 767 (Sup. Ct. Kings County 1956) ("plaintiff may not have costs on the partial judgment at this time"). In some cases, denial is more explicitly indicated. *Honegman v. Brodesky*, 130 N.Y.S.2d 497, 499 (Sup. Ct. Kings County 1954) ("no award of taxable costs may be made in connection with the partial judgment"); *Berwaldt v. Zehrlaut*, 247 App. Div. 732, 285 N.Y. Supp. 472, 473 (2d Dep't 1936) ("Upon the entry of partial judgment, unless plaintiff elects not to continue . . . , such plaintiff is not entitled to costs"). In all of the cited cases, however, the partial judgment was less than the minimum recovery then required by section 1474, and although the court did not expressly decide whether the plaintiff could have brought his action in

is based only upon the amount of the second judgment.<sup>135</sup> Moreover, section 1483, and not section 1480, applies to a partial judgment for the defendant.<sup>136</sup>

## 2. MULTIPLE PARTIES

Under the Civil Practice Act, two or more persons need not be united in interest in order to be joined as parties in a single action.<sup>137</sup> Nevertheless, only one bill of costs is awarded to all prevailing plaintiffs whether or not they are united in interest.<sup>138</sup> Where multiple defendants all prevail, however, separate bills of costs may be awarded if they are not united in interest,<sup>139</sup> and are represented by separate attorneys,<sup>140</sup>

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an inferior court, it may have based denial of costs on section 1474. Such reasoning, however, would dictate that if the first recovery is insufficient under section 1472, the defendant would be entitled to costs. Despite the broadening of section 1480 to cover severances other than those on a defendant's admissions (see note 123 supra), and despite the 1879 deletion of the provision prohibiting costs to the defendant (see text accompanying note 128 supra), this result seems unsound.

<sup>135</sup> See note 132 supra.

<sup>136</sup> See text at note 121 supra.

<sup>137</sup> The rule for permissive joinder of parties is set forth in section 212: § 212. Permissive joinder of parties.

1. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them would arise in the action. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief.

2. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them would arise in the action. Judgment may be given according to their respective liabilities, against one or more defendants as may be found to be liable upon all of the evidence, without regard to the party by whom it has been introduced.

3. It shall not be necessary that each plaintiff shall be interested in obtaining, or each defendant be interested in defending against all the relief demanded, or as to every cause of action included in any proceeding; but the court may order separate trials or make such other orders as will prevent a party from being prejudiced, delayed, or put to expense by the joinder of a party against whom he asserts no claim and who asserts no claim against him.

<sup>138</sup> *Haddad v. Triple Cities Tractor Corp.*, 276 App. Div. 886, 93 N.Y.S.2d 884 (3d Dep't 1949); see also note 142 infra. In *Brown v. Cohan*, 254 App. Div. 20, 21, 4 N.Y.S.2d 883, 884 (3d Dep't 1938), the court stated:

The plaintiffs appeal from orders denying retaxation of separate bills of costs in each of six actions brought against the same defendant and arising out of the same set of facts. The actions were not consolidated but were tried together as provided by section 96-a, of the Civil Practice Act. Defendant was entitled to tax costs in each action as the jury had returned verdicts of no cause of action. Plaintiffs could have avoided this liability by becoming coplaintiffs in one action. However, that procedure would have required them to forego the right to separate bills of costs in each action wherein there was a recovery. Having chosen to chance the larger recovery of costs incident to the six separate actions, they should not now complain because through adverse verdicts the defendant receives a corresponding benefit.

<sup>139</sup> *Gwizdak v. Netherland Cab Co.*, 51 N.Y.S.2d 560 (Sup. Ct. N.Y. County 1944) (separate attorneys but united in interest; one bill of costs); *Underwood v. Schulz*, 130 N.Y. Supp. 158 (Sup. Ct. App. T. 1911) (same); see *Hayman v. Morris*, 179 Misc. 265, 38 N.Y.S.2d 782 (Sup. Ct. N.Y. County 1942); cf. *Officers v. Belmont*, 15 Misc. 120, 36 N.Y. Supp. 813 (C.P. 1895) (defendants entitled to separate bills of costs if they would have been liable severally).

<sup>140</sup> *Hook v. German Am. Bank*, 152 App. Div. 253, 136 N.Y. Supp. 1019 (4th Dep't

unless the attorneys were employed "in bad faith for the purpose of enhancing the costs."<sup>141</sup>

This distinction between prevailing plaintiffs and prevailing defendants is justifiable when two considerations are kept in mind. First, costs are intended to compensate the prevailing party for his expense rather than to penalize the losing party. From this it follows that a single prevailing party should only be entitled to a single bill of costs, regardless of the number of adverse parties. Second, it is the plaintiff who has the option of joining parties. Thus, if several persons not united in interest join as plaintiffs in a single action, each voluntarily sacrifices his right to a separate bill of costs if he prevails; in return, all are liable to only one bill of costs against them if they fail.<sup>142</sup> Similarly, if a single plaintiff joins several persons not united in interest as co-defendants and each successfully defends by his own attorney, each is entitled to tax his own bill of costs against the plaintiff, yet all are nevertheless liable for only one bill if they fail.<sup>143</sup>

Multiple parties, however, do not always stand or fall together, and the rules for determining the right to costs where some prevail and others fail are unclear. If one plaintiff prevails and another is defeated, for example, the prevailing plaintiff is entitled to costs against the defendant, but there is some doubt as to whether the defendant may re-

1912); *Hayman v. Morris*, 179 Misc. 265, 38 N.Y.S.2d 782 (Sup. Ct. N.Y. County 1942); *Jacobs v. Feinstein*, 133 App. Div. 416, 117 N.Y. Supp. 823 (2d Dep't 1909); *Rowe v. Granger*, 118 App. Div. 459, 103 N.Y. Supp. 439 (3d Dep't 1907). *Contra*, *Mazet v. Crow*, 10 N.Y. Supp. 743 (N.Y. City Ct. 1890).

<sup>141</sup> *Wolper v. New York Water Serv. Corp.*, 83 N.Y.S.2d 97, 98 (Sup. Ct. Kings County 1948); see *Delaware, L.&W. R.R. v. Burkard*, 40 Hun 625 (N.Y. Sup. Ct. Gen. T. 5th Dep't 1886).

<sup>142</sup> See note 138 *supra*; see also *Salimoff & Co. v. Standard Oil Co.*, 259 N.Y. 219, 222-23, 181 N.E. 457, 457-58 (1932):

There is no provision that I can find in the Civil Practice Act which would permit these eighteen plaintiffs, if they win, to have eighteen bills of costs against the defendant, or, if the defendant should win, would give it eighteen bills of costs against the plaintiffs. Prior to section 209, only a single bill of costs was assessed against unsuccessful co-plaintiffs, whether their causes of action were joint or several. . . .

The defendant and the courts below have approached this action as if there were to be eighteen separate trials of the issues. Section 209 was adopted for the very purpose of avoiding such unnecessary litigation and expense.

It is not clear, however, whether the court in the *Salimoff* case considered that the plaintiffs were united in interest, for it went on to state:

Another reason for our answers to these questions lies in the fact that the plaintiffs have been properly united as parties to the action without the assistance of section 209 of the Civil Practice Act. They have a joint interest, which makes them proper parties, and would have justified their joint complaint prior to the enactment of this section. They allege that their oil lands in Russia were confiscated by the Russian government and all distinguishing lines of title obliterated. Thereafter, it is said, the government commingled the extracted oil, sold it to the defendant, which knew that the oil had been wrongfully taken and misapplied. If these facts be true, it is appropriate, if not necessary, that these owners should join in one action to have their various quantities allocated to each of them.

<sup>143</sup> *Codding v. Scott*, 1 Misc. 485, 21 N.Y. Supp. 473 (N.Y. City Ct. 1892).

cover costs against the plaintiff he defeated. Recent cases have denied the defendant a bill,<sup>144</sup> relying upon a dictum in *Salimoff & Co. v. Standard Oil Co.*,<sup>145</sup> that "[t]he very purpose sought to be accomplished by section 209 [now section 212(1)] would be somewhat frustrated if by consolidation into one action, costs were allowed on the basis of separate actions." Yet, in the similar situation of section 1483, where the plaintiff in a two-party action prevails upon one cause of action but fails upon another, each party is entitled to costs against the other if the causes of action are not substantially the same.<sup>146</sup>

In the converse situation, where a single plaintiff prevails against one defendant but is defeated by another, section 1476 of the Civil Practice Act provides that the court may award the successful defendant costs if he was neither united in interest nor united in an answer with the unsuccessful defendant.<sup>147</sup>

The term "united in interest" has been defined in this area, on the basis of a definition formulated with respect to service upon codefendants,<sup>148</sup> as requiring that they stand or fall together and that judgment against one will similarly affect the other.<sup>149</sup> If this is so, it appears unlikely that one defendant will succeed while another united in interest with him will fail,<sup>150</sup> and the requirement offers little guidance. Accordingly, most of the decisions which have denied costs to the successful defendant under section 1476 have relied upon the fact that he was "united in an answer" with the unsuccessful defendant.<sup>151</sup> This requirement may not relate to the employment of separate attorneys, for it has been held that a defendant may recover costs if he was not united in an

<sup>144</sup> *Piels v. Tron*, 62 N.Y.S.2d 201 (Sup. Ct. N.Y. County 1946); *Girou v. Metropolitan Distribs., Inc.*, 181 Misc. 345, 43 N.Y.S.2d 388 (Sup. Ct. N.Y. County 1943); *Boldin v. Smith*, 161 Misc. 696, 291 N.Y. Supp. 832 (Sup. Ct. Greene County 1936).

<sup>145</sup> 259 N.Y. 219, 222, 181 N.E. 457, 458 (1932).

<sup>146</sup> See text accompanying notes 119-21 *supra*.

<sup>147</sup> E.g., *Larin v. Gugino*, 18 Misc.2d 200 (Niagara County Ct. 1959). Such an award is discretionary, however. See text accompanying note 153 *infra*.

<sup>148</sup> See N.Y. Civ. Prac. Act § 16; *Prudential Ins. Co. v. Stone*, 270 N.Y. 154, 159, 200 N.E. 679, 680 (1936); cf. III N.Y. Temp. Comm'n on the Courts Rep. 252, Leg. Doc. 6(b) (1957) ("'united in interest' seems to be an expression originated by the New York codifiers; . . .").

<sup>149</sup> See *Hayman v. Morris*, 179 Misc. 265, 38 N.Y.S.2d 782 (Sup. Ct. N.Y. County 1942); cf. *Doran v. Sackett*, 142 Misc. 496, 254 N.Y. Supp. 675 (Sup. Ct. Monroe County 1931).

<sup>150</sup> But cf. *Ferraro v. Denton*, 249 App. Div. 857, 292 N.Y. Supp. 920 (2d Dep't 1937). Such a situation may occur, perhaps, where one defendant asserts and succeeds on an affirmative defense which his codefendant cannot rely upon. See *Yamato Trading Co. v. Hoexter*, 44 Hun 491 (N.Y. Sup. Ct. Gen. T. 1st Dep't 1887).

It has been held to be "within the discretion of the court to impose some costs as a condition of allowing the discontinuance" by the plaintiff against one of two defendants who were united in answer. *Stevens v. Ilush*, 107 Misc. 353, 357, 176 N.Y. Supp. 602, 605 (Sup. Ct. App. T. 1919). Cf. *Mazet v. Crow*, 10 N.Y. Supp. 743 (N.Y. City Ct. 1890).

<sup>151</sup> *Allis v. Wheeler*, 56 N.Y. 50 (1874); *Stolper v. Barbarita*, 285 App. Div. 130, 136 N.Y.S.2d 174 (1st Dep't 1954); *Schmuckler v. Green*, 249 App. Div. 342, 293 N.Y. Supp. 171 (3d Dept. 1937).

answer even though he was represented by the same attorney.<sup>152</sup> Since the defendant's costs are discretionary under section 1476 however, they have been denied to defendants who were neither united in interest nor in answer with the unsuccessful defendants.<sup>153</sup> Such denial seems unwarranted when it is considered that the defendants were joined by the plaintiff and that if all of the defendants had succeeded they might have been entitled to separate bills.<sup>154</sup> The courts have justified the discretionary denial of costs to the prevailing defendant under section 1476 on the grounds that the plaintiff acted "reasonably" in joining both defendants, and should not therefore be made liable for costs.<sup>155</sup> Since the kind of action covered by section 1476 is one where costs are awarded as of course<sup>156</sup> and reasonableness is not a criterion in such an action between two parties, even where each party recovers on some of the causes of action,<sup>157</sup> it is difficult to understand why the prevailing defendant should be in a worse position solely because he was joined—albeit reasonably—with a defendant who lost. The courts in this area seem to emphasize the punitive aspect of costs, rather than looking to costs as compensation to the prevailing party for his expense. The fact that consideration is often given to the reasonableness of the losing party's actions in equity, where costs are discretionary,<sup>158</sup> would not seem to warrant employment of the criterion as the basis of exercising discretion under section 1476, where, but for the plaintiff's joinder, the prevailing defendant would have been entitled to his costs as of course.

Moreover, an award of costs to the prevailing defendant is only discretionary where the plaintiff actually recovers costs against the losing defendant. Where the plaintiff's judgment does not include costs, because of the operation of section 1474, the provisions of section 1476 do not apply and the prevailing defendant becomes entitled to costs of course under section 1475.<sup>159</sup> The limitation of section 1475<sup>160</sup> prevents

<sup>152</sup> *Kozlowski v. Gomolski*, 181 App. Div. 234, 167 N.Y. Supp. 731 (1st Dep't 1917), rev'd on other grounds, 224 N.Y. 510, 121 N.E. 269 (1918); but see *Hayman v. Morris*, 179 Misc. 265, 38 N.Y.S.2d 782 (Sup. Ct. N.Y. County 1942).

<sup>153</sup> E.g., *Roto-Wac Realty Corp. v. Hale Operating Corp.*, 8 Misc. 2d 984, 166 N.Y.S.2d 1000 (Sup. Ct. N.Y. County 1957); *Doran v. Sacket*, 142 Misc. 496, 254 N.Y. Supp. 675 (Sup. Ct. Monroe County 1931); *Sullivan v. Wager* [infant's action], 139 Misc. 855, 250 N.Y. Supp. 483 (N.Y. City Ct.), aff'd, 161 Misc. 295, 292 N.Y. Supp. 523 (Sup. Ct. App. T. 1st Dep't 1931).

<sup>154</sup> See text accompanying notes 139-41 supra.

<sup>155</sup> See cases cited in note 153 supra.

<sup>156</sup> See N.Y. Civ. Prac. Act §§ 1470, 1476.

<sup>157</sup> See N.Y. Civ. Prac. Act § 1483.

<sup>158</sup> See 23 Carmody-Wait, *Cyclopedia of New York Practice* 78-79 (1956).

<sup>159</sup> *Haniford v. Safer*, 214 App. Div. 435, 212 N.Y. Supp. 462 (4th Dep't 1925); *Hannon v. Epstein*, 161 Misc. 356, 292 N.Y. Supp. 741 (Sup. Ct. Queens County 1936). In *Sullivan v. Wager* [father's action], 139 Misc. 855, 856, 250 N.Y. Supp. 483 (N.Y. City Ct. 1931), the trial court attempted to apply the discretionary rule to the prevailing defendant's right to costs; finding that "it was plainly the part of common sense for the . . . plaintiff to

the losing defendant from recovering costs; it does not preclude the prevailing defendant, however, since the plaintiff's not being entitled to costs against him results from plaintiff's complete failure to recover and not from an insufficient recovery.

In effect, this limitation of the application of section 1476 puts additional teeth into section 1474. Not only will failure to bring suit in an inferior court result in failure to recover costs against a losing defendant, but it will convert a winning co-defendant's limited<sup>161</sup> discretionary right to a right to costs of course.

### III. CONCLUSION

The provisions for statutory costs in the New York Civil Practice Act are archaic, inconsistent and misleading. Like most other practice act provisions, they have not been thoroughly examined or evaluated in over a century. Accretion of particular provisions and patchwork amendment have obscured their original purpose and have resulted in a body of law unsuited to modern conditions and needs.

The distinction between actions in which costs are awarded as of course and those in which costs are in the discretion of the court is still based upon the jurisdiction of the Justice Courts. While this basis had undoubted merit at the time of its formulation, the development of other inferior courts throughout the state and the expansion of the jurisdiction of the Justice Courts has never been taken into account. Moreover, the Justice Courts' jurisdiction is no longer geared to the costs provisions. It seems clear that the enactment of other more efficient provisions to encourage small actions to be brought in the inferior courts has vitiated much of the basis for the costs distinction, which should therefore be thoroughly re-examined in the light of present day needs and practice.

Although Field purported to abolish procedural distinctions between law and equity, the costs provisions still perpetuate it. There is no reason why *all* legal actions should entitle the parties to costs as of course while costs in *all* equitable ones should be in the discretion of the court. Indeed, the legal-equitable distinction that presumably underlies the pres-

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sue both defendants" and that "it was entirely sensible and reasonable" for the plaintiff to bring his action in a higher court than was necessary, the court denied costs to the prevailing defendant. On appeal, the Appellate Term reversed on the ground that the prevailing defendant was entitled to costs of course under section 1475, and section 1476 was inapplicable. 161 Misc. 295, 292 N.Y. Supp. 523 (Sup. Ct. App. T. 1st Dep't 1931).

<sup>160</sup> See note 32 *supra*.

<sup>161</sup> Before the court may exercise its discretion in favor of the prevailing defendant under section 1476, it must find that he was not united in interest or in an answer with the losing defendant. If the prevailing defendant becomes entitled to costs of course, however, these limitations are apparently inapplicable. Cf. *Ingeman v. Snare & Triest Co.*, 158 App. Div. 915, 143 N.Y. Supp. 840 (1st Dep't 1913).

ent provisions is not even a safe guide to their effect. The archaic attempt to preserve the traditional discretion of equity not only falls far short of its goal, but it conflicts with more modern concepts of liberal joinder, which have encouraged the combining of actions for a sum of money with those seeking other relief.

Another distinction in the present law that is difficult to justify under modern conditions of practice is that between actions and special proceedings. In some of the former, at least, costs are awarded as of course. In all of the latter, costs are in the discretion of the court. The basic difference between an action and a special proceeding, however, is only the summary nature of the latter, a consideration unrelated to whether a party should be entitled to costs or must rely upon the discretion of the court. There is no real difference between an action which is disposed of by a successful motion for summary judgment and a special proceeding which is disposed of upon the return date. Yet, in the former, costs may be awarded as of course and in the latter, an award of costs—in the same amount—is only made in the discretion of the court. Similarly, if a special proceeding necessitates a trial of issues, it is difficult to understand why the successful litigant's right to costs for the trial should be less than if the identical issues were tried in an action.

It seems clear that costs should be awarded in all cases, absent a showing of unusual circumstances. While this is the general rule where the courts have discretion to award costs, there should be an equivalent rule which would permit a court to deny costs to a party now entitled to them as of right, where that right conflicts with reason or justice.

Modern concepts of liberal joinder are also thwarted by the sections of the Civil Practice Act that deal with multiple claims and multiple parties, for they were designed to meet problems of litigation in an era long past. Inconsistencies abound and the decisional law is obscure and confusing.

The faults and obsolescence of the provisions determining the right to costs are matched, if not surpassed, by the provisions determining the amount of costs to be awarded. Both in impact and in the amounts involved, the concept of statutory costs bears little relation to present reality. Logically, costs should either approach reasonable compensation to a winning party or their travesty should be abolished. Undoubtedly, much of the difficulty in interpreting the present statutory provisions results from a paucity of decision, comment and interest based upon the insignificance of the amounts usually involved. Yet retention of these arbitrary, small amounts dictates simplicity of oper-

ation and computation in place of the present obscurity.<sup>162</sup> Even so, the present provisions provide little benefit to the party who succeeds on a meritorious claim or defense, and they add insult to the injury of injustice.

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<sup>162</sup> Although the New York Advisory Committee on Practice and Procedure refrained from recommending major changes in the costs provisions, the revision it proposed would effect significant simplifications. For example, costs are made discretionary in all cases and the simplified computation of section 1504-a of the Civil Practice Act is employed throughout the state. Proposed N.Y.R. Civ. Proc. 150.01, 151.01, Sen. Int. No. 27 (1960). The Committee was reluctant to change the amounts that are presently awarded since they "present social and policy problems separate from the committee's function of simplification of procedure." Senate Finance Committee & Assembly Ways and Means Committee, Fourth Preliminary Report of the Advisory Committee on Practice and Procedure, A-167, A-411 (Advance Copy, reprinted from 1960 McKinney's Session Law News of New York, pamphlet no. 5).

The costs provisions proposed by the Advisory Committee appear in Titles 150-54 of Sen. Int. No. 27 (1960), and are discussed in Senate Finance Committee & Assembly Ways and Means Committee, *op. cit. supra* at A-396-A-426.